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RICHARD PARISI AND MARSHA PARISI, PETTI1ONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, RESPONDENT.	:	**COMMISSIONER OF EDUCATION** **DECISION**

SYNOPSIS

Petitioners alleged the Board failed to address their complaints concerning a school custodian. They contended that the Board did not respond to their written complaint, did not investigate their complaint, and denied them the minutes of a meeting at which there was a discussion which led to the denial of their request that the Board reimburse them for legal fees. The Board moved for summary decision, which was in part a motion to dismiss for lack of jurisdiction.

The ALJ concluded that under the circumstances, the portions of the petition concerning petitioners' complaint to the Board and the investigation of the situation should be dismissed for failure to state a claim upon which relief might be granted. The ALJ concluded that the portion of the petition related to petitioners' request for minutes of meetings should be dismissed for lack of jurisdiction. Likewise, the portion of the petition related to reimbursement of legal fees should be dismissed for lack of jurisdiction.

The Commissioner adopted findings and determination in Initial Decision as his own with clarification. The Commissioner concurred that the matter was properly dismissed, in that petitioners failed to state a claim upon which relief could be granted, although the Commissioner admonished the Board for lack of diligence in failing to respond to petitioners' written complaint. Moreover, the Commissioner agreed that he is without the authority to order reimbursement for legal costs. The Commissioner noted that the record did not indicate whether the custodian was a tenured employee. If he was tenured, petitioners failed to assert that the Board erred in not certifying tenure charges to the Commissioner. If he was not tenured, then any disciplinary action taken by the Board against him was not within the scope of the Commissioner's jurisdiction. There being no viable school claim before the Commissioner, the AU correctly concluded that the Commissioner could not reach to petitioners' ancillary claims which arise under the Open Public Meetings Act and the Right to Know Law.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

OAL DKT. NO. EDU 3673-99
AGENCY DKT. NO. 51-3/99

RICHARD PARISI AND
MARSHA PARISI,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF SADDLE BROOK,
BERGEN COUNTY,
Respondent.

Richard Parisi, *pro se*

Anthony N. Gallina, Esq., for respondent

Record Closed: September 27, 1999 Decided: November 10, 1999

BEFORE **RICHARD McGILL,** ALJ:

Richard Parisi and Marsha Parisi (petitioners) filed a petition with the Commissioner of Education alleging that the Board of Education of the Township of Saddle Brook (respondent) did not respond appropriately to their complaint concerning one of its employees. More specifically, petitioners alleged that respondent did not respond to their written complaint, that respondent did not properly investigate the

complaint, that they did not receive any acknowledgment that steps were taken to resolve the matter and that they were denied minutes of a meeting at which there was a discussion which led to the denial of their request that respondent reimburse them for legal fees. Respondent now moves for summary decision.

PROCEDURAL HISTORY

The petition in this matter was filed on March 18, 1999, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.* S.A. 18A:6-9. Respondent filed an answer on March 31, 1999, and the matter was transmitted to the Office of Administrative Law on April 14, 1999, for determination as a contested case.

On August 10, 1999, petitioners filed papers seeking to compel discovery, and respondent filed a response on August 31, 1999. On September 13, 1999, respondept filed its motion for summary decision, and petitioners responded by letter received on September 27, 1999. The discovery dispute was held in abeyance for consideration of respondent's motion for summary decision, which is in part a motion to dismiss for lack of jurisdiction.

MOTION FOR SUMMARY DECISION

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R.4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However,

excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.,* 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, this circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 523 (1995).

Respondent's motion for summary decision has three aspects. First, respondent contends that the Commissioner of Education lacks jurisdiction over this dispute because it does not arise under the school laws. Second, respondent maintains that even if petitioners' allegations are accepted as true, the petition fails to state a claim upon which relief may be granted. Third, respondent submitted a certification of its superintendent of schools and based thereon moves for summary decision.

A. Facts

The pleadings and the papers submitted in regard to the pending motions indicate that some of the facts are essentially undisputed. Petitioners' original complaint to respondent concerned William Moscatelli, who is employed by respondent as a custodian. Petitioners and Moscatelli are neighbors. In 1997, petitioners hired Moscate!li to do bathroom renovations. Petitioners were not satisfied with the work

done by Moscatefli and dismissed him. The relationship between petitioners and Moscatelli became acrimonious, and subsequently, petitioners filed suit against Moscatelli and obtained a refund of $1,100. Thereafter, petitioners made various complaints to respondent about Moscatelli with the result that he charged Richard Parisi with harassment. As a result of these proceedings, petitioners incurred legal fees of approximately $2,000.

Petitioners' allegations against the employee are as follows. During the course of the dispute, there were several verbal confrontations between petitioners and Moscatelli. Petitioners maintain that Moscatelli was wearing his work uniform or driving one of respondent's vehicle when some of these confrontations occurred. In addition, petitioners allege that Moscatelli used highly offensive language in front of their children. Richard Parisi expresses concern for the safety of his wife and their children. The three children attend the school to which Moscatelli is assigned. Petitioners further allege that respondent did not respond to their complaint about Moscatelli or conduct an appropriate investigation.

The certification of respondent's superintendent of schools indicates as follows. Respondent referred petitioners' complaint to Superintendent of Schools Harry A Groveman. Superintendent Groveman conducted an investigation and met with Moscatelli and his supervisor. Superintendent Groveman gave Moscatelli a verbal warning but did not recommend that respondent take any action against Moscatelli. Superintendent Groveman spoke with Richard Parisi on four or more occasions and advised him as to the results of the investigation. Subsequently, respondent made a determination to deny petitioners' request for reimbursement of legal fees.

B. Law and Analysis

The Commissioner of Education has authority to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. In

addition, the Commissioner of Education has ancillary jurisdiction concurrent with the Superior Court of New Jersey to resolve alleged violations of the Open Public Meetings Act that arise in connection with a controversy under the school laws. *Sukin v. Northfield Bd. of Ed.,* 171 *N.J. Super.* 184, 187 (App. Div. 1979). The question under the Open Public Meetings Act must have a significant nexus to the underlying school law issue. *Rovello v. Hopewell Valley Reg. Sch. Dist. Bd. of Ed.,* 93 *N.J.A.R.2d* (EDU) 313. Where a dispute does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick,* 48 *N.J.* 94, 102 (1966).

Here, petitioners did not cite any statute or regulation in their petition, and in response to respondent's motion, petitioners cite only *N.J.A.C.* 6:24-1.16, which authorizes the Commissioner to award interest under certain circumstances. However, it is evident that the petition, while not artfully drawn, relates in substance to possible discipline of an employee by a board of education. This type of dispute would fall within the jurisdiction of the Commissioner of Education.

The legal fees in question relate to a dispute over bathroom renovations and defense of a charge of harassment against Richard Parisi in municipal court. While these matters involved a school employee, the disputes did not in any way involve the school laws. It follows that the Commissioner of Education does not have jurisdiction over petitioners' request for legal fees.

Petitioners allege that respondent denied their request for minutes of meetings. The petition refers to the Right to Know Law, while respondent cited the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21. The question whether the Commissioner of Education has jurisdiction over this issue will be addressed after consideration of the other portions of the motion for summary decision.

Respondent maintains that even if petitioners' allegations are accepted as true, the petition fails to state a claim upon which relief can be granted. In addition, respondent submitted Superintendent Groveman's certification, which contradicts the allegations in the petition concerning petitioners' complaint.

Superintendent Groveman's certification is based on his personal knowledge and appears to be fully credible. Petitioners had no personal knowledge of Superintendent Groveman's investigation, and they offered no evidential materials to raise a genuine issue of material fact concerning his assertions. In accordance with the standard set forth in *Brill,* Superintendent Groveman's certification is accepted as true. Briefly, Superintendent Groveman conducted an investigation which included interviews of Moscatelli and his supervisor. The meetings were informal, and Superintendent Groveman gave Moscatelli a verbal warning. Superintendent Groveman spoke with Richard Parisi on four or more occasions and advised him as to the results of the investigation. Under the circumstances, the conclusion is warranted that Superintendent Groveman conducted an appropriate investigation of petitioners' complaint.

In addition to the lack of factual support, petitioners' position has no basis in law. In essence, petitioners want the Commissioner of Education to compel respondent to take certain steps which would lead to disciplinary action against Moscatelli. However, discipline of an employee of a school district is governed by statutes and regulations which provide for specific procedures and strict procedural safeguards. See *N.J.S.A.* 1BA:6-11. Under these procedures, it is not the function of the Commissioner of Education to review a school district's decision to investigate an employee or a determination not to bring charges. Under the circumstances, the portions of the petition concerning petitioners' complaint to respondent and the investigation of the situation should be dismissed for failure to state a claim upon which relief may be granted.

The remaining question concerns the jurisdiction of the Commissioner of Education over the alleged denial of petitioners' request for minutes of meetings. In view of the above determinations, there is no pending dispute or controversy under the school laws. In the absence of a dispute arising under the school laws, the Commissioner of Education does not have ancillary jurisdiction over an alleged violation of the Right to Know Law or the Open Public Meetings Act. It follows that the portion of the petition related to petitioners' request for minutes of meetings should be dismissed for lack of jurisdiction.

In view of the above, I **CONCLUDE** that the portions of the petition related to reimbursement for legal fees and petitioners' request for minutes of meetings should be dismissed for lack of jurisdiction and that respondent's motion for summary decision should be granted in regard to the portions of the petition related to petitioners' complaint concerning Moscateili.

Accordingly, it is **ORDERED** that the petition in this matter be **DISMISSED.**

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

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

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

Nov. 10, 1999
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

11/10/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

cml/sej

OAL DKT. NO. EDU 3673-99
AGENCY DKT. NO. 51-3/99

RICHARD PARISI AND MARSHA PARISI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record, the Commissioner concurs that this matter is properly dismissed, in that petitioners fail to state a claim upon which relief can be granted.[1] First, as the Administrative Law Judge (AU) noted, petitioners' request for reimbursement of legal fees does not arise under the school laws, so that the Commissioner is without the authority to order reimbursement to petitioners for such costs.

Further, petitioners demand reasons why the Board failed to respond to their written complaint, pursuant to Board Policy No. 9130, which establishes procedures for addressing written complaints and grievances presented by the public. Although the Commissioner notes that the record does support petitioners' claim, and the Board is hereby reminded of the need to comply with its own

[1] Petitioners request the following relief: "1. Reason why I never received a respond [sic] to written complaint. 2. Why I never received a hearing or a [sic} investigation report on your findings. 3. What steps are being taldng (sic] for the safety of my family. 4. The minutes to all private meetings that my name or wife [sic] name was mention [sic], including why you feel you are not reasonable [sic] for my attorney bill. 5. Reimburse Parisi Family $1,000 for legal fees." (Petition of Appeal)

policies,[2] at this point in the proceedings, there is no meaningful relief which the Commissioner may grant petitioners as a result.

Additionally, the Commissioner finds that the record does not indicate whether Mr. Moscatelli is a tenured employee. To the extent that he *is* tenured, the Commissioner observes that petitioners do not claim that they brought charges against Mr. Moscatelli pursuant to *N.J.S.A.* 6-11. Had they so alleged, and thereby contended that the Board considered the charges and erred in failing to certify them to the Commissioner, such a claim would properly be before the Commissioner, contrary to the suggestion of the AU at page 6 of the Initial Decision. *See Rosa Astacio-Borja v. Board of Education of the Passaic County Technical-Vocational High School District, Passaic County,* Commissioner Decision March 30, 1998. If Mr. Moscatelli *is not* a tenured employee, then any disciplinary action taken by the Board against him is not within the scope of the Commissioner's jurisdiction.

Finally, there being no viable school law claim before the Commissioner, the AU correctly concluded that the Commissioner cannot reach to petitioners' ancillary claims which arise under the Open Public Meetings Act and the Right to Know Law.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and clarified above. The Petition of Appeal is dismissed.[3]

IT IS SO ORDERED.

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C SIONER OF EDUCATION

Issue Date January 3, 2000
Mailing Date January 3, 2000

[2] The policy states, ***inter alia,*** that "[a] matter that cannot be resolved infonnally may be appealed at successive levels of authority, up to and including the Board of Education. *** The complaint and its immediate resolution will be reduced to writing at the first and at each successive level of appeal. *** A reasonable period of time, not to exceed thirty calendar days, will be permitted for the filing of an appeal in writing at each successive level. A decision at each level of appeal must be rendered in writing no later than thirty calendar days after the appeal is filed." (Certification in Support of Motion for Summary Decision at Exhibit C.)

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,

PETITIONER,

V.

HAMMONTON EDUCATION ASSOCIATION; HAMMONTON ADMINISTRATORS' ASSOCIATION; HAMMONTON SUPERVISORS ASSOCIATION; TEAMSTERS INDUSTRIAL UNION LOCAL 929; BERLIN TOWNSHIP BOARD OF EDUCATION; BERLIN TOWNSHIP EDUCATION ASSOCIATION; CHESILHURST BOARD OF EDUCATION; CHESILHURST EDUCATION ASSOCIATION; CLEMENTON BOARD OF EDUCATION; CLEMENTON EDUCATION ASSOCIATION; LINDENWOLD BOARD OF EDUCATION; LINDENWOLD EDUCATION ASSOCIATION; PINE HILL BOARD OF EDUCATION; PINE HILL EDUCATION ASSOCIATION; PINE HILL PRINCIPALS AND SUPERVISORS ASSOCIATION; WATERFORD TOWNSHIP BOARD OF EDUCATION; WATERFORD TOWNSHIP EDUCATION ASSOCIATION; WATERFORD TOWNSHIP SUPPORT STAFF ASSOCIATION; TEAMSTERS LOCAL 676; WINSLOW TOWNSHIP BOARD OF EDUCATION; WINSLOW TOWNSHIP EDUCATION ASSOCIATION; WINSLOW TOWNSHIP ADMINISTRATORS ASSOCIATION; LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION; LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION; LOWER CAMDEN COUNTY REGIONAL ADMINISTRATORS ASSOCIATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

This matter arises from the impending dissolution of the Lower Camden County Regional School District No. I (LCCR). Petitioner, Hammonton BOE, has a proposed sending/receiving contract with Waterford, one of the constituent districts of the LCCR, to accept that district's students in grades 7-12. Prior to consummating its agreement, Hammonton seeks Declaratory Judgment from the Commissioner on three issues it deems essential, namely, that Waterford has the right to send its students to Hammonton pursuant to the parties' proposed Agreement (Count One); that Hammonton does not have any obligation, pursuant to *N.J.S.A.* 18A:13-64 *et seq.,* independently, or derivatively through Waterford, or otherwise, to employ any current employee of the LCCR because of the District's dissolution or because of the formation of a sending/receiving relationship between Hammonton and Waterford (Count Two); and that Hammonton and Waterford may enter into a sending/receiving agreement for a term of 30 years or, in.the alternative, for a term of 10 years with the parties having the right to extend the period for two extension periods of 10 years each (Count Three).

The Commissioner found that education law poses no impediment to Hammonton entering a sending/receiving relationship with Waterford pursuant to the parties' proposed agreement ***(N.J.S.A.*** ISA:38-11); that Hammonton owes no duty, either independently or derivatively, to the employees of the LCCR ***(N.J.S.A.*** 18A:13-64; ***Stagaard);*** and that the current boards of Hammonton and Waterford may enter into a sending/receiving agreement for a contractual term of no longer than 10 years, with future boards having the right to enter into successor contracts, in 10-year increments, if they so desire ***(N.J.S.A.*** 1SA:38-20; *Lincoln Park).*

AGENCY DKT. NO. 90-4/99

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,

PETITIONER,

V.

HAMMONTON EDUCATION ASSOCIATION; HAMMONTON ADMINISTRATORS' ASSOCIATION; HAMMONTON SUPERVISORS ASSOCIATION; TEAMSTERS INDUSTRIAL UNION LOCAL 929; BERLIN TOWNSHIP BOARD OF EDUCATION; BERLIN TOWNSHIP EDUCATION ASSOCIATION; CHESILHURST BOARD OF EDUCATION; CHESILHURST EDUCATION ASSOCIATION; CLEMENTON BOARD OF EDUCATION; CLEMENTON EDUCATION ASSOCIATION; LINDENWOLD BOARD OF EDUCATION; LINDENWOLD EDUCATION ASSOCIATION; PINE HILL BOARD OF EDUCATION; PINE HILL EDUCATION ASSOCIATION; PINE HILL PRINCIPALS AND SUPERVISORS ASSOCIATION; WATERFORD TOWNSHIP BOARD OF EDUCATION; WATERFORD TOWNSHIP EDUCATION ASSOCIATION; WATERFORD TOWNSHIP SUPPORT STAFF ASSOCIATION; TEAMSTERS LOCAL 676; WINSLOW TOWNSHIP BOARD OF EDUCATION; WINSLOW TOWNSHIP EDUCATION ASSOCIATION; WINSLOW TOWNSHIP ADMINISTRATORS ASSOCIATION; LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION; LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION; LOWER CAMDEN COUNTY REGIONAL ADMINISTRATORS ASSOCIATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, William S. Donio, Esq. (Donio, Bertman & Donio)
For Respondent Boards of Education of Berlin Twp., Clementon, Lindenwold, Pine Hill and Winslow Twp., Vito Gagliardi, Jr., Esq. (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen)

For Respondent Education Associations of Berlin Twp., Chesilhurst, Clementon, Lindenwold, Pine **Hill,** Waterford Twp, Winslow Twp. Lower Camden County Regional and Waterford Twp. Support Staff Association, Arnold M. Mellk, Esq. (Wills, O'Neill & Mellk) and Richard A Friedman, Esq. (Zazzali, Zazzali, Fagella & Nowak) (Co-Counsel)

For Respondent Hammonton Supervisors Association, Donna Schuster, Secretary/freasurer

For Respondent Waterford Township Board of Education, Betsy Bisset, Esq. (Maressa: Goldstein, Patterson, Drinkwater & Oddo)

For Respondents Hammonton Education Assn., Pine Hill Principals & Supervisors Assn., Winslow Twp. Administrators Assn., Wayne J. Oppito, Esq.

For Respondent Board of Education of the Lower Camden County Regional School District No. 1, Barry Chatzinoff, Esq. (Weinberg, McCormick, Chatzinoff & Paul)

For Respondent Hammonton Administrator's Assn., James Donoghue, President

For Respondent Teamsters Industrial Union Local 929, William **H.** Haller, Esq. (Freedman & Lorry)

BACKGROUND AND PROCEDURAL HISTORY

This matter arises from the impending dissolution of the Lower Camden County Regional School District No. 1 (hereinafter "LCCR") pursuant to *N.J.S.A.* 18A:13-51 *et seq.* LCCR is currently a limited purpose regional school district which operates four schools located in Winslow Township, Lindenwold and Pine **Hill** educating pupils in grades 7-12 from the communities of Winslow Township, Lindenwold, Pine Hill, Clementon, Berlin, Chesilhurst and Waterford Township.[1] On or about October 10, 1997, LCCR constituent districts submitted an application to the Commissioner, pursuant to *N.J.S.A.* 18A: 13-56, requesting that a Board of Review convene to authorize a public referendum to consider the dissolution of the LCCR. The parties were advised by letter, dated January 27, 1998, that the Board of Review had grantsd the application. At the ensuing public referendum, conducted on May 12, 1998, dissolution of the

[1]Edgewood Junior and Senior High Schools in Winslow (serving primarily students from Winslow Twp., Waterford Twp. and Chesilhurst); Overbrook Junior High School in Lindenwold (serving primarily students from Berlin Twp.,

LCCR was approved by a majority of the voters in the seven communities and by five of the seven towns in accordance with *N.J.S.A.* 18A: 13-59. As a result of the impending dissolution of the LCCR, the Board of Education of the Township of Waterford (hereinafter "Waterford"), one of the LCRR's constituent members which operates a K-6 district, was required to designate a district to receive its pupils iri grades 7 through 12. Petitioner, Board of Education of the Town of Hammonton (hereinafter "Hammonton"), operates a PreK-12 school district in Atlantic County and shares a common border with Waterford. After extensive discussions and reviews, Hammonton and Waterford entered into a proposed sending/receiving relationship, pursuant to an agreement dated April 26, 1999, whereby Hammonton agreed to accept Waterford's 7-12 grade students. Such agreement was expressly conditioned upon the approval by Hammonton voters of a bond referendum to raise funds to build a new high school in Hammonton and renovate existing facilities in order to accommodate the increase in students.2 The cost of this project is anticipated to be approximately $33,840,000 and will be financed through the issuahce of bonds for a likely term of 30 years, which it is envisioned will be repaid through state aid and Waterford's tuition payments. The bond issue was subsequently approved by Hammonton voters at a special referendum held on June 28, 1999. The agreement was further conditioned on a declaration by the Commissioner of Education with respect to three issues deemed essential by Hammonton prior to its consummation of this agreement.

The within matter was opened before the Commissioner on April 28, 1999, by the filing of a Petition of Appeal for Declaratory Judgment, pursuant to *N.J.A.* C. 6:24-2.1, by Hammonton. Subsequent to the receipt of Answers to the Petition from respondents,; the

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Clementon, Lindenwold, Pine Hill and Winslow Twp.); and Overbrook Senior High School in Pine Hill (serving r,rimarily students from Berlin Twp., Clementon, Lindenwold and Pine Hill).

Hammonton currently receives the Borough of Folsom's pupils in grades 9-12 pursuant to a sending/receiving relationship with the Folsom Board of Education.

[3]Hammonton's requested relief was opposed only by the submission filed by Respondent "Education Associations" (Berlin Township Education Association, Chesilhurst Education Association, Clementon Education Association,

Director of Controversies and Disputes advised the parties that the Commissioner had determined to accept the request for Declaratory Judgment in this matter, and established a schedule for the parties to fully brief their respective positions on the issues. With the receipt of the last scheduled submission, the record in this matter closed on October 27, 1999.

Hammonton•s· petition includes three counts, which seek the following declarations: that Waterford has the right to send its students to Hammonton pursuant to the parties' proposed Agreement (Count One); that Hammonton does not have any obligation, pursuant to *N.J.S.A.* 18A: 13-64 *et seq.,* independently, or derivatively through Waterford, or otherwise, to employ any current employee of the LCCR because of the district's dissolution or because of the formation of a sending/receiving relationship between Hammonton and Waterford (Count Two); and that Hammonton and Waterford may enter into a sending/receiving agreement for a term of 30 years or, in the alternative, for a term of 10 years with the parties having the right to extend the period for two extension periods of 10 years each (Count Three).

COMMISSIONER'S DETERMINATION

In determining the application of the statutes at issue herein to the facts existing in this matter, consistent with his authority pursuant to *N.J.A.C.* 6:24-2.1 *et seq.,* the Commissioner finds as follows:

Initially, the Commissioner finds that education law poses no impediment to Hammonton entering a sending/receiving relationship with Waterford pursuant to the parties'

Lindenwold Education Association, Pine Hill Education Association, Waterford Township Education Association, Waterford Township Support Staff, Winslow Township Education Association, and Lower Camden County Regional High School District No. 1 Education Association).

proposed agreement.[4] The governing statute in this regard, ***N.J.S.A.*** 18A:38-11, Designation of high school of another district for attendance by pupils, specifies:

> The board of education of every school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a high school or high schools of this state for the attendance of such pupils.

As neither the clear language of this provision nor any other education law, regulation, or existing case law, in light of the circumstances which exist in this matter, precludes Hammonton and Waterford from entering into their proposed sending/receiving agreement, execution of such agreement is within the inherent powers of each respective Board.

As to whether Hammonton has any responsibility to utilize employees of the dissolved LCCR district, the statutory provision at issue here is ***N.J.S.A.*** 18A: 13-64, which establishes the rights of all employees of a regional district in the case of a withdrawal from or dissolution of a regional district. This statute, in pertinent part, provides:

> All employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***

This provision unmistakably envisions that employees of a dissolving district must look to the constituent districts for their employment rights. The right confetTed by *N.J.S.A.* 18A: 13-64 on staff employed by the regional district prior to the dissolution date is initially to con;inued employment in one of the constituent districts. *See Stagaard v. Contini, 91 N.J.A.R.* 2d. (EDU) 217, *a.ff'd* State Board October 1, 1997. Moreover, this statutory right is confined to instances

[4]It is also noted that Harnrnonton's request for relief on this Count of its petition is unopposed.

where regional staff members cannot be accommodated within their certification to available high school positions. *Id.* at 219. It is uncontroverted here that Hammonton is not a constituent district of the LCCR, nor is it claimed that Hammonton either had any input in the hiring or employment of LCCR employees, or played any role whatsoever in the referendum to dissolve the LCCR. As such, *N.J.S.A.'* 18A:13_-64 does not operate to create an independent obligation for Hammonton to employ staff of the LCCR as a result of the district's dissolution.

Neither does Hammonton have any derivative responsibility, pursuant to *N.J.S.A.* 18A:28-6.1, to employ regional district staff by virtue of its proposed sending/receiving relationship with Waterford, as this statute is inapplicable in this matter. In this connection, the Education Associations urge that Waterford, as a constituent district, has an obligation pursuant to *N.J.S.A.18A:13-64* to recognize and act to preserve the employment rights of the LCCR's employees and, therefore, Hammonton, as the receiving district for Waterford's students, has a duty, pursuant to *N.J.S.A.* 18A:28-6.1, to recognize the tenure and seniority rights of LCCR staff who serviced the students of its sending district. *N.J.S.A.* 18A:28-6.1 specifies:

> Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure in office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position***.

The NJ. Supreme Court undertook interpretation of this statute in *In re Jamesburg High S,chool Closing,* 83 *N.J.* 540, and found that this particular provision is triggered *only* if a district closes a school and agrees with another district to send its pupils from such closed school to that district. Here, Waterford has not closed one of its schools. Neither does it have any staff that

would be impacted by its proposed sending/receiving relationship with Hammonton, since all affected staff were employed by the LCCR rather than Waterford. Moreover, the situation for the affected LCCR employees has not been altered by Waterford's proposed agreement with Hammonton. These individuals will still be able to select positions in all seven of the constituent districts; they will just be uriable to select positions in grades 7-12 in Waterford, a selection which would not be available to them under present circumstances. Similarly, the prospect of large scale unemployment of LCCR employees as a result of dissolution appears remote, as the parties' submissions indicate that there will be at least one additional school opening as a consequence of dissolution, notwithstanding the absence of the Waterford students.

In summary, because *N.J.S.A.* 18A: 13-64 and the interpretation of this provision by the Commissioner and the State Board in *Stagaard, supra,* cannot be read to obligate Hammonton, as a non-constituent district, to accept any employees from the dissolved regional, and recognizing that *N.J.S.A.* 1SA:28-6.1 has been found to be inapplicable to the situation existing here, there is no legal authority to support a conclusion that Hammonton has a responsibility, of any nature, to these employees.

Finally, Hammonton seeks a determination that the parties are not precluded from entering into a sending/receiving relationship for a contractual term of 30 years. A term of this length is deemed vital in order to ensure the financial resources necessary to repay the bond obligation incurred to finance the construction and renovation of its schools required to facilitate the educating of Waterford's students. It is clear that education law operates to prevent the current boards of Hammonton and Waterford from committing to such a term. In this regard, it is well-established that boards of education, generally, have no authority to reach forward beyond their own official life and into the term of their successors. A board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind

its successors only in those ways and to the extent expressly provided by statute. *Gonzalez v. Board of Education of Union City,* 325 *N.J. Super.* 244, 252 (App. Div. 1999), citing *Skladzien v. Board of Educ.,* 12 *N.J. Misc.* 602, 604-05, 173 *A.* 600 (Sup. Ct. 1934), *aff'd,* 115 *N.J.L.* 203, 178 *A.* 793 (E. & A. 1935). The Legislature, apparently recognizing the unique nature of sending/receiving relationships and the need to offer some measure of protection for districts, such as Hammonton here, which must undertake construction or remodeling of facilities in order to allow them to accommodate the students of another district pursuant to such a relationship, carved out an exception to the general prohibition against binding future boards in its enaction of *N.J.S.A.* 18A:38-20. This provision specifies:

> Whenever a board of education, now or hereafter furnishing elementary and high school education or either thereof for the pupils of another school district, finds it necessary to provide additional facilities for the furnishing of education to such pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding 10 years whereby it agrees to provide such education to the pupils of such other district during the term of such agreement, in consideration of the agreement by the board of education of such other district that it will not withdraw its pupils and provide school facilities for them in its own or another district during the term of said agreement except as provided in this article, and that the sending district will provide for the payment of tuition in accordance with section 18A:38-19.

It must be presumed that in executing this provision the Legislature intended to strike a balance between the well-established stricture against binding future boards and the conflicting interests, such as the need for stability, which inherently arise in sending/receiving relationships and unambiguously designated its outside maximum limit of equipoise. Consequently, the Vyithin boards may not bind future boards beyond the 10-year express prescription of the statute. It is equally evident that, at the expiration of this period, the boards then sitting are similarly authorized, pursuant to *N.J.S.A* 18A:38-20, to enter into subsequent 10-year successor

agreements if they so desire. See State Board decision in *Board of Education of the Borough of Lincoln Park v. Board of Education of the Town of Boonton,* 95 *N.J.A.R.* 2d (EDU) 493.

The Commissioner underscores, however, that, irrespective of the contractual timeframes specified in the parties' agreement, a sending/receiving relationship does not automatically terminate upon the expiration of this agreed-upon time period. Rather, such relationship cannot be altered or terminated except upon application made to and approved by the Commissioner, pursuant to *N.J.S.A.* ISA:38-13, upon his finding that the termination will result in no substantial negative educational, financial or racial impact.

Accordingly, the Commissioner determines that Hammonton and Waterford are not precluded from entering into a sending/receiving relationship; that Hammonton owes no duty, either independently or derivatively, to the employees of the LCCR; and that the current boards of Hammonton and Waterford may enter into a sending/receiving agreement for a contractual term of no longer than 10 years, with future boards having the right to enter into successor contracts, in IO-year increments, if they so desire.[5]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 4, 2000
Faked JanuarJ 5, 2000

IN THE MATTER OF THE TENURE	:	
HEARING OF DENISE CARMONA,	:	COM.t\1ISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	
_____:		

AGENCY DOCKET NO. 344-11/99

IN THE MATIER OF THE TENURE	:	
HEARING OF DENISE CARMONA,	:	**COMMISSIONER OF EDUCATION**
SCHOOL DISTRICT OF THE CITY	:	**DECISION**
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	
_____	:	

For the Board, George G. Frino, Esq.

This matter having been opened before the Commissioner of Education on November 18, 1999, through the certification of tenure charges against Denise Carmona, a tenured custodian, for excessive absenteeism, abandonment of position and unbecoming conduct by the Board of Education of the City of Atlantic City; and

Respondent, having been served, via regular mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on November 16, 1999; and

The Commissioner having directed respondent, via both certified and regular mail on November 22, 1999, to file an Answer to the tenure charges against her; and

Whereas, there is no indication that respondent did not receive such communications which clearly provided her notice that, pursuant to *P.L.* 1998, *c.* 42, effective July 1, 1998, an individual against whom tenure charges are certified *"shall have 15 days to submit a written response to the charges to the commissioner,"* and that failure to answer within

the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted and the Commissioner deciding the matter on summary judgment pursuant to ***N.J.A.C.*** 6:24-1.4(e); and

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicates that respondent was previously the subject of tenure charges certified to the Commissioner in July 1997 which were settled by the parties in June 1998, the terms of which agreed, *inter alia,* that respondent would immediately return to work, effective June 23, 1998[1]; and

In that the Board states in present tenure charges that the gravamen of the charges against respondent is that she was absent from work for three hundred two days (302) days from July 3, 1997 to June 30, 1998; further, the Board alleges that within twenty (20) days of the settlement of the previous charges, respondent again resumed her pattern of excessive absences, *i.e.,* approximately one-hundred twenty-four days (124) absent from July 7, 1998 to June 6, 1999 (see Print-out for Absences 1998-1999 School Year) for a variety of personal illnesses, workers' compensatory illnesses, family leave, vacation, funeral and personal days; and

Whereas, the Commissioner's review of the unbecoming conduct tenure charge indicates that respondent is alleged to have, on August 5, 1999, threatened to kill administration officials; and

Deeming such charges to be admitted. and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions

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[1] *See /11 the Matter of the Tenure Hearing of Denise Carmona. School District of the City of Atlantic City, Atlantic County,* decided by the Commissioner, August 5, 1998.

constitute excessive absenteeism, abandonment of position, and unbecoming conduct, warranting dismissal from her tenured custodian position; now, therefore

IT IS SO ORDERED this _____ day of January 2000 that summary judgment shall be granted to the Board, and Denise Carmona shall be dismissed from her tenured custodian position in the employ of the Atlantic City Board of Education as of the date of this order.[2]

COMMISSIONER OF EDUCATION

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* ISA:6-27 ***et seq.*** and *N.J.A.C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after date of mailing to the parties.

JmiuarJ 4, 2000
Date of r•;,,,,,;.1::.lli,, Jam.1;;,cy G, 2000

4-00

RICHARD CROMWELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning custodian contended that he was a tenured employee whose rights were violated when the Board did not renew his employment. The Board contended that petitioner was hired for fixed terms of employment.

ALJ found that petitioner was clearly appointed to a series of one-year, fixed term contracts for the eleven years between November 15, 1984 and June 30, 1995. Thereafter, the Board minutes revealed that the Board continued renewing petitioner's one-year fixed terms. Thus, petitioner's rights were not violated when the Board did not renew his employment for the 1998-99 school year. Summary decision was granted to the Board. Petition was dismissed.

The Commissioner concurred with the AU that, notwithstanding the Board's discontinuing the practice of executing formal employment contracts subsequent to the 1994-95 school year, the Board minutes revealed that petitioner was hired for fixed terms. Summary decision was granted to the Board. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LA\V

INITIAL DECISION

OAL DKT. NO. EDU 9213-98

AGENCY DKT. NO. 359-8/98

RICHARD CROMWELL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY

Respondent.

Joseph P. Kreoll, Esq., for petitioner (Robert J. Romano, Jr., attorney)

Kelly Ann Guariglia, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: October 18, 1999 Decided: November 18, 1999

BEFORE **STEPHEN G. WEISS,** ALJ

This case was transmitted by the Department of Education to the Office of Administrative Law in September 1998 and involves a demand by the petitioner, Richard Cromwell, that pursuant to *N.J.S.A.* 18A:17-3 he be declared a tenured custodial employee of the respondent River Vale Board of Education. Thus, he seeks an order restoring him to the position of Chief of Plant Operations, retroactive to July 1, 1998, and for other relief consequent thereto. His tenure claim is predicated upon certain actions taken by the respondent with respect to his re-employment for the 1995-96 through 1997-98 school years. Cross-motions for summary decision are pending.

In my view, the essential facts necessary to a determination are not reasonably in dispute and that summary decision can be rendered. Thus, for the reasons which follow, I have determined that Cromwell's motion be denied and that the Board's cross-motion for summary decision be granted.

FINDINGS OF MATERIAL FACTS

1. Respondent is the Board of Education of the Township of River Vale (the "Board") and is created under the laws of the State of New Jersey.

2. In November 1984, the Board appointed petitioner for a fixed term of employment as a maintenance worker. Specifically, the Board and petitioner executed an employment contract whereby petitioner was employed from November 15, 1984 through June 30, 1985 at the annual salary of $17,510.

3. The Board and petitioner subsequently executed a new, one-year employment contract, appointing petitioner as a maintenance worker from July 1, 1985 through June 30, 1986 at an annual salary of $19,165.

4. The next year, the Board and petitioner executed an employment contract appointing petitioner to be a maintenance worker from July 1, 1986 through June 30, 1987 at an annual salary of $24,940.

5. The following year, the Board and petitioner executed an employment contract appointing petitioner to be a maintenance worker from July 1, 1987 through June 30, 1988 at an annual salary of $25,335, plus a 10% differential.

6. The next year, the Board and petitioner executed an employment contract appointing petitioner Chief of Plant Operations from July 1, 1988 through June 30, 1989 at an annual salary of $26,515, plus a 10% differential.

7. The following year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 1, 1989 through June 30, 1989. The Board minutes

from the meeting at which the Board approved the appointment indicated, "Resolution Employment of Non-Affiliated Administrative Staff."

8. The next year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 1, 1990 through June 30, 1991 at an annual salary of $35,596. The Board minutes from the meeting at which the Board approved the appointment indicated," Renewal of Non-Affiliated Maintenance Personnel."

9. The following year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 1, 1991 through June 30, 1992 at an annual salary of $42,763.88. The Board minutes from the meeting at which the Board approved the appointment indicated, "Renewal of Contract."

10. The next year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 1, 1992 through June 30, 1993. The Board minutes from the meeting at which the Board approved the appointment indicated, "Renewal of Contract."

11. The following year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 2, 1993 through June 30, 1994 at an annual salary of $47,200. The Board minutes from the meeting at which the Board approved the appointment indicated, "Renewal of Contract."

12. The next year, the Board and petitioner executed a contract appointing petitioner Chief of Plant Operations from July 1 1994, through June 30, 1995 at an annual salary of $50,320. The Board minutes from the meeting at which the Board approved the appointment indicated, "Renewal of Contract."

13. The following year, 1995-96, the Board and petitioner did not execute a formal employment contract, although the Board determined that petitioner's salary for the school year beginning July 1, 1995 and ending June 30, 1996 would be $52,533. As in previous years, the Board minutes from the meeting at which the Board approved the appointment indicated, "Renewal of Contract."

14. The next year, .the Board determined that petitioner's salary for the school year beginning July 1, 1996 and ending June 30, 1997 would be $54,109. The Board minutes from the meeting at which the Board approved the appointment again indicated "Renewal of Contract."

15. The following year, the Board determined that petitioner's salary for the school year beginning July 1, 1997 and ending June 30, 1998 would be $55,732. The Board minutes from the meeting at which the Board approved the appointment again indicated "Renewal of Contract."

16. At its May 26, 1998 meeting, the Board determined it would "not renew th,:; rehiring" of petitioner for the 1998-99 school year and his employment was terminated on June 30, 1998.

DISCUSSION

N.J. S.A. 18A: 17-3, governs the tenure of janitorial employees and provides:

> Every public school janitor of a school district shall, unless he is appointed for 2 fixed term, hold his office, position or employment under tenure during a good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense . . . (Emphasis added).

Thus, boards of education have considerable discretion whether to grant tenure to its custodians. *See e.g., Wright v. Bd. of Ed. of the City of East Orange,* 99 *N.J.* 112, 120 (1985). If the employment is not for a fixed term, the custodian acquires tenure immediately, regardless of any unexpressed intentions of the board. *Id.* at 119.

In the instant case, of course, the issue is whether any of the Board's action (or , inaction) with respect to Cromwell's salary and/or employment status from September 1, 1995 to June 30, 1998 resulted in an indefinite appointment so as to entitle him to claim statutory tenure. In order to determine whether a janitor has been appointed for a fixed or

indeterminate term *of* employment, one first must look to any employment contract between the parties. *Sharpe v. Bd. of Ed. of the Twp. of Wyckoff,* 93 *N.J.A.R.* 2d (EDU) 332 (1993}. In *Sharpe,* as in the instant case, a custodian who was notified that his employment was not renewed filed a petition with the Commissioner of Education claiming he had been terminated in violation of his tenure rights. The ALJ reviewed the board's minutes pertaining to employment which revealed that although Sharpe had been hired by board resolution, which did not specifically indicate a fixed term, a contemporaneously executed employment contract did set forth a term of one year. The second year, the minutes revealed the board adopted a resolution renewing Sharpe's employment for the "school year." However, the parties did not execute an employment contract for that year. For the third year, the board again adopted a resolution renewing the employment for the "school year," and the parties also contemporaneously executed a one-year employment contract. At the end of that school year the board notified Sharpe it had decided not to renew his employment.

The Commissioner, in adopting the ALJ's decision to deny tenure, reasoned thaUin the event an employment contract is "ambiguous or inconclusive" one must consider "other indicia of the nature of the appointment, including board minutes and resolutions." *Ibid. See also, Burrows v. Ramapo Indian Hills Regional High School District Board of Education,* 93 *N.J.A.* C. 2d (EDU} 610 (1993), where the Commissioner, in finding that a custodian did not have tenure, explained that the absence of employment contracts for two years was not determinative because the minutes reflected an appointment by resolution for each school year which was analogous to being appointed to a fixed term.

In this case, petitioner clearly was appointed to a series of one-year, fixed-term contracts for the eleven years between November 15, 1984 to June 30, 1995. The contract executed by the parties, as well as the board minutes pertaining to his employment, both specified unambiguously that he was employed for a fixed term. However, for the twelfth through fourteenth years, 1995-96 through 1997-98, the parties did not execute any contracts. Instead, the Board Secretary and Cromwell signed memoranda stating the petitioner's salary for the fixed term of one school year. Because the memoranda were not

signed by the Board_ president pursuant to *N.J.S.A.* 1SA:27-5,[1] one therefore also must look to the board minutes for guidance, as did the ALJ and the Commissioner in *Sharpe, supra.*

The Board's minutes for these three school years are practically identical to the minutes from the preceding four years. More specifically, they refer to "Renewal of Contract" and indicate a term of one school year. Although the Board discontinued the practice of executing formal contracts after the 1994-95 school year, the minutes reveal inescapably that il continued renewing Cromwell's one-year fixed terms. Thus, the facts are very similar to those in the *Sharpe* case. Although, during the second year of Sharpe's employment, the parties did not execute an employment contract; nevertheless, the ALJ concluded, and the Commissioner agreed, that the board had appointed him for a fixed term because the minutes indicated that the board had "adopted a resolution renewing the annual appointment of its custodial staff." *Sharpe v. Bd. of Ed. of the Twp. of Wyckoff,* 93 *N.J.A.R.* 2d (EDU) at 332. Hence, as in *Sharpe,* the reference in the minutes to the "Renewal of Contract" for one year plainly amounts to an appointment for a fixed term, thus resulting in no tenure.

Petitioner cites *Smith v. Bd. of Ed. of the Twp. of East Brunswick,* OAL Dkt. No. EDU 5654-81 (June 13, 1983), *aff'd* Comm'r of Ed. (August 15, 1983), *affd* State Board of Education (April 4, 1984) in support of his position. In *Smith,* a custodian who had been employed for over ten years relied upon a resolution providing that custodians in the school district would receive tenure after three years. The ALJ found that *certain* salary notices in that case were similar to ones typically given to tenured teachers. More specifically, the ALJ stated:

> Such salary notices or salary agreements are generally reserved for those employees who have acquired a tenure status in the employ of a board of education. **Once** an employee has acquired tenure, as for example, a teaching staff

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[1] *N.J. S.A.* 18A27-5 states:

> Every contract between a board of education which has not made rules governing such employment and any teaching staff member shall be made in writing, in triplicate, signed by the president and secretary of the board of education and by such person.

> membr. pursuant to *N.J.S.A.* 1SA:28-5, the board's offer of a contract to the teacher becomes superfluous in regard to the term of employment. The term is indefinite and continuous; therefore, the only subject matter to be contracted for is the employee's annual salary and emoluments... [TJhe need for a contract between a board of education and a tenured employee, setting forth all the terms and conditions of employment is no longer necessary and the board resorts to the issuance of a salary notice or salary agreement, pursuant to the negotiated agreement to the tenured employee."
> *[Id.* at 13 (emphasis added).]

In my view, petitioner's reliance on *Smith* is misplaced. Most notably, in *Smith* the top of each document contained the notation, "Non-Certificatedffenure." *Id.* at 12. Clearly, that reference to "tenure" greatly undermined the board's position. Indeed, as the ALJ observed, it made the need for a more formal contract appear unnecessary. Moreover, the minutes in *Smith* did not set forth definite terms of employment (in contrast to the instant matter), as apparently the board was unsure if the custodian had acquired tenure. Lastly, as the ALJ in *Smith* commented, it was superfluous to offer a contract to an employee who already had acquired tenure. *Id.* at 13.[2]

The petitioner's further reliance on *Gilliam v.* Toms *River Bd. of Education,* 1974 *S.L.D.* 540 (1974), also is distinguishable. In *Gilliam,* the Commissioner held that annual salary agreements alone did not establish yearly re-appointments for definite terms. *Id.* at 546. However, there is no proof that the salary agreements in *Gilliam* resembled the documents at issue here. Moreover, in *Gilliam,* the board minutes did not reflect appointments for fixed terms. In contrast, in this case, the annual informal salary agreements read in conjunction with the minutes reveal it was intended that petitioner be appointed to annual fixed terms of employment. Thus, consistent passage of resolutions "renewing" petitioner's employment for one year clearly distinguishes the instant matter from *Gilliam.*

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[2] Cromwell also refers to a memorandum from Superintendent Cerasa to the Board setting forth a three-year proposal. However, this document does not strengthen petitioner's argument. First, there is no indication that Cerasa was not merely conveying a proposal that petitioner, himself, had suggested. Second, there is no evidence that the Board adopted the proposal. Lastly, the proposal reflected a fixed, three-year term. Therefore, even if the Board had adopted it, petitioner would not have acquired tenure.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that summary decision in favor of respondent should be **GRANTED** since, contrary to petitioner's claim, although more precision in wording by respondent would have been appropriate, clearly all of petitioner's appointments were intended to be and were for a fixed term.

Accordingly, pursuant to *N.J.A.C.* 1:1-12.5, I hereby **ORDER** that summary decision be rendered in favor of the respondent and that petitioner's verified petition be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New_ Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 15, 1999
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

11/22/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 2: 4 1999

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DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

AGENCY DKT. NO. 359-8/98

RICHARD CROMWELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions essentially recast and reiterate his arguments advanced below. In that all material aspects of petitioner's exceptions have been fully addressed and resolved in the Initial Decision, such exceptions will not be revisited here.

Upon his careful and independent review of the record, the Commissioner concurs with the ALJ that, notwithstanding that the Board discontinued the practice of executing formal employment contracts subsequent to the 1994-95 school year, the Board minutes clearly reveal that petitioner was continued in his employment for successive fixed terms and, therefore, he did not acquire tenure as a school custodian. As such, petitioner's rights were not violated when the Board determined not to renew his employment for the 1998-99 school year.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein. Summary decision is granted to the Board and the within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 6, 2000

Date of Mailing, January 6, 2000

4-00

EDU #9213-98
C# 4-00
SB# 9-00

RICHARD CROMWELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 6, 2000

For the Petitioner-Appellant, Robert J. Romano, Jr. & Associates (Joseph P. Kreoll, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Kelly Ann Guariglia, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 7, 2000

Date of mailing ----- JUN 08 2000

D.S., on behalf of minor child, A.S; R.S., on behalf of minor children, H.H. and H.H.; E.H., on behalf of minor child, C.H.; G.G., on behalf of minor child, G.S.; W.M., on behalf of minor child, E.M.; AND THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioners alleged that respondents failed to implement properly the provisions of the Comprehensive Education Improvement and Financing Act (CEIFA), *N.J.S.A.* 18A:7F-1 *et seq.,* as they pertained to the district's State aid for the 1997-98 and 1998-99 school years, by applying the statute's stabilization provision at *N.J.S.A.* 18A:7F-10(a), thereby reducing the amount of State aid otherwise payable under CEIFA formulas.

Respondents filed a motion to dismiss the appeal on the grounds that those counts pertaining to the 1997-98 school year were untimely filed, that the petition failed to plead requisite facts in support of its claims and that respondents had acted lawfully in determining the amount of aid due the Board pursuant to CEIFA since such aid is capped by *N.J.S.A.* 18A:7F-10(a).

The Commissioner granted respondents' motion and dismissed the appeal, noting that the counts of the petition pertaining to the 1997-98 school year allotment, about which the Board received notice on or about January 28, 1997, were filed well beyond the 90-day limitation period set forth at *N.J.A.C.* 6:24-1.2, the appeal having been filed over one year later on April 9, 1998. The Commissioner rejected petitioners' claim that respondents have deprived the district and its students of a thorough and efficient system of public education by applying the stability provision to petitioners' district, emphasizing that the final aid amount due under CEIFA is derived through cumulative application of the act's several formulas, including core curriculum standards, categorical and stabilization aid formulas; that the core curriculum standards aid formula distributes State aid relative to the wealth of a district, and to its growth or loss in enrollment, compared to that of other districts; and that petitioners failed entirely to plead requisite facts in support of their claim, contending that factual pleadings of inequity were unnecessary in this matter. The Commissioner additionally noted that CEIFA's stabilization provision will work in the 1999-2000 school year and beyond so that the district will receive CEIFA formula aid based on actual pupil enrollment counts.

January 10, 2000

AGENCY DKT. NO. 100-4/98

D.S. on behalf of minor child, A.S; R.S., on behalf of minor children, H.H. and H.H.; E.H., on behalf of minor child, C.H.; G.G., on behalf of minor child, G.S.; W.M., on behalf of minor child, E.M.; AND THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

For Petitioner, Gorman & Rauh (Bruce M. Gorman, Esq.)
For Respondent, John J. Farmer, Jr., Attorney General (Howard Z. Myerowitz, DAG)

This matter was opened as a controversy before the Commissioner of Education on April 9, 1998, through the filing of a petition of appeal by the Board of Education of the City of Wildwood.[1] Therein, the Board alleged that respondents failed to implement properly the provisions of the Comprehensive Education Improvement and Financing Act (CEIFA), ***N.J.S.A.*** 18A:7F-1 *et seq.,* as they pertained to the district's State aid for the 1997-98 and 1998-99 school years. Specifically, the Board alleged that CEIFA established, through an explicit formula, the

[1]The instant appeal followed upon an April 6, 1998 Superior Court, Chancery Division ruling wherein the judge denied, on grounds of failure to exhaust administrative remedies, the Board's April 3, 1998 application for an order compelling the same relief, from the same respondents, as is sought herein. That ruling was appealed by the Board, and upheld by the Appellate Division, together with a related ruling involving the same parties and consolidated for opinion purposes, in an unpublished decision dated February 17, 1999 *(Board of Education of the City of Wildwood v. Sandra Loewe et al.* and *Board of Education of the City of Wildwood v. Leo F. Klagho/z et al.,* Nos. A-5337-97T1 and A-681 l-97T1 (App. Div. February 17, 1999 *(Wildwood v. Loewe)).*

amount of State aid I}.ecessary, by definition, for the Board to provide a thorough and efficient system of public education (T&E); and that respondents, by providing less than that amount for the years at issue, by definition, denied the Board's students their constitutional entitlement to T&E. As relief, the Board sought, for each of the years in dispute, payment of the difference between the amount it claimed to be statutorily due, and the amount it was actually paid. The Board further sought a directive that future State aid payments be in accordance with its alleged statutory entitlement.

In lieu of an answer, respondents filed a motion to dismiss the appeal on grounds that those counts pertaining to the 1997-98 school year were untimely filed, that the petition failed to plead requisite facts in support of its claims, and that respondents had acted lawfully in determining the amount of aid due the Board pursuant to CEIFA, such aid being capped by the statute's stabilization provision at N.J.S.A. 18A:7F-IO(a). Opposition papers were filed by the Board, as was a reply by respondents.

On June 8, 1998, the Board filed an amended petition, listing actions it was allegedly unable to undertake due to the amount of aid it received from respondents. On July 28, 1998, respondents renewed their motion to dismiss, both on the grounds previously raised and on the additional ground that the Board lacked standing to bring the appeal. Thereafter, on August 18, 1998, a second amended petition was filed, including a number of students and their guardians as petitioners and making additional allegations with respect to the basis for petitioners' claims. On September 9, 1998, respondents again renewed their motion to dismiss; opposition and reply papers were filed in due course.

In the interim, on May 20, 1998, the Board sought an order from the Superior Court, Chancery Division, enjoining the Commissioner from taking any action on the instant

appeal and directing that the matter be heard at the Office of Administrative Law by an Administrative Law Judge whose decision would be final. The Board's application was denied both by the trial court and on appeal, in a decision dated February 17. 1999.[2]

Following subsequent review of the record and the arguments of the parties, petitioners were advised, on August · 16, 1999. that the Commissioner required further submissions in order to render a determination on the motion. Specifically. the Commissioner requested a detailed explication of how the district failed to offer a thorough and efficient system of education during each of the two years at issue in the petition, and of the manner in which such alleged deficiencies were a direct and proximate result of the funding mechanism set forth in CEIFA. A submission was filed in response to this request. as were reply papers, ending with petitioners' filing of October 19, 1999. The record having closed on that date, the matter now proceeds to determination.

Upon careful consideration, for the reasons set forth below, the Commissioner determines to grant respondents' motion and dismiss the petition of appeal.

Initially, the Commissioner fully concurs with respondents that those counts of the petition pertaining to the 1997-98 school year must be dismissed as filed well beyond the 90-day limitation period set forth at *N.J.A.C.* 6:24-1.2(c). Petitioners do not dispute that the Board was notified of its State aid allotment for that year on or about January 28, 1997, yet an appeal was not filed with the Commissioner until over one year later, on April 9, 1998.[3] In favor of relaxing the filjng rule pursuant to *N.J.A.C.* 6:24-1.15, the Board states only that time limitations on its claim should be tolled in the interest of equity, since CEIFA aid is a statutory right. and that, since respondents' own misconduct and errors have led to the instant appeal, respondents

[2] *See* note 1, *supra.*
[3] Even the Board's prior appeal to Superior Court was not filed until April 3, 1998.

should not be peffi1!tted to rely on a procedural bar to dispose of petitioners' claim. The Commissioner does not find these assertions persuasive, given the need for a reasonable degree of repose in administrative matters and the absence of any explanation whatsoever on the part of petitioners as to why an appeal could not have been filed in a timely manner. Notwithstanding the above, the Commissioner notes that, even assuming," *arguendo,* that petitioners' appeal could be considered on its merits as it pertains to the 1997-98 school year, the analysis below would dictate dismissal for that year as well as for 1998-99.

Turning to those merits, the Commissioner finds that petitioners have failed, on both legal and factual grounds, to present a sufficient cause for determination. Petitioners "crystallize" their own argument as follows:

> The CEIFA statute was the Legislature's response to the *Abbott v. Burke* line of cases, which culminated in the determination that the Quality Education Act II was unconstitutional. (citation omitted) The *Abbott v. Burke* line of cases construed the constitutional mandate to provide each child with a thorough and efficient education in terms of money. The litigation concerned how much it would cost to provide a thorough and efficient education, and who should provide that money.
>
> The Legislature's response was enactment of the CEIFA statute. Following the thinking of the Supreme Court, in enacting the CEIFA statute the Legislature defined "thorough and efficient education" in terms of a monetary formula. That formula computed to the penny precisely how much money was needed to provide a thorough and efficient education, how much money was to be provided by the individual school district, and how much money was to be provided through State aid. The way the formula is structured, if the school district provides its calculated portion of funding, and if the State of New Jersey provides aid in the amount specified by the formula, then the children will receive a thorough and efficient education.
>
> For 1997-98, respondent Commissioner calculated that the Wildwood School District required CEIFA aid in the amount of $2,445,907.00. For 1998-99, the Commissioner calculated that the Wildwood Board of Education would require CEIFA aid in the amount of $2,955,107.00 in order to provide a thorough and efficient education.

> Petitioners do_not dispute these calculations. In fact, petitioners embrace them. Petitioners agree that in order for the children of Wildwood to receive a thorough and efficient education, it was necessary for the State of New Jersey to pay over [to] the Wildwood Board of Education the [above-referenced sums].
>
> The problem is, the State of New Jersey failed to pay over the needed CEIFA aid. Instead, the State of New Jersey paid $645,848.00 [actually $645,851.00, as indicated in the petition and its supporting documents] in CEIFA aid in 1997-98, and $710,439.00 in CEIFA aid for 1998-99.
>
> Since the Wildwood School District did not receive the required amount of CEIFA funding for 1997-98 and 1998-99, then by definition, *the children did not [receive] a thorough and efficient education.* To hold to the contrary would negate the purpose and intention of the CEIFA Act.***The CEIFA Act specifies that, in order for each child in the state of New Jersey to receive a thorough and efficient education, the State of New Jersey must pay a specific, calculable amount of CEIFA aid each year. In [the years in dispute], the State failed to pay to the Wildwood School District the amount which, by its own calculation, it determined to be necessary under the CEIFA formula for the students to receive a thorough and efficient education. Therefore, pursuant to the stated intention of the CEIFA, the children of Wildwood did not receive a thorough and efficient education during 1997-98 and 1998-99.
>
> (Petitioners' Supplemental Brief, at 2-4) (emphasis *sic).*

This summation, which accurately captures the more extensive arguments set forth in petitioners' primary briefs, is the essence of petitioners' claim: Merely by applying the stability clause to petitioners' district, therefore necessarily reducing the amount of State aid otherwise payable under CEIFA formulas, respondents, by definition, have deprived the district and its students of T&E.

On its face, such an argument cannot stand. As noted by the Appellate Division:

> [CEIFA] establishes a complex formula to determine the amount of school aid, and then places limitations on receipt of that aid through application of the "Stabilization Aid Growth Limit," defined in *N.J.S.A.* 18A:7F-3 as follows: *(quotation omitted)* ***Pursuant to N.J.S.A. 18A:7F-10(a), "the total stabilized aid for each district shall not be increased by more than the district's stabilization aid growth limit." This section limits what a school district will receive. *(Wildwood v. Loewe, supra,* at 2-3)

Petitioners' error lie in attempting to isolate one aspect of that formula and characterize it as a fixed entitlement. Indeed, petitioners misunderstand the fundamental nature of the core curriculum standards aid formula. It is not, as they contend, an absolute formula; rather, it distributes State aid relative to the wealth of a district, and to the enrollment growth or loss of a district, compared to that of other districts. The final aid amount due any district under CEIFA is derived through the *cumulative* application of the act's *several* formulas, including core curriculum standards, categorical and stabilization aid formulas, and *no one* of these formulas is determinative of the final aid calculation. In the instant matter, no allegation is made that respondents refused or failed to provide the aid required by CEIFA following application of all its formulas. The only action taken by respondents was to implement, in addition to all other formulas required, those provisions of the statute which were structured, for the years in question, to create a transition between the prior and new funding systems; so as, in the interest of avoiding disruption and promoting effective use of funds, to prevent both extraordinary increases and extraordinary decreases in the aid provided to any district. In this regard, respondents were doing no more than fulfilling their obligation under the law.[4]

However, although petitioners' primary claim is, in effect, that *any* application of the stabilization clause is inherently unconstitutional because it will result in an aid amount different from that provided by the core curriculum standards formula, petitioners also contend that respondents erred in their actual calculation. Specifically, petitioners claim that respondents perpetuated the unconstitutionality of the Quality Education Act (QEA) by applying CEIFA's stabilization formula to the aid respondents' district had received in the 1996-97 school year, that is, under the QEA, rather than to the amount otherwise due the district under CEIFA. In so

[4] Petitioners' claim that such fulfillment was inherently unconstitutional has already been rejected by the Appellate Division, as discussed more fully below.

doing, petitioners cl im, respondents may have relied on one sentence contained in N.J.S.A. 18A:7F-10, stating that "For the 1997-98 school year, the pre-budget year total shall include foundation aid, transition aid, categorical aids for special education, bilingual education, and county vocational education, and transportation aid paid for the 1996-97 school year." Petitioners contend,

> There are two ways to interpret that sentence. Clearly, respondents interpret that sentence to be restrictive. It is necessarily their position that only the items set forth in that sentence can be utilized in determining the CEIFA base. *** Petitioners would contend that such a construction is incorrect. If the Legislature had intended that construction, then it would have stated:
>
> "for the 1997-98 school year, the pre-budget year total shall *consist* a/foundation aid..."
>
> The clear purpose of that sentence is to insure that schools which had come to rely upon the amount of foundation aid which they had received under QEA II would not now suddenly have inflicted upon them a serious budgetary shortfall. In short, the Legislature was establishing a floor, a minimum below which funding could not fall.
> (Petitioners' Brief in Opposition to Motion to Dismiss Second Amended Petition of Appeal at 9) (emphasis *sic)*

Based upon this reasoning, petitioners conclude that, if the Legislature in enacting CEIFA intended the interpretation taken by respondents, then the act is inherently unconstitutional in its reliance on a discredited funding formula; if it did not, then respondents erred in their calculations. Either way, petitioners contend, they must prevail.

This argument fails on two counts. Initially, as noted by respondents, the QEA was found unconstitutional only as applied to twenty-eight special needs districts because it did not assure substantial equivalence between such districts and District Factor Grouping I & J districts. (Respondents' Reply to Petitioners' Brief in Opposition to Motion to Dismiss Second Amended Petition at 2) Therefore, there is no absolute impediment to using aid amounts allocated pursuant to it as the basis for initial calculations under the Legislature's successor

funding formula, pa_rticularly for districts other than the twenty-eight "Abbott" districts. Further, a reading of *N.J.S.A.* 18A:7F-10 in its *entirety* clearly indicates that, in that section, the Legislature was seeking to define, for each transitional year between enactment and 1999-2000, the precise base to which the stabilization growth limit was to be applied, and that, for the act's first year of operation, such base would, of necessity, reach back to amounts which had been awarded under the prior formula so as to effectuate an incremental transition from actual amounts received under the old funding law to actual amounts eventually to be received under the new. In this context, the interpretation espoused by petitioners is not only illogical, but also negates the carefully structured statutory scheme; whereas that taken by respondents is both reasonable and supported by legislative language and intent. *See Stafford v. Stafford Zoning Board,* 154 *N.J.* 62, 71 (1998) (wherein the Court held that legislative intent controls when construing a statute, and that, if the language of the statute clearly reveals its meaning, such language controls).

Having rejected petitioners' claims with regard to respondents' determination to apply, and their actual calculations under, CEIFA's stabilization provisions, the Commissioner turns to the effect of such application on the district's ability to provide T&E. Here, the Commissioner concurs with respondents that petitioners have entirely failed to plead requisite facts in support of their claims, a deficiency which cannot be overstated in the present context.

In determining that the within matter should be heard by the Commissioner rather than decided by the trial court as a matter of law, the Appellate Division expressly recognized that it "cannot simply be presumed that application of the stabilization aid growth limit***deprives the school district the ability to fulfill its constitutional mandate," and that

proceedings in a forum of educational expertise were necessary to determine whether that was, indeed, the case. (*Wildwood v. Loewe, supra,* at 8)

Although petitioners list a half-dozen or so items the district alleges it has been unable to accomplish, such as hiring a curriculum coordinator and department chairpersons, training teaching staff, purchasing certain materials, and providing before-, after- and summer school remedial programs, there is no link whatsoever between the facts pled and petitioners' bald assertions that the district cannot implement the Core Curriculum Content Standards and that such inability is the direct result of insufficient funding due to respondents' application of CEIFA's stabilization provision. Neither are the facts petitioners allege, as noted by respondents, indicative of failures which could in any way be characterized as "clear, severe, extensive and of long duration" so as to rise to the level of constitutional deficiency (Respondents' Letter Brief in Support of Motion to Dismiss Second Amended Petition at 10, citing *Abbott v. Burke,* 119 ***N.J.*** 287,385 (1990)).

In this regard, although petitioners assert that "liberality of pleading has been the byword in New Jersey," and that "[s]pecific fact pleading is not necessary, so long as "the fundament of a cause of action may be gleaned *(citation omitted),"* (Petitioners' Brief in Opposition to Motion to Dismiss Second Amended Petition of Appeal at 13), petitioners' primary contention is, in fact, that educational inequities need not even be pied:

> ***As set forth in Paragraph 12 of the First Count of petitioners' petition, it is *respondents* who have determined what is necessary for petitioner BOARD to afford the children of Wildwood a thorough and efficient education. Pursuant to CEIFA, *respondent* has calculated the amount of CEIFA aid which petitioner must receive in order to provide a thorough and efficient education. ***Petitioner BOARD would emphasize that those numbers were certified to petitioner BOARD by respondent Commissioner Klagholz pursuant to CEIFA. As such, they constitute admissions against interest, and respondent is necessarily estopped from denying that those amounts of funding are necessary if the children of Wildwood are to receive a thorough and efficient education.

> Accordingly, it is unnecessary for petitioners to specifically plead "educational inequities." Such inequities are implicitly admitted by respondents. (*Id.* at 13-14) (emphasis *sic)*

This contention plainly reveals petitioners' claim in regard to the effect of respondents' application of CEIFA to be nothing more than a restatement of their earlier claim, that application of the stabilization provision, in and of itself, warrants a finding of unconstitutionality; such claim, however, has already been expressly rejected, both by the Appellate Division, *supra,* and herein. Moreover, the contention is fatal to any request for a factual hearing on claims regarding the constitutionality of CEIFA as applied, since, by it, petitioners are plainly alleging that the only facts material to such claims have already been admitted by respondents.

In addition, as observed by respondents, inherent in petitioners' arguments is the suggestion that, if not for respondents' application of CEIFA's stabilization aid clause, the district would be able to provide T&E. However, the Commissioner talces notice of the undisputed fact that Wildwood received more aid in 1997-98, even after stabilization, than it had under the prior funding formula. He further notes that the district received approximately $1.5 million over and above CEIFA aid through special language in the 1997 and 1998 Appropriation Acts. Finally, he observes that, by its own terms and consistent with its dual purpose as a transitioning device and a mechanism for controlling the growth of State aid from year to year, CEIFA's stabilization provision will work in the 1999-2000 school year and beyond so that the final aid calculation for Wildwood in any given year will include core curriculum standards aid based on the district's growth in actual enrollment, without the transitional limitation imposed during the first two years of the act's operation. (Respondents' Letter Brief in Support of Motion

to Dismiss Second "?-mended Petition at 10-11) To the extent that petitioners are alleging that the stabilization provision, as it will apply in 1999-2000 and beyond, acts to prevent the district from providing T&E in accordance with the constitutional mandate, such allegation, in addition to being insufficiently pied, is premature until such time as the funding formulas of CEIFA have been fully reflected in the educational programs of the district and afforded an opportunity to work as intended.

Given the dearth of legal and factual sufficiency in the claims advanced by petitioners, the Commissioner finds that no useful purpose would be served by further proceedings in this matter. Accordingly, the Commissioner declines to direct such proceedings, and, for the reasons expressed herein, grants respondents' motion and dismisses the petition of appeal. [5] [6]

IT IS SO ORDERED.

U

COMMISSIONER OF EDUCATION

[5] In view of the holding herein, the Commissioner does not find it necessary to reach the issue of the Board's standing to continue as a petitioner in the instant appeal.

[6] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 10, 2000
Date of Mailing-January 10, 2000

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C # 6-00
SB #11-00

D.S., on behalf of minor child, A.S.; R.S., on behalf of minor children, H.H. AND H.H.; E.H., on behalf of minor child, C.H.; G.G., on behalf of minor child, G.S.; W.M., on behalf of minor child, E.M.; AND THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

PETITIONERS-APPELLANTS,

V.

LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 10, 2000

For the Petitioners-Appellants, Gorman & Rauh (Bruce M. Gorman, Esq., of Counsel)

For the Respondent-Respondent, Elisabeth Doyle, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 7, 2000

Date of mailing

(SB) 8-00

SB #8-00

PLEASANTECH ACADEMY CHARTER SCHOOL EDUCATION ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL AND DAVID HESPE, COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak {Richard A. Friedman, Esq., of Counsel)

For the Respondents-Respondents, Arlene G. Lutz, Deputy Attorney General {John J. Farmer, Attorney General of New Jersey)

In a letter dated July 2, 1999, the PleasanTech Academy Charter School Education Association (hereinafter "petitioner") filed a complaint with the Commissioner of Education pursuant to N.J.S.A. 18A:36A-15,[1] alleging that teachers employed by the charter school were not being compensated in conformity with the terms of the school's charter. The petitioner claimed that the school's action violated N.J.S.A. 18A:36A-11, which requires a charter school to operate in accordance with its charter.

[1] N.J.S.A. 18A:36A-15 provides, in pertinent part:

> Any individual or group may bring a complaint to the board of trustees of a charter school alleging a violation of the provisions of this act. If, after presenting the complaint to the board of trustees, the individual or group determines that the board of trustees has not adequately addressed the complaint, they may present that complaint to the commissioner who shall investigate and respond to the complaint. ...

May 3, 2000

Consequently, it requested that the Commissioner conduct an investigation of this matter.

By letter dated October 18, 1999, Anne O'Dea, Director of the Office of School Choice in the Department of Education, advised the counsel for the petitioner that the Department's Office of Compliance was conducting an investigation of the complaint. On December 22, 1999, counsel for the petitioner wrote to Ms. O'Dea requesting the status of the investigation. He added that unless a response was received by January 1, 2000, the petitioner "may initiate appropriate action ... which may include ... instituting litigation ...."

By letter dated December 23, 1999, Ms. O'Dea responded that a review by the Office of Compliance of the concerns raised by the petitioner revealed that the school was addressing accounting deficiencies and that its teachers were being compensated in accordance with the terms of their individual contracts. She observed that "although budgeted amounts are included in the charter, the amounts are projections."

On January 18, 2000, the petitioner filed the instant appeal to the State Board "from the final decision rendered on behalf of the Commissioner of Education pursuant to N.J.S.A. 18A:36A-15, by Anne O'Dea, Director, Office of School Choice, New Jersey Department of Education on December 23, 1999."

For the reasons that follow, we remand this matter to the Commissioner for a final decision with respect to the petitioner's complaint.

N.J.S.A. 18A:36A-15, which authorizes "any individual or group" to present a complaint to the Commissioner if they determine that the charter school's board of trustees has not adequately addressed it, requires the Commissioner to investigate and

respond to such complaint if it alleges a violation of the provisions of the Charter School Program Act. In this case, the Commissioner did not respond to the petitioner's complaint. Rather, the only response was from Ms. O'Dea, Director of the Office of School Choice.

Nothing in the correspondence between the parties reflects that Ms. O'Dea was fulfilling, on behalf of the Commissioner, the statutory function imposed on him by the terms of N.J.S.A. 18A:36A-15. Nor is she an assistant commissioner, who may be assigned by the Commissioner to hear and determine disputes arising under the education laws as permitted by N.J.S.A. 18A:4-34c. Consequently, there is not in this case a decision rendered on behalf of the Commissioner that is appealable to the State Board of Education. See N.J.S.A. 18A:6-27 (appeals to the State Board may be taken by any party aggrieved "by any determination of the commissioner"); N.J.A.C. 6:2-1.1 \a) (final decisions of the Commissioner are appealable to the State Board).

Hence, it is necessary to remand this matter to the Office of Controversies and Disputes in order to provide the Commissioner with the opportunity to render a determination with respect to the petitioner's complaint. Given the amount of time that has elapsed since the petitioner filed its complaint with the Commissioner, we direct that the Commissioner make such determination expeditiously.

May 3, 2000

Date of mailing ___ MAY 05 2000

9-00

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

J .10,. 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11498-97
AGENCY DKT. NO. 427-10/97

MARK LEIBOWITZ,
Petitloner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent

Eugene G. Liss, Esq., for petitioner

Cherie L. **Maxwell,** Esq., for respondent
(Sils, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross)

Record Closed: January **14,** 1999 Decided: November 17, 1999

BEFORE **IRENE JONES,** ALJ:

This matter was transmitted ta the Office of Administrative Law on December 3, 1997, far a hearing pursuant ta *N.J.S.A.* 52:14B-1 ta 15 and *N.J.S.A.* 52:14F-1 to 13.

NEW JERSEY IS AN EQUAL OPPORTUNITY

Hearing dat s were scheduled for October 8 & 9, 1998 and January 14, 1999 but were adjourned at the request of the parties. On January 13, 1999, the undersigned Administrative Law Judge was notified by the parties that the matter had been settled. A signed copy of the Stipulation of Settlement was forwarded to this office on September 22, 1999.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

11/18/99
DATE

Irene Jones
IRENE JONES, *M*

Receipt Acknowledged:

11/24/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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School District of the City of Newark

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STATE Of tiEW JERSEY
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COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 11498-97N
Agency Ref. No. 427-10/97
OAL Docket No. EDUOR 01151-99N
Agency Ref. No. 505-11/98

MARK LEIBOWITZ

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ('"Newark" or "District") and Mark Leibowitz ("Leibowitz"), agree to the following terms in full resolution of ***this*** matter:

WHEREAS, Leibowitz disputes the bases for the District's withholding of his 1_9.7-1998 and 1998-1999 increments, and

WHEREAS, it appears that Leibowitz has made efforts to improve bis performance during the current school year; and

WHEREAS, the parties agree that it is in the public interest ***to*** enter into ***this*** agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of ***this*** agreement \Vill not present any risk of harm to students and/or the safe operation of the school district,

NOW, TIIEREFORE, the parties agree as follows:

1. The District shall, upon approval of this agreement by the State District Superintendent and the Commissioner of Education, restore Petitioner's 1998-1999 salary increment. The 1997-1998 increment withholding shall remain in effect.

2. . The 1997-1998 increment withholding shall remain in effect until the end of the 1998-1999 school year, at which time Newark will review Leibowitz' observations and evaluations. If Leibowitz' annual summative evaluation reflects a satisfactory rating, he shall be placed back on the appropriate level of the salary guide, effective September 1, 1999, as if neither increment withholding had occurred.

3. Leibowitz shall, upon execution of this agreement, withdraw with prejudice the appeals filed in relation to the 1997-1998 and 1998-1999 increment withholdings, specifically OAL Docket Nos. EDUOR 1 1498-97N and EDUOR 01151-99N.

4. Leibowitz acknowledges that the payments reflected in this agreement constit , the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Leibowitz, on behalf of himself, his heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind. in character, that he has had or may now have: against any v.fthem, relative ta the !itlg:u:ion h:!d.:1 identified.

5. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

6. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Mark Leibowitz

Dated: 9-1-99

State-Operated School District of the City of Newark

By:

Dated:

OAL DKT. NO. EDU-11498-97
AGENCY DKT. NO. 427-10/97

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 20CO

10-00

G.E., ON BEHALF OF HER MINOR NEPHEW, R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD O: EDUCATION OF THE SOUTH ORANGE/MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 10, 2000

Stale of.\"ew Jersey
OFFICE OF ADMINJSTRATIVE LAW

INITIAL DECISION

SETTLEMENT)

OAL DKT. NO.: EDU 3235-96

AGENCY DKT. NO. 17-1/96

G.E. on behalf **of her minor** nephew, **R.C.,**

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

G.E, *prose,* for her minor nephew R.C., petitioner

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

Record Closed: November 3, 1998 Decided: November 23, 1999

BEFORE **THOMAS** E. **CLANCY,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 14, 1996 for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52: 14F-1 et seq.*

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

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19. 1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be {and are hereby) **TERMINATED.**

I hereby FILE this initial decision wit:1 the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

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

11-23-99
DATE

4 CA. Cf 7
THOMAS E. **CLANCY,** ALJ

11/24/99
DATE

ReceiQt Acknowledged: 2
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 2 9 1S99
DATE

a
OFFIE OF ADMINISTRATIVE-1:.A

/g

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. 0. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and Maplewood Board of Education

G.E., on behalf of the minor child, R.C.,
Petitioner,
v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD GHOUL DISTRICT,
Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT NO. EDUOS 03235-96N

Agency Ref. No. 17-1/96

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioner Gertrude Exilus and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate as follows:

1. Petitioner Exilus will pay to Board Six Hundred Dollars ($600.00) as fu.. satisfaction for tuition monies related to R.C.'s attendance in District schools.

2. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

3. The parties waive any and all claims which were or could be asperted in the within action or any other action, including attorneys fees and damages pursuant to any fedGra! er Stat9 edtJcation?!, co stitutiona! 0r civil rights daims, including 42 !!.S..Q.. 1983, and specifically release the other party from any claims arising out of or related to these claims.

4. As a result of the foregoing, Petitioner Exilus hereby withdraws her Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 1BA:38-1, with prejudice.

/ciERTRUDE EX,ILUS.

Dated: / rJT).. C/9

SOUTH ORANGE AND MAPLEWOOD BOARD OF EDUCATION

Dated: 10/31/99

Document #: 378062/JLB

OAL DKT. NO. EDU 3235-96
AGENCY DKT. NO. 17-1/96

G.E., ON BEHALF OF HER MINOR NEPHEW, R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE/MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 2000

(SB) -10-00

SB #10-00

IN THE MATIER OF THE DENIAL OF THE :
CHARTER SCHOOL APPLICATION OF THE : STATE BOARD OF EDUCATION
LIBERTY ACADEMY CHARTER SCHOOL, : DECISION
SOMERSET COUNTY. :

Decided by the Commissioner of Education, January 6, 2000

For the Appellant, Michael Detsis, pro se

For the Participant, Dina Rocco, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

On February 5, 2000, the presidenUco-founder of the proposed Liberty Academy Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education denying his application to establish a charter school. On February 25, 2000, the Director of the State Board Appeals Office {"Director") advised the appellant that the Commissioner had pro ided the State Board with the record in this matter and that the briefing schedule was therefore being established. She informed the appellant that a brief in support of his appeal was due on or before March 10, 2000.

The appellant, however, failed to file a brief by that date. By letter dated March 14, 2000, the Director advised the appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal.

July 5, 2000

By letter dated April 26, 2000, the Director further advised the appellant that "given the circumstances, and in view of your pro se status, you are being given the opportunity to file your brief along with an explanation, and the request that the Legal Committee accept the brief." The appellant was given until May 15, 2000 to file such documents, and the Director attached a copy of the regulations governing appeals to the State Board.

The appellant, however, failed to file a brief by May 15. By letter dated May 25, 2000, the Director advised the appellant of such failure and again indicated that the matter was being referred to the Legal Committee. The appellant has still failed to file a brief in support of his appeal, nearly two months after the extended deadline. Nor has he offered any explanation for his failure to file or requested an extension of time for such filing. Given these circumstances, we dismiss the appeal in this matter for faHure to perfect. N.J.A.C. 6A:4-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2060

11-00

IN THE MATTER OF THE TENURE HEARING OF SHEILA JACKSON. SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION
SHEILA JACKSON, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, RESPONDENT.	:	

January 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5357-99
AGENCY DKT. NO. 97-4/99

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Petitioner,
v.
SHEILA H. JACKSON,
Respondent.

OAK DKT. NO. EDU 9129-99
AGENCY DKT. NO. 197-7/99

SHEILA H. JACKSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

CONSOLIDATED

Sheldon H. Pincus, Esq., for Sheila H. Jackson, petitioner
(Bucceri & Pincus, attorneys)

Howard M. Newman, Esq., for Linden Board of Education
(Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: October 25, 1999 Decided: November 17, 1999

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

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

On or abouf April 29, 1999, the Linden Board of Education certified charges of unbecoming conduct, insubordination and incapacity against respondent, Sheila H. Jackson, a tenured music teacher. On May 13, 1999, respondent filed an answer denying the charges and asserting affirmative defenses. On May 20, 1999, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J. S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On July 9, 1999, petitioner, Sheila H. Jackson, filed a verified petition of appeal with the Commissioner of Education alleging that respondent improperly withheld her employment and adjustment increments for the 1999-2000 school year. The Linden Board of Education filed an answer on July 21, 1999 demanding judgment against petitioner and seeking dismissal of the verified petition. On August 11, 1999, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J. .A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The tenure case (OAL Dkt. No. EDU 5357-99) was assigned to Administrative Law Judge Stephen G. Weiss and scheduled for hearing on September 21 through September 24, 1999 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. It was understood that the increment withholding case (OAL Dkt. No. EDU 9129-99) would be consolidated with the tenure case. The cases were assigned to the undersigned judge on September 20, 1999 and are consolidated for purposes of hearing and decision. As a result of settlement conferences held between the parties, a settlement was reached on September 22, 1999, and the hearing was adjourned.

The parties have agreed to settle these matters and have prepared the attached Settlement Agreement, indicating the terms of settlement.

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

1. The settlement agreement complies with the requirements of *Cardonick v. Brooklawn Bd. of Educ.,* 193 SLD --- (St. Bd. April 6, 1983).

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

3. The settlement agreement is in the public interest.

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

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

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

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

November 19, 1999
DATE

Elinor R. Reiner
ELINOR R. **REINER,** ALJ

Receipt Acknowledged:

11/24/99
DATE

Debbie Antanaitis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

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

IN THE MATTER OF THE HEARING:		BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
OF SHEILAH. JACKSON,	:	ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE	:	AGENCY REF. NO. 94-4/99
		O.A.L. DOCKET NO. EDU 5357-99
CITY OF LINDEN,	:	
UNION COUNTY	:	
SHEILA JACKSON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 197-7/99
		O.A.L. DOCKET NO. EDU 9129-99
LINDEN BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

WHEREAS, Sheila H. Jackson (hereinafter referred to as "Jackson") has been employed by the Linden Board of Education (hereinafter referred to as "the Board") as a Teacher of Music since January 1991 and has obtained tenure as a teaching staff member; and

WHEREAS, on or about March 9, 1999, the Board served Jackson with tenure charges of unbecoming conduct, incapacity and other just cause; and

WHEREAS, on or about March 17, 1999, Jackson filed a Verified Petition with the Commissioner of Education alleging that she was the subject of a work-related injury and that her rights under N.J.S.A. 1SA:30-2.1 were being violated. This matter, entitled Jackson v. Linden Board of Education, Agency

Ref. No. 54-3/99, OAL Docket No. EDU 3617-99, has been placed on the inactive list, pursuant to N.J.A.C. 1:1-9.7, pending the resolution of a Workers' Compensation Claim Petition (Docket No. CP-98-037124) filed on Jackson's behalf.

WHEREAS, on April 26, 1999, the Board resolved to certify the charges to the Commissioner of Education but determined not to suspend Jackson from her teaching position pending a determination of the charges; and

WHEREAS, on or about May 12, 1999, Jackson filed an Answer of Denial and Affirmative Defenses to the Tenure charges; and

WHEREAS, on or about June 17, 1999, the Board resolved to withhold Jackson's employment and adjustment increments for the 1999-2000 school year; and

WHEREAS, on or about July 8, 1999, Jackson filed a Verified Petition with the Commissioner of Education alleging the withholding of increment(s); and

WHEREAS, throughout the pendency of these matters, Jackson has been reporting to work and performing her duties in a satisfactory manner; and

WHEREAS, the parties have engaged in extensive discovery and also reviewed and considered the reports of physicians who have had the opportunity to examine Jackson and who have determined her to be fit to teach; and

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators, teachers and others

who would be called to testify at hearing, said hearing expected to require at least four days to conclude; and

WHEREAS, the Board would incur substantial financial costs by continuing this litigation that would significantly exceed the cost of this settlement; and

WHEREAS, the Board has received the recommendation of its Superintendent of Schools that the dismissal of Jackson is no longer desired, nor, given her skills and experience, in the best interests of the Board and, therefore, the public; and

WHEREAS, the parties wish to amicably resolve their differences in these consolidated matters without the need to resort to formal litigation;

NOW THEREFORE, in consideration of the aforementioned mutual premises and promises and in exchange for the consideration more particularly set forth below, the parties hereby agree as follows:

1. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter being OAL Docket No. EDU 05357-99 and Agency Ref. No. 94-4/99 subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. Jackson agrees to withdraw, with prejudice, the Verified Petition regarding the 1999-2000 withholding of increments and bearing OAL Docket No. 09129-99 and Agensy Ref. No. 192-7/99, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education. Notwithstanding said withdrawal, nothing shall preclude Jackso1

from requesting the Board, in its discretion, to restore said increments in future years and pursuant to N.J.S.A. lBA:29-14.

3. Jackson reserves any and all rights that she was to continue to pursue a determination of a certain Workers' Compensation Claim Petition (Docket No. CP-98-037124) and as a consequence of that determination, resolution of the Verified Petition in Jackson v. Linden Board of Education, Agency Ref. No. 54-3/99 and OAL Docket No. EDU 3617-99.

4. The parties' entry into this settlement agreement shall not be construed as an admission of guilt or wrong doing by either party.

5. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and th t the terms of this Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and the parties shall return to the same positions they held prior to this Agreement.

6. The parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Agreement and that each sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

7. This Agreement shall be subject to the laws of the State of New Jersey.

..8. The undersigned representatives of the Board herehy acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

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

WITNESS:

FOR THE LINDEN BOARD OF EDUCATION

By: _____, Board **President**

Dated: 10/14/99

By: _____, Board Secretary

Dated: 10/14/99

FOR SHEILAH. JACKSON

-SheilaH.Jcksoij/

Dated: 10/26/99

_____
Sheldon H. Pincus, Esq.

Dated: 10/25/99

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON. NEW JERSEY 07013-2440

(973) 773-5665

FAX (9731773-2170

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Ocr 25 | 29 Fa '99

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

}\fARY J. HAMMER
MEMBER N.J. & N.Y. BARS
LINDA GANZ OTT

October 21, 1999

Hon. Elinor R. Reiner, A.L.J.
Office of Administrative law
185 Washington Street
Newark, NJ 07102

Re: In the Matter of the Tenure Hearing of Sheila Jackson,
School District of linden
O.A.L. Docket No. EDU 05357-99N
Agency Ref. No. 94-4/99
-and-
Sheila Jackson v. linden Board of Education
0.A.L. Docket No. EDU 9129-99
Agency Ref. No. 197-7/99

Dear Judge Reiner:

Enclosed is an original and one (1) copy of the Settlement Agreement in these consolidated matters. Kindly issue an Initial Decision approving same.

Thank you far your courtesy and cooperation in this matter.

Very truly yours,

Sheldon H. Pincus

/mab
cc: Howard M. Newman, Esq. (w/enc.)
Ms. Sheila Jackson (w/enc.)

OAL DKT. NOS. EDU 5357-99 AND 9129-99 (Consolidated)
AGENCY DKT. NOS. 94-4/99 AND 192-7/99

IN THE MATIER OF THE TENURE	:	
HEARING OF SHEILA JACKSON,	:	
SCHOOL DISTRICT OF THE CITY	:	
OF LINDEN, UNION COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION
SHEILA JACKSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. In *re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 2000

12-00

12-00

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCES URBAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF MONTYALE, BERGEN COUNTY.	:	

January 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5450-98
AGENCY DKT. NO. 128-5/ 8

IN THE MATTER OF THE TENURE HEARING OF FRANCES URBAN

Stephen R. Fogarty, Esq., for petitioner
(Fogarty & Hara, attorneys)

Daniel D. Hediger, Esq., for respondent
(Louis A. Capazzi Jr., attorney)

Record Closed: November 17, 1999 Decided: November 18, 1999

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

This matter involves tenure charges of inefficiency certified by the Montvale Board of Education ("Board") against Frances Urban under the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:17-2 and *N.J.S.A.* 18A:6-10 to -18.1.

Frances Urban is a tenured secretary employed by the Board. By resolution adopted on May 4, 1998, the Board found the existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the Board accused Ms. Urban of failure to correct numerous inefficiencies within ninety days of her receipt of notice of the specific deficiencies. Ms. Urban has consistently denied the charges against her.

On May 6, 1998, the District filed its written charges with the Commissioner of Education ("Commissioner"). Ms. Urban filed her original answer on May 26, 1998 and her amended answer on September 3, 1998. Meanwhile, on June 11, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Educ.,* 1983 S.L.O. _ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the [employee] to the proposed agreement, the Administrative Law Judge's finding that the [employee] entered into the agreement with a full understanding of his rights, and (a finding] that the agreement is consistent with the public interest.

On November 17, 1999, the parties submitted a written record sufficient to make a determination of whether or not the proposed settlement should be accepted. Counsel for both parties have set forth the reasons why a settlement would be in the public interest. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Frances Urban has been employed by the Board as a secretary since November 1986.

2. The Board served her with the first set of charges of inefficiency on November 21, 1997 and with a second set of charges of inefficiency on March 10, 1998. According to the Board's pleadings, Ms. Urban has failed to correct many of these alleged areas of inefficiency.

3. If a hearing becomes necessary, the Board intends to call at least six fact witnesses and the secretary intends to call at least five fact witnesses. Given the voluminous statement in support of the charges filed by the Board, the hearing will last at least six days and may not finish within the time allotted.

4. Litigation of the charges would lead to disruption of the Board's educational program due to a great amount of time lost by administrators, teaching staff members and office personnel who would be required to testify to the numerous incidents which led to the filing of the tenure charges.

5. Board counsel estimates conservatively that legal fees for prosecuting this case before the Commissioner would be approximately $50,000.

6. Under the proposed terms of settlement, Ms. Urban will resign from her position effective March 15, 1999, which was the last date that she was on the Board payroll. She will receive a payment of $19,412, which represents the difference between the salary which she would earn for two years, less the salary that she is currently earning. Thus, the settlement cost to the district is far less than the anticipated costs of litigation.

7. She would also receive payment of $8,376, representing her accumulated sick leave and accrued vacation time. Ms. Urban is entitled to that amount regardless of the outcome of the tenure charges.

8. If the matter proceeds to hearing, it is unlikely that a final decision will be rendered prior to the end of March 2000. Meanwhile, Ms. Urban would be entitled by law to a continuation of her pay pending the outcome of the hearing.

9. From the Board's viewpoint, the outcome under the settlement would be better than could be achieved if it prevailed after a lengthy and costly tenure battle. Money spent on litigation costs could be put to better use for the benefit of the children of Montvale.

10. Before entering into this agreement, Ms. Urban fully understood her rights and had adequate opportunity to consult with legal counsel.

11. Since Ms. Urban does not hold any educational certification, this is not the type of case which must be referred to the State Board of Examiners for licensing review.

12. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interests.

It is **ORDERED** that the parties comply with the settlement terms and thf;lt the proceedings are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J. S.A.* 52: 148-10.

Nov. 18, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/24/99
DATE

Debbie Antamis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1999
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

al

RELEASE

,his Release, dated , is given

aY the Releasor(sl Frances Urban

referred to as "I",

TO THE BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE and its officers, employers, administrators, agents, servants and all other persons firms or corporations who or which are or might be liable in the premises from any and all clai.:is which I have or might have against them referred to as "You•. If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. **I** release and give up any and all claims and rights which **I** may have against you. This releases all claims, including those of which I am not a•.;are ar.d those not mentioned in this Release. This Release applies to claims ::-esultir.g from anything which has happened up to now. I specifically release the followir.g claims:

> More particularly any and all claims arising out of the employment relationship between Frances Urban and the Beard of Education of the Borough of Montvale, including, but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claims(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement, which allege a violation of the Older Workers' Benefits Protection Act, 29 U.S.C. 621, et seq., or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.
>
> This Release does not apply to any rights which Frances Urban may have under the terms of the Memorandum of Agreement between Frances Urban and the Board of Education of the Borough of Montvale, or to deny her rights to receive a pension from the Teachers' Pension and Annuity Fund.

2. Pavrnent. I have been paid a total of $L00, and other good and valuable consideration as more specifically set forth under the terms of the Memorandum of Agreement between Frances Urban and the Montvale Board of Education, in full payment for making this Release. I agree tl::at I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bou.,d. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Sandra J. Giblin

(Seal)
NOTARY PUBLIC

J&:zg

FRANCES URBAN

SANDRA J. GIBLIN
Notary Public · State of New Jersey
STATE o, NEW Ji9mmrss.!,qp: Expires July 25, 2000

COUNTY CF BERGEN)

BE IT REMEMBERED that on this Novembu: /0/ 19fC/, before me personally appeared Frances Urban who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the ~~contents~~ thereof and thereupon I acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

liL11" -/A:L«td-:;, -;

SANDRA J. GrBLIN
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November 16, 1999

I, Marian Latz, Secretary of the Board of Education of the Borough of Montvale, County of Bergen, State of New Jersey, do hereby certify the following to be a true extract from the minutes of the Executive Business Meeting of the Board of Education of the Borough of Montvale, held on Monday, November 15, 1999:

TENURE SE1TLEMENT

Introduced by: Mrs. Schimmenti Seconded by: Mr. Flagg

Motion 4.1

BE IT RESOLVED by the Borough of Montvale Board of Education as follows:

1. The request of Frances Urban to tender her resignation with the Board of Education effective March 15, 1999, is hereby approved and accepted.

2. The terms, stipulations and conditions as established in a Settlement Agreement between the Board of Education and Frances Urban, which is annexed to this Resolution, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached., Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

Roll call vote members voting aye: Mr. Carroll
Mrs. Ewing
Mr. Flagg
Mr. Hessler
Mrs. Schimmenti
Mrs. Castka

No None

Marian Latz

Marian Latz
Board Secretary

Ms. Rose Castka
Board President
Montvale Board of Education
47 Spring Valley Road
Montvale, New Jersey 07645

Re: Letter of Resignation

Dear Ms. Castka:

Pursuant to the terms of the Settlement Agreement between the Borough of Montvale Board of Education and myself, I hereby submit my irrevocable resignation from the position of secretary, effective March 15, 1999. This resignation is expr ssly conditioned upon the Board's compliance with the aforesaid Settlement Agreement and is of no force or ef feet, even if accepted, unless said Agreement is fully performed by the Board.

Sincerely,

Frances Urban

Frances Urban

Dated: f--lov.J0$_1$ J'1'17

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
Nov 17 11 55 AM '99

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Petitioner,
Board of Education of the
Borough of Montvale

IN THE MATTER OF THE TENURE HEARING OF FRANCES URBAN, BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDU 5450-98 AGENCY REF. NO.: 128-5/98 **SETTLEMENT AGREEMENT**

WHEREAS, the respondent, Frances Urban (herein fter referred to as "Urban"), has been employed by the petitioner, the Board of Education of the Borough of Montvale (hereinafter referred to as the "Board") as a secretary since 1986 and has obtained tenure in that position;

WHEREAS, on or about November 21, 1997, the Board Secretary/School Business Administrator served Urban with charges of inefficiency together with a written statement of evidence in support thereof;

WHEREAS, Urban was informed in writing that, unless the inefficiencies were corrected within ninety (90) days, the Board intended to certify the charges of inefficiency to the Commissioner of Education;

WHEREAS, on or about February 23, 1998, the administrators responsible for bringing the charges of inefficiency to the attention of the Board notified the Board in writing what charges had not been corrected;

WHEREAS, on or about March 10, 1998, the Board Secretary/School Business Administrator formally served Urban with charges of inefficiency, which included only those charges that had not been corrected during the ninety (90) correction period, together with a written statement of evidence in support thereof;

WHEREAS, Urban was advised that she had fifteen (15) days in which to file a written response to the charges of inefficiency with the Board;

WHEREAS, Urban did not file a written response to the charges of inefficiency with the Board;

WHEREAS, on May 4, 1998, the Board certified the charges of inefficiency and suspended Urban without pay effective May 6, 1998;

WHEREAS, said charges of inefficiency were filed by petition with the Commissioner of Education on May 6, 1998;

WHEREAS, Urban filed an Answer to the petition on May 26, 1998, denying the charges filed against her;

WHEREAS, since at least September 1, 1998, Urban has been and continues to be employed in a health care facility, where she earns $18,720 annually;

WHEREAS, Urban's suspension without pay expired on September 1, 1998, whereafter Urban's suspension continued with pay, less compensation earned outside of the Board's employ, fro.m September 1, 1998 until May 4, 1999;

WHEREAS, at Urban's request, the Honorable Ken R. Springer, A.L.J., adjourned the hearing in this matter, which was scheduled to begin on April 27, 1999;

WHEREAS, as a condition to the above-mentioned adjournment, Urban agreed that the Boards' obligation under N.J.S.A. 18A:6-14 to pay Urban her full salary during her period of suspension, less any sums received by way of substitute employment, would be suspended during the period of the adjournment, said obligation resuming upon the first day of hearing in this matter, and to reimburse the Board in the amount of $1,500, which amount represented the Board's attorney's fees incurred in connection with its preparation for the hearing, said conditions being embodied in an Order signed by Judge Springer dated May 4, 1999;

WHEREAS, Urban's last day on the Board's payroll was March 15, 1999;

WHEREAS, Urban's obligation to reimburse the Board in the amount of $1,500 was converted to a judgment by the Superior Court of New Jersey, Law Division, by way of summary proceeding to enforce Judge Springer's order, which proceeding was unopposed by Urban;

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators, teachers and office personnel who would be called to testify at the hearing, said hearing expected to require at least six (6) days to conclude;

WHEREAS, the continuation of this litigation would cause the Board to incur substantial financial costs that would significantly exceed the cost of this settlement;

WHEREAS, the parties agree that a settlement would be in the best interests of the Montvale Public Schools and, therefore, the public; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises and in exchange for the consideration more particularly set forth below, the parties hereby agree as follows:

1. Urban hereby resigns her position of employment with the Board, together with all tenure and seniority rights, effective March 15, 1999, subject only to approval of this Agreement by the Board, the Office of Administrative Law and the Commissioner of Education. Urban submits her resignation

knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications. Urban will sign an irrevocable letter of resignation from all employment with the Board. The form of Urban's irrevocable letter of resignation is attached hereto as Exhibit A.

2. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter bearing O.A. L. Docket No. EDU 5450-98 and Agency Ref. No. 128-5/98, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

3. In consideration for Urban's resignation effective March 15, 1999, the Board agrees to pay Urban the following compensation:

a. $9,706, less usual and customary deductions for withholding taxes and charges, which represents the difference between the salary that Urban would earn from March 15, 1999 to March 15, 2000 if she remained in the Board's employ ($28,426) and the salary that she is currently earning, and expected to earn during that period, outside of the Board's employ ($18,720);

b. $9,706, less usual and customary deductions for withholding taxes and charges, which represents the difference between the salary that Urban

would earn from March 15, 2000 to March 15, 2001 if she remained in the Board's employ ($28,426) and the salary that she is currently earning, and expected to earn during that period, outside of the Board's employ ($18,720);

c. $5,000, less usual and customary deductions for withholding taxes and charges, which represents payment for Urban's accumulated sick leave (one-hundred days at $50 per day pursuant to the terms of the 1994-1997 Agreement between the Board and the Montvale Secretaries Association), to which she is legally entitled regardless of whether or not her separation from the Board's employ is voluntary or involuntary; and

d. $3,376, less usual and customary deductions for withholding taxes and charges, which represents payment for Urban's accrued vacation (27.4 days at $123.22 per day pursuant to the formula contained in the 1994-1997 Agreement between the Board and the Montvale Secretaries Association), to which she is legally entitled regardless of whether or not her separation from the Board's employ is voluntary or involuntary.

All monies due to Urban under this Agreement will be paid, after normal payroll deductions, upon final approval of this Agreement

by the Office of Administrative Law and the Commissioner of Education.

4. The compensation and benefits specified in paragraph 3 of this Agreement are to be provided in consideration for Urban waiving any and all claims she has, or could have, against the Board, its agents, employees, and representatives, including, but not limited to, claims for discrimination, contract, tort, constitutional violations and/or attorney's fees. Urban shall execute a General Release in favor of the Board releasing the Board from all claims, liabilities or expenses to which it may be subject, arising from any claims or rights of Urban. The form of this General Release is attached hereto as Exhibit B. Nothing in this Agreement or the documents referenced herein shall preclude eith r party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

5. Urban shall pay to the Board $1,500 as and for reimbursement of the Board's attorneys fees incurred in connection with its preparation for the April 27, 1999 hearing, which was adjourned at Urban's request. Urban expressly authorizes the Board to withhold this amount ($1,500) from the monies due to Urban under paragraph 3 of this Agreement. Upon its receipt of said amount, the Board shall file a Warrant to Satisfy Judgment with the Superior Court of New Jersey.

6. The parties acknowledge that this Agreement shall

be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this Agreement.

7. The parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Agreement and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

8. Urban represents that at least twenty-one (21) days have passed from the date she received this Agreement, which was on or about March 8, 1999, and the date she signed this Agreement, during which time she had the opportunity to consider the terms of this Agreement. Pursuant to law, Urban may revoke this Agreement if she provides the Board with written notice within seven (7) days from the date she signs this Agreement. Failure to provide written notice to the Board within the seven (7) day time period shall result in this Agreement becoming a binding obligation upon Urban.

9. This Agreement shall be subject to the laws of the State of New Jersey.

10. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

11. Urban hereby declares that she is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Agreement and that she is satisfied with her legal representation. Urban agrees that she is and will continue to be bound by these terms and conditions in the future.

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

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

WITNESS:

BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE

By: _____
MarianLatz
Board Secretary/Business Administrator

Dated: 11/5/99

By: _____
Rose Castka
Board President

Dated: 11/15/99

WITNESS:

By: _____

Dated: Nov. 01 /'7'77

By _____
Frances Urban

Dated: Nov- /0 lc;99

OAL DKT. NO EDU 5450-98
AGENCY DKT. NO 128-5/98

IN THE MATIER OF THE TENURE	:	
HEARING OF FRANCES URBAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF MONTYALE, BERGEN COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *ajf'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 2000
Date of Mailing, January 11, 2000

SB/12-00

SB #12-00

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE IBRAHIM CHARTER SCHOOL, : DECISION
PASSAIC COUNTY. :

Decided by the Assistant Commissioner of Education, January 27, 2000

For the Appellant, Syed M. Tariq-Shuaib, prose

For the Participant Commissioner of Education, Dina Rocco, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

The decision of the Assistant Commissioner of Education is affirmed for the reasons expressed therein.

August 2, 2000

Date of mailing AUG 4 2000

13-00

MICHAEL HEIM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF HARMONY, WARREN	:	
COUNTY,	:	
RESPONDENT.	:	

January 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(DISMISSAL)

OAL DKT. NO.: EDU 1738-97

AGENCY DKT. NO. 611-12/96

MICHAEL HEIM,

Petitioner,

V.

HARMONY BOARD OF EDUCATION.

Respondent.

Donald E. Souders, Esq., represented petitioner

Ted Del Guercio, Esq., represented respondent
(David Wallace, attorneys)

Record Closed: October 29, 1998 Decided: November 19, 1999

BEFORE **THOMAS** E. **CLANCY,** ALJ:

In this matter, the Board of Education determined that petitioner was not domiciled in Harmony Township and that he therefore had to withdraw from the school district or pay tuition to it. Petitioner appealed this determination and the matter was referred to the Office of Administrative Law (OAL), on February 7, 1997 for resolution as a contested case.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences in October 1998 (see Exhibit "A"), and a settlement agreement was drafted in January 1999 (see Exhibit "A"). Nevertheless, the petitioner and his parents, Robert and Patricia Heim, never signed the agreement.

On April 15, 1999, the undersigned contacted petitioner's attorney and was advised that he had had a great deal of difficulty in contacting the Heims, but would keep trying to get in touch with them. Thereafter, the undersigned himself left messages on the Heims'

telephone answering machine {908-454-2810) on 5/11/99, 5/18/99, 5/24/99, 6/3/99 and 6/11/99 {see Exhibit "8"), but no one called him back. On August 16, 1999, the undersigned was informed by respondent's attorney that a complaint was filed in Superior Court against he Heims for the money they owed the Board of Education and that proper service had been effected upon them (see Exhibit "C").

Finally, on September 15, 1999, a Final Judgment by Default was entered by the Superior Court of New Jersey in Warren County against the Heims in the amount of $8046.69 with costs, in favor of the Harmony Township Board of Education {see Exhibit "D").

Based on the foregoing, the undersigned is persuaded to CONCLUDE that all issues originally litigable at the Office of Administrative Law have now been rendered MOOT by the Superior Court adjudication referred to above. Furthermore, for the reasons stated in a letter to the Heims from their attorney dated October 25, 1999 (see Exhibit "E") . . . and because the Heims have not contacted the undersigned as of this date*, the undersigned also CONCLUDES that the Heims' failure to respond is tantamount to the abandonment of their request for an OAL hearing.

Accordingly, I **ORDER** that the Heims' request for a hearing be (and is hereby) **DISMISSED** without prejudice.

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

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

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* even though they received their attorney's certified letter instructing them to contact the undersigned (see Exhibit "F") by November 10, 1999.

OAL DKT. NO. EDU 1738-97

/I-If-- 97
DATE

THOMAS E. **CLANCY,** ALJ

11/24/99
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 29 1999
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 1738-97
AGENCY DKT. NO: 611-12/96

MICHAEL HEIM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF HARMONY, WARREN	:	
COUNTY,	:	
RESPONDENT.	:	

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

Upon review of the record the Commissioner adopts the recommendation of the Administrative Law Judge to dismiss the instant matter since it has been rendered moot by virtue of the Final Judgment by Default entered against petitioner on September 15, 1999 by New Jersey Superior Court.

Accordingly, the Petition of Appeal is hereby dismissed.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* lSA:6-27 *et seq.* and *N.I.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 10, 2000
Date of Mailing, January 11, 2000

14-00

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

January 10, 2000

State of New Jersey
OFFICE OF **ADMINISTRATIVE LAW**

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11652-98
AGENCY DKT. NO. 501-11/98

EUGENE GRAHAM,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Eugene G. Liss, Esq., for petitioner

Arsen Zartarian, Associate Counsel, for respondent
(Margaret C. Murphy, General Counsel, attorney)

Record Closed: November 18, 1999 Decided: November 18, 1999

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

This matter was transmitted to the Office of Administrative Law on December 17, 1998, for a hearing pursuant to *N.J.S.A.* 52:148-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Nov. 18, 1999
DATE

Ken R. Springer
KEN R. SPRINGER,ALJ

Receipt Acknowledged:

11/24/99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1999
DATE

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OFFICE OF ADMINISTRATIVE LAW
Nov 18 10 21 PM '99

EUGENE G. LISS
Attorney at Law
94 MAIN STREET
1st Floor
LITTLE FALLS, NEW JERSEY 07424
Attorney for Petitioner, Eugene Graham

EUGENE GRAHAM	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Dkt. No.: EDU 11652,98 Agency Ref. No.: 501, 11/98
v.	:	
STATE, OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER and RELEASE
Respondent.	:	

The State, Operated School District of the City of Newark ("Newark" or "District") and Eugene Graham ("Graham"), agree to the following terms in full resolution of this matter:

WHEREAS, Graham disputes the basis for the District's withholding of his 1998, 1999 increment; and

WHEREAS, it appears that Graham made efforts to improve his performance during the 1998, 1999 school year and he received a satisfactory annual evaluation for the 1998, 1999 school year; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. The 1998, 1999 increment withholding shall remain in effect until the end of the 1999,2000 school year, at which time Newark will review Graham's observations and evaluations. If Graham's annual summative evaluation reflects a satisfactory rating, he shall be placed back on the appropriate step, degree level, and dollar amount of the salary guide, effective September 1, 2000. The withheld monies will not be returned to Mr. Graham.

2. Graham shall, upon execution of this agreement, withdraw with prejudice, the appeal filed in relation to his 1998, 1999 increment withholding specifically OAL Docket No. EDU 11652,98.

3. Graham acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Graham, on behalf of himself, his heirs, successors and assigns, hereby full releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities c[c] whatsoever kind in character, that he has had or may now have agalnst an[y] of them, relative to the litigation herein identified.

4. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

5. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State,Operated School District of the
City of Newark

Eugene C. Graham
EUGENE GRAHAM

By: [signature]
MARION BOLDEN, Superintendent

Dated: 11-16-00

Dated: 10/29/99

[signature]
Eugene G. Liss, Esq.
Attorney for Mr. Graham

[signature]
Arsen Zariterian, Esq.
Associate Counsel
Newark Public School

OAL DKT. NO. EDU 11652-98
AGENCY DKT. No·. 501-11/98

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

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

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

IT rs so ORDERED.

COMMISSIONER OF EDUCATION

January 10, 2000
Date of Mailing, January 10, 2000

C.J. AND M.J., on behalf of minor child, C.M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents appealed Board's decision denying their request for permission for their daughter to attend Toms River High School or Brick Memorial High School instead of Lakewood High School after a fellow student allegedly assaulted her.

Upon petitioners' advice that they had'withdrawn their daughter from Lakewood High School, the ALJ dismissed the matter as moot.

The Commissioner affirmed the recommended decision of the ALJ.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING
CONTESTED CASE
OAL DKT. NO. EDU 08614-99S
AGENCY DKT. NO. 309A-10/99

C.J. AND M.J. ON BEHALF OF MINOR CHILD C.M.J.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TO\VNSHIP OF LAKE\VOOD, OCEAN COUNTY,
Respondent.

C.J. and **M.J.** on behalf of minor child **C.M.J.,** petitioners

Thomas Monahan, Esq., for respondent (Gilmore and Monahan, attorneys)

Record Closed: November 10, 1999 Decided: November 22 1999

BEFORE **JEFFS. MASIN,** ALJ:

This matter was opened to the Office of Administrative Law ("OAL") on an application for emergent relief first filed with the Commissioner of Education. C.J. and M.J., the parents of a 16-year-old female, C.M.J., requested emergency relief pem1itting their daughter to ,attend Toms River High School or Brick Memorial High School or alternatively to be continued on home instruction which she has been receiving since spring 1999.

This judge in this case issued an Interlocutory Order Denying Emergent Relief on October 20, 1999, which was affinned by the Commissioner of Education on October 29, 1999.

On November 10, 1999, the attorney for respondent informed this office that C.M.J. was withdrawn from Lakewood High School.

Therefore, having reviewed the record and for good cause shown, it is hereby **ORDERED** that this matter be **DISMISSED** as moot since C.M.J. has withdrawn from the school district.

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

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

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

!/ (er ,,v, f&f
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

\1 4)9:J
DATE

brVlr
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV ;j 0 1999
DATE

ea. a
OFFICE OF ADMIN1STRATIVE LAW

mJm

OAL DKT. NO. EDU 8614-99
AGENCY DKT. NO. 309A-10/99

C.J. AND M.J., on behalf of minor child, C.M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge. Accordingly, the Petition of Appeal is dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 18A:6-27 ***et seq.*** and ***N.J.A.C.*** 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 11, 2000
Date of Mailing, January 11, 2000

G.J.C. AND L.C., on behalf of minor child, N.C.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents appealed the Board's denial of credit for their son's senior- year, first-period Physics course due to excessive absenteeism, which barred him from graduation with his class on June 25, 1999 and prevented his graduation until he passed a five-credit course of his choosing, bringing the number of prerequisite credits to the total required.

The ALJ ordered that N.C. be credited with the A- grade earned and with the credits accumulated for successful completion of his Physics course, that N.C.'s cumulative grade point average be recalculated to reflect the actual grade earned and that N.C. be awarded his high school diploma.

The Commissioner concurred with the Al.J's finding of infirmity in the Board's appeal process for failure to provide petitioners with a clear listing of the absences underlying the decision to alter N.C.'s scholastic record, noting, however, that petitioners were warned about N.C.'s swiftly accumulating absences and reminded of the Board's policy of excessive absenteeism resulting in no course credit. Nonetheless, the Commissioner, like the AU, found that the Board's decision to compel N.C. to take a summer course after he had successfully completed his Physics course was unreasonable. The Commissioner affirmed the AlJ's recommended order of relief.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4627-99

AGENCY DKT. NO. 164-6/99

G.J.C. AND L.C. ON BEHALF OF MINOR CHILD, N.C.,

Petitioners,

v.

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

Respondent.

G.J.C. and L.C., petitioners, *prose*

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

Record Closed: August 30, 1999 Decided: October 13, 1999

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioners, G.J.C., the father. and L.C. the mother, on **behalf** of **their son, N.C.,** appeal from denial of credit for his senior-year first-period course in Physics, which, as a consequence, (a) barred him from graduation with his class on June 25, 1999, and (b) prevented graduation until

N.C. passed a five-credit course of his choosing, bringing the number of prerequisite credits to the total required.

The **Somerville Board of Education, respondent,** contests the appeal, defending its actions and policy as reasonable and lawful.

Today's Initial Decision (a) awards full credit for the course in Physics, (b) directs that the cumulative point grade average reflect the actual grade earned, and (c) directs the award of a diploma.

PROCEDURAL HISTORY

This case was initiated by an appeal for emergent relief, dated June 21, 1999. The matter was filed in the Office of Administrative Law on June 22, 1999, and oral argument on the motion convened on Friday, June 25, 1999. On the same date, the administrative law judge issued an order granting the motion, which also of even date was reversed by an Assistant Commissioner of Education.

Thereafter, plenary hearing went forward on July 12, 1999. At hearing, the material facts were stipulated, and a motion for summary decision was brought by the Board. Briefs followed, the last of which was filed in the OAL on August 30, 1999. On that date the record closed.

ANALYSIS OF THE RECORD

Background:

The concise history of this matter was set forth in the June 25, 1999, order of the AU granting the motion for emergent relief:

> But for the present dispute, N.C., a senior at Somerville High School, would graduate in the ceremony this evening with his class. The Board has

decided to bar N.C. from graduation because he was absent for sixteen days during his first period class. The limit for absences is 15 days. In disposing of the school-level appeal to the Board Attendance Committee by **N.C.** through his father, G.J.C., the Board maintained that there were no "extenuating circumstances or hardships" which would impel it to decide in his favor, and according to policy, credit for the course therefore will not be granted. The attendant consequences noted above followed, and petitioners brought the instant appeal.

The order of an Assistant Commissioner of Education, issued on even date, reversed the ALJ's grant of relief.

Against this background the parties agreed at plenary hearing of July 12, 1999, that the material facts were not in dispute. They determined to submit on stipulated facts, and that stipulation is incorporated verbatim as follows:

Absences

October 2, 1998	Absent all day for driving test
October 16, 1998	Absent all day for driving re-test
December 23, 1998	Absent for head injury obtained in Tae Kwon Do training, requiring physician treatment and CAT scan. The Board of Education has no "pink slip" of record.
January 7 and 8, 1999	Absent in California for national Tae Kwon Do championship ***(See,*** Exhs. R-5, P-31, P-32)
January 11, 1999	Absent because of return home from California championship at 2:30 a.m. ***(See,*** Exhs. R-5, P-31, P-32)
January 19	Major dental surgery, removal of four molars and treated by dentist, with confirming medical note. The Board of Education has no "pink slip" of record. Nevertheless, the school did note on record that an explanatory call from N.C.'s mother, L.C., was received on this date.(See. Exhs. P-8, P-9).

January 20	The parents assert that N.C. was recovering from the above dental surgery. The Board of Education has no "pink slip" of record.
February 11, March 3, April 19, 26	Mononucleosis, treated by physician, with confirming medical note. The Board of Education has no "pink slip" of record.

Late Arrivals

November 9	nineteen minutes late - slept in ***(See,*** Exh. **P-2)**
December 17	two hours, five minutes late - slept in ***(See,*** Exh. P-3)
February 9	thirty minutes late - pulled over by police ***(See,*** Exh. P-4)
February 10	fifteen minutes late ***(See,*** Exh. P-5)

Hearing

In response to petitioner's appeal, the School District did convene an Attendance Committee hearing, according to established procedures. The District did not beforehand provide the attendance records sought by G.N.C. Afterward, the District did not provide to G.N.C. the notes of each Committee member who decided, because they were shredded in the normal course, a practice designed to protect student privacy.
[Joint Stipulation of Facts, July 12, 1999]

On the foregoing stipulations, the parties bring the following arguments:

Parent's contention

The petitioners ask that (a) several specific absences of their son be excused (b) that **N.C.**'s grades, both during the year and from summer school, be accepted, and (c) that **N.C.**'s grade-point average reflect these grades.

In addition, the parents move in their letter brief of August 16, 1999 for various reimbursements and exonerating letters, as well as for modification of the school handbook

and Board policy. Finally, they request the filing of the high school diploma awarded to their son.

The parents base their position on the following arguments:

First, petitioners believe that the rule book of the high school is unreasonable, and inconsistent with policies of the board itself. The board had publicly declared that arrival within the first 20 minutes was a one-half absence. If the student handbook is in conflict with that promulgated Board policy, it is the policy which must prevail. Petitioners contend that, although the State relied on a later policy promulgation, that policy was not found on any website as the Board maintained, and after review of the Board's hearing minutes, it was found not to be recorded there, either. Only an approval on second reading was noted. Petitioners insist that adherence to the Board's earlier published policy would reduce N.C.'s unexcused absences by at least one, bringing him within the allowable absence quota.

Second, petitioners offer other reasons to obviate some of the disputed absences:

They insist that it is unreasonable to accept without charge those latenesses for students from Branchburg who are transported by bus, and yet to charge students from the same location (including their son) who are transported by the parent. Additionally, petitioners' son, N.C., was absent on some days for an unavoidable medical or dental appointment, as board regulations permit. A penalty for failing to submit an excuse within 72 hours, as has been imposed here, is not reflected in board regulations and is unreasonable.

In fact, petitioners point out, medical excuses ***were*** provided at a later date by the attending doctors for the absence following his oral surgery, because N.C.'s physical condition was such that he could not attend class. In addition, N.C.'s absences on February 11, March 3, April 19 and 26, were confirmed as required because of the effects of lingering mononucleosis, and appellant was absent on December 23, 1998, because of a severe head injury requiring a cat scan on December 26. All were reasonable causes for absence.

Further, the Board's own regulations provide for absence to take a driver license examination. N.C. took that examination twice, on October 2 and October 16. Modification of the published Board policy by unpublished requirements is unreasonable, and N.C. should be credited for those days.

Petitioners argue as well that the Attendance Appeals Committee, the first level of review in this dispute, was unreasonable when it failed to provide, as requested, an accurate list of those dates of absence which the school felt did not fall within the acceptable range of absences. Further, the committee was unreceptive to any arguments, and immediately destroyed all evidence of its review, an act which denied both the petitioners and the Commissioner of any basis on which to determine whether the committee acted unreasonably.

The parents point out other perceived shortcomings: Although their son signed for a student handbook, none was provided to his parents, leaving them unaware of their collective obligations; the lack of verification slips was not made known to them, the parents, when N.C. was absent, even though these slips were critical to their son's graduation; and finally, it was unreasonable on its face to specify a minimum of 10 days absence to qualify as an instance of serious illness.

Responding to the Board's reply brief, petitioners argue that they have never accepted the facial reasonableness of the Board's policies or procedures, as the Board erroneously suggests. Moreover, introduction of evidence not stipulated, ***i.e.,*** N.C.'s past record, is cause for dismissal of the Board's position, which is supported only by a case decision not analogous to the present circumstances.

Petitioner concludes that, for all these reasons, the board and the high school were arbitrary, capricious and unreasonable in depriving their son of course credit, and of graduation with his class.

The Board's awment;

The Board maintains in its motion for summary decision that its attendance policy was reasonable, and properly enforced. Consequently, the presumption of its validity has not been overcome by petitioners, who have failed to carry their burden of proof. More to the point, neither the AU nor the Commissioner of Education can substitute their individual judgment for that of the board.

Relying on the jointly stipulated facts, the Board argues that the dispute is ripe for summary decision under existing case law, for the following reasons:

The petitioning student, N.C., received a copy of the 1998-99 Somerville Student Handbook (Exhibit R-1) which requires parental notes for absences. Moreover, petitioner's son failed to complete a "pink slip" explaining his absence, on seven of twelve occasions. His excuses were also unacceptable, the Board observed. Drivers examinations warrant only early dismissal, and must be verified. Medical notes are required to be submitted within 72 hours of medical treatment. Petitioner N.C. did not comply with any of these requirements.

In the Board's view, appellant's excuses are neither extraordinary nor unusual, yet, in reaching its decision, the attendance committee of the high school took them into account. It found that neither the tardies nor N.C.'s unexcused absences were for reasons acceptable under Board policy. Sixteen absences exceeds the number permitted. The Board highlights petitioners' compilation and submission of excuses as having occurred only after a warning of May 14, 1999. Petitioner's submissions were well beyond the time for compliance.

The Board emphasizes that the standard employed by the Attendance Appeal Committee of the high school was: "situations where unforeseen factors have created hardships" (Exhibit R-1, p. 3). This had not been satisfied in the committee's view. Neither oral surgery nor athletic competitions, nor four separate days of fatigue, or an entire day for each absence to take a driver's tests, or an alleged headache, would be sufficient excuses to

justify absence. Neither do N.C.'s excuses of sleeping late, or being pulled over, or "abducted" justify tardiness, the board argues.

The Board maintains that petitioner was provided due process throughout. The parents were permitted to plead their case before the Attendance Appeals Committee, without limitation, and nothing of record demonstrates that the published Board policy on attendance, as modified in 1997, differs from the guiding rules in the student handbook. Petitioners have not proven detriment from reliance on unamended Board policy, rather than the available rule book. The lack of "discovery" before an attendance appeal is heard by the Attendance Appeal Committee is not a fatal legal defect. Parents coming before the Committee are not provided the dates of the challenged absences for a reason: the school seeks to prevent recalcitrant students from obtaining physician's notes months after the fact, when pink absence slips had not been completed at the appointed. times. Neither does the committee have to keep records of its proceedings, the Board argues.

The Board's reply to appellant's brief contends that petitioners improperly broaden d the scope of relief sought, and none of it is either within the jurisdiction of this tribunal or authorized by law. Additionally, despite petitioners' complaint of an erroneous copy of previously existing Board policy, the student handbook reflects the amended policy legally in effect. The handbook fully informs petitioners and their son of his school obligations.

Finally, the Board contends, the reasonableness of an attendance policy not of record is not within the purview of the relief sought or of the stipulations given. Neither may petitioners' brief's unsupported adversion to private conversations between client and attorney be considered by the AU, who had denied admission of that information at hearing.

CONCLUSIONS OF LAW

Ripeness for summary decision:

This dispute is ripe for summary decision pursuant to *N.J.A.C.* 1:1-12.5(b). That rule states:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> *[N.J.A.C.* 1:1-12.5; *See also, Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 73-75 (1954)]

Additionally, the facts must be considered in the light most favorable to the opposing party, *Boyer v. Anchor Disposal,* 135 *N.J.* 86 (1994).

Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 541 (1995). The court there elaborated on its intent:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth

> of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra,* 477 *U.S.* at 249, 106 *S. Ct.* at 2511, 91 *L.Ed.2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra,* 477 *U.S.* at 250, 106 *S. Ct.* at 2511, 91 *L.Ed.2d* at 213. The import of our holding is that when the evidence " is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S. Ct.* at 2512, 91 *L1Ed. 2d* at 214, the trial court should not hesitate to grant summary judgment.
> *[Id.* at 540]

There are no disputes over material facts in this matter.

The applicable law:

The Board's action is presumed lawful. Neither the judgment of the ALJ nor the Commissioner of Education may be substituted for that of the Board. Nevertheless, the Board's decision must survive application of the legal standard that it be reasonable, and not arbitrary. *Kopera V. Bd of Educ., Tp.* of W. *Orange,* 60 *N.J. Super.* 288 (App. Div. 1960).

This is the law which must be applied in the present circumstances.

Applying the Law to the Facts:

<u>The ALJ's emergent relief order of June 25, 1998:</u>

The material facts proposed during the oral argument on the motion for emergent relief are not different from those stipulated at plenary hearing. The rationale of the administrative law judge (ALJ) recommending the relief is therefore again appropriately offered to the Commissioner of Education for consideration: [1]

[1] However, it is stressed here that the Commissioner must consider as w ll the Assistant Commissioner's order of even date, rejecting this rationale, and reversing the AI.J's ruling.

There is no question that policy determinations by the Board may not be overturned unless that policy is arbitrary and unreasonable, ***Kopera, supra.*** Neither this tribunal nor the Commissioner may substitute his judgment for the Board in instances when the policy or its application is reasonable.

In this particular instance it is not unreasonable for the Board to expect petitioners' compliance with the policy of requiring timely notice to the school of the reasons for absence. Here, no notices were given as to absences. and only three explanatory "pink slips" were provided in school by N.C. on his r-eturn.

Nevertheless, the impact of denying N.C. course credit for a Physics course indisputably passed, denying graduation after four years with his class, and jeopardizing college entrance as well as grade point average is out of proportion to the offense. Mr. Roesch testified that the Board agreed that N.C. has satisfied the science requirements for high school graduation. Additionally, the Board did not dispute that N.C. had academically passed the course with an A- in the final exam. Nonetheless, he added that the incomplete would be treated as a Ograde and be factored into his grade point average. This does not reflect reality. N.C. passed the course and should not now suffer academically for that reason, or be required to re-take a course in which he has demonstrated proficiency. Interpreting Board policy to ·reasonably evaluate individual circumstances would be itself unreasonable and arbitrary.

Moreover, the credible testimony from L.C., supports the proposition that L.C. did notify the school by phone to report N.C.'s absence because of oral surgery, which would have put the school on notice of two days of absence. There is no evidence to contest the believable position of the petitioners that N.C. was absent for legitimate medical reasons on December 23 for a head injury, which was supported by the notice of a later CAT scan in the emergency room on December 26. Nor is there evidence to contest the mononucleosis absence also supported by medical certification, on February 11, March 3, April 19 and April 26. This would account for five more days of the sixteen absences listed.

While the late arrivals or absences for the driving test on October 10 and October 16 for full day are hardly defensible, the absences for Tae Kwon Do championship in California as well as the absence on return at 2:30 a.m. on January 11 are believable and at least entitled to some weight.

In any event, although there has not been compliance with the strict letter of the Board's rules, it is sufficient that petitioners have provided credible evidence of medical absence of (1) day for a head injury, (2} days for oral surgery, and (4) days for mononucleosis. It is believable also that

> there were at least (2) days absence for a national athletic championship. These cumulative absences cannot reasonably be thought to justify the current result: a bar from graduation, loss of academic credit for a course passed, skewing of a grade point average, and placement in college rendered at risk.
>
> In sum, there would be a likelihood of success for petitioners at plenary hearing, petitioners would be irreparably harmed if not granted emergent relief. and, while the Board regulations are not unreasonable, their construction by the Board in the exercise of its discretion *on these peculiar facts* has been arbitrary and unreasonable, within the definition advanced by ***Kopera, supra.*** Consequently, it should be overturned.

The stipulated facts:

In addition to the above rationale, and holding to the stipulated facts as well as the record to date, the preeminent remaining issue warrants the same legal conclusion as reached in the AI.J's emergent order: Despite his absences, appellant successfully completed the Physics course during the period in contention. He received an A-minus. He was credited by the district with completing all science courses necessary to graduate. Yet, the Board has compelled N.C. to take an additional course, whether or not Physics. This is on its face arbitrary and unreasonable, within the meaning of *Kopera, supra.*

School officials could well have penalized N.C. for his absences, within the wide discretion inherent in their powers to discipline for non-compliance with rules. Any reasonable penalty, selected from among a universe of disciplinary actions, would have been within the justifiable responses by the district. It is plain that N.C. does not emerge in the record of the period in issue as having been a model of good deportment, a fact which he and his parents concede.

The school's judgment also could have extended to preventing N.C.'s further attendance in the course. Once N.C. passed beyond the boundary of acceptable absences, the school officials, in the application of their expertise, could have understandably concluded that comprehension of the material could not be expected within the course time remaining. A designation of "incomplete" would have been reasonable. This did not occur. Thereafter, N.C. was permitted to continue the study of Physics, and to demonstrate his competence in the subject matter, by achieving a grade of A-minus.

While discipline is always an option for school officials, a custom of discrediting undisputed, recorded academic achievement should not be employed as a method of discipline, since, in its untruth, it is arbitrary and unreasonable.

The Board's approach to N.C.'s attendance violations is also rendered colorably unreasonable by virtue of the practice of its Attendance Appeals Committee. Before appearing before the committee, petitioners were denied a clear listing of those absences which underlay the school's decision to alter their son's scholastic record, and to deny him the rite and record of graduation. In short, the school asked petitioners to defend against charges which could, and did, result in a penalty, while withholding the specifics of those charges. This was a denial of minimal due process. *Goldberg v. Kelly,* 391 U.S: 254 (1970). Opportunity for unlimited discussion, as the Board maintains was available before the committee, is not enough. Such opportunity does not cure the fundamental shortcoming presented by the parents' lack of information on the specific absences. That knowledge was basic to fair dealing.

It must be added that this flaw is cured by a *de novo* recommendatory proceeding before this tribunal, and by access to a final administrative decision by the Commissioner of Education. Nonetheless, taken together with the Board's determination (a) to punish by obviating acknowledged scholastic achievement, and (b) to discredit the parents' proofs of illness which would have justified at least one critical day of absence, this same flaw discloses that a basic unfairness suffuses the school's absence policy with an unreasonableness prohibited by the court in *Kopera, supra.*

Petitioners' entreaty for reimbursements. apology. and changes in board policy:

Petitioners' avowed entitlement to reimbursement of expenses incurred during this litigation to apologies from school officials, and to compelled alteration of Board policy, are all outside the scope of review or award by the ALJ. They also are unsupported by petitioners' reference to legal authority otherwise.

Briefed arguments by both parties that ignore rulings of the ALJ which were not :ippealed:

Both parties have argued past earlier ALJ rulings rejecting the arguments• premises, and excluding them from the record. Petitioners have referred in their brief to ostensibly overheard conversations. The proferred content of these conversations was held by the ALJ to have been protected by attorney-client privilege. In like fashion, the Board, through disingenuous insertion of a footnote, has mentioned N.C.'s past record. which the ALJ had ruled was barred for being irrelevant and prejudicial.[2].

2

Since the ALJ's rulings were left undisturbed by interlocutory appeal, they may not be considered, and the two foregoing arguments of the parties are specifically identified here as being outside the record of evidence before this tribunal, and before the Commissioner of Education.

ORDER

I **ORDER** therefore, after a review of the entire record, and after consideration of all arguments advanced by the parties, that:

(1) N.C. be credited with the grade earned, and with the credits accumulated for successful completion of the Physics course taken during the regular school year, and that

(2) N.C.'s cumulative average be re-calculated to reflect the actual grade earned, and that

(3) N.C. be awarded his high school graduation diploma.

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

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

[2] Respondent's brief of August 10, 1999, at p.3.

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

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

October 13, 1999

DATE

ALJ

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

10-14-99

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 1999

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Letter dated June 17, 1999: William M. Roesch to Mr. & Mrs. Greg Carr

P-2 Tardy Report Pass, dated 11-9

P-3 Tardy Report Pass, dated 12/17/98

P-4 Tardy Report Pass, dated 2/9/99

P-5 Tardy Report Pass, dated 2/10/99

P-6 Letter Nassim Carr to Sommerville BOE, dated June 20, 1999

P-7 Letter dated June 21, 1999 from Francisco Labbaddio, M.D.

P-8 Medical Note Dr. Robert Aldin, dated May 24, 1998

P-9 Medical Note Dr. Aldin, DDS

P-10 Emergency Department Record, dated December 26, 1998

P-11 Faxed Passenger Itinerary and Receipt, issued December 28, 1998

P-12 Individual Student Report

P-13 Iowa Test of Educational Development

P-14 Assistant Commissioner of Education decision on motion, dated June 25, 1999

P-15 Exceptions Michael J. Rogers, Esquire

P-16 Calendar

P-17 Excerpt from handbook

P-18 Letter: William M. Roesch to Mr. & Mrs. Greg Carr, dated May 14, 1999

P-19 Petition for appeal

P-20 Excerpt from handbook

P-21 Excerpt from handbook

P-22 Excerpt from handbook

P-23 Absence report

P-24 Attendance officer's report

P-25 Excerpt from Attendance Policy R. 5 200.24

P-26 Tardy Report Pass dated 11-9

P-27 Excerpt from regulations, Somerville School District

P-28 Tardy Report Pass, dated 12/17/98

P-29 Emergency Department record

P-30 Excerpt from Board policy

P-31 Faxed passenger itinerary and receipt, dated December 28, 1998

P-32 Calendar of events U.S. Tae Kwon Do

P-33 Medical Note Dr. Robert Albin

P-34 Medical Note Dr. Robert Albin

P-35 Excerpt from Board policy

P-36 Excerpt from Somerville School District Regulation

P-37 Medical note Francisco Labaddio, M.D., dated June 21, 1999

P-38 Medical article

P-39 Excerpt from Board policy on attendance

P-40 Letter: Nassim Carr to Sommerville BOE, dated June 20, 1999

P-41 Regulation: Somerville School District

P-42 Letter and Order from AU, dated June 25, 1999

P-43 Map

P-44 Attendance officer's report

For respondent:

R-1 Reciept of student handbook: Nassim Carr, dated September 9, 1998

R-2 Class attendance warning, January 18, 1999

R-3 Class attendance warning, April 28, 1999

R-4 Class attendance warning, Mayl4, 1999

R-5 Report of Student bsence.

R-6 Report of Student absence, 10-19-98

R-7 Report of Student Absence 10-2-98

R-8 Period attendance: Nassim G. Carr

R-9 Memo from William M. Roesch to teachers of Nassim Carr: June 15, 1999

R-10 Excerpt from SBOE Policy E-Manual

OAL DKT. NO. EDU 4627-99
AGENCY DKT. NO. 164-6/99

G.J.C. AND L.C., on behalf of minor child, N.C.,	:	
PETITIONERS,	:	
V.	:	**COMMISSIONER OF EDUCATION**
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	**DECISION**
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on October 15, 1999 and the exceptions were filed on November 1, 1999. Accordingly, the exceptions are not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's finding of infirmity in the Board's appeal process, in that the Board failed to provide petitioners with "a clear listing of those absences which underlay the school's decision to alter their son's scholastic record***." (Initial Decision at p. 13) Nonetheless, the Commissioner is compelled to observe that petitioners *were notified* by letters dated January 18, 1999 and April 28, 1999 that N.C.'s absences were swiftly accumulating, and were therein reminded of the Board's rule regarding 15 absences for full year courses and eight absences per semester course, as well as the Board's rule regarding tardiness after the first ten

minutes of class being recorded as a full absence. The letters further instructed petitioners that absences which exceed these amounts *"will result* in no credit being granted for the particular course" (Exhibits R-2 and R-3) (emphasis added) and referred petitioners to the handbook for further explanation. Thus, petitioners were duly informed that, as of December 23, 1998,[1] N.C. had five absences in his first period class and that, as of April 1, 1999,[2] N.C. had 14 absences in his first period class.

Thereafter, in his letter of May 14, 1999, petitioners were informed by Mr. Roesch that N.C. had been absent more than 15 times from his first period Physics course and would, therefore, receive an "Incomplete" at the end of the year. That correspondence provided petitioners with the process for appeal, noting that the appeal, as per the handbook, was "limited to situations where unforeseen factors have created hardships." (Exhibit R-1a at p. 3) Therefore, while the Commissioner concurs with the AU that the Board should have provided petitioners with the information that formed the basis of its decision, *i.e.,* the specific dates on which absences were problematic, his finding does not in any way presume that petitioners were without knowledge of N.C.'s precarious position *for months before their appeal was initiated,* and also does not negate petitioners' duty to know the Board's rules regarding absenteeism and tardiness, to know exactly when their son was absent from school and the reasons therefor, and to monitor for themselves their son's absences in relation to the Board's rules.

Notwithstanding that petitioners cannot be held blameless in the events underlying the within dispute, like the AU, the Commissioner finds that the Board's decision to compel N.C. to take a summer course, after he had successfully completed his Physics course, and received a grade of A-, was unreasonable. (Initial Decision at p. 12) *See also V.J.H. v.*

[1] As noted in the January 18, 1999 correspondens:e.
[2] As noted in the April 28, 1999 correspondence.

Board of Education of the City of Orange Township and Woodrow 'Zaros, 1987 *S.L.D.* 1669 at 1678, 1679 (wherein the Commissioner affirmed that although excessive absences and truancy from class may justifiably lead to the withholding of credit and denial of graduation, policies which call for an automatic imposition of a grade penalty for unexcused absence or absences resulting from suspensions will not be upheld); *J.B., on behalf of W.B. v. Board of Education of the Township of Pequannock, Passaic County,* 93 *N.J.A.R.* 2d (EDU) 664 (where the Commissioner held that a grading policy which automatically reduced a high school senior's grade to failing for cutting physical education class on the last day of school was arbitrary.)

Accordingly, the Initial Dedsion of the A U is affirmed, as amplified herein.[3]

IT I'S **SO** ORDERED.

COMMISSIONER OF EDUCATION

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to ***N.J.S.A.*** 1SA:6-27 ***et seq.*** and ***N.J.A.*** *C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
January 12, 2000
fute of Mailing, January 12, 2000

(613), 7-t:Po

SB #17-00

IN THE MATTER OF THE DENIAL : STATE BOARD OF EDUCATION

OF A CHARTER SCHOOL APPLICATION. : DECISION

For the Petitioner-Appellant, Cheryl Dowdell, prose

For the Participant, John Worthington, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On February 5, 2000, Cheryl Dowdell (hereinafter "Dowdell"), who identified herself only as a "Newark Public Schools Educator," filed a notice of appeal to the State Board of Education from a determination of the Commissioner of Education rejecting an application for a charter school. Dowdell did not identify the proposed charter school. Nor did she include a copy of the Commissioner's rejection letter with her notice.

By letter dated February 9, 2000, the Director of the State Board Appeals Office acknowledged receipt of the notice of appeal and advised Dowdell that her notice was deficient in that she had not specified the proposed charter school whose rejection she was appealing. She was given until February 22 to cure this deficiency by filing a corrected notice of appeal. She was also informed that the briefing schedule was being placed into abeyance pending correction of this defect.

Dowdell did not submit a corrected notice of appeal. Nor did she respond to the February 9 letter or otherwise identify the proposed charter school which was the subject of her appeal. By letter dated February 24, Dowdell was advised that, as a

Apr. 5, 2000

result of such failure, this matter was being referred to the Legal Committee of the State Board for consideration of her failure to designate the decision being appealed from.

N.J.A.C. 6:2-1.7 requires a notice of appeal to "specifically designate the decision appealed from." Despite being provided with notice of this deficiency, Dowdell has still failed to identify the proposed charter school which is the subject of her appeal. Nor has she responded in any way to the February 9 or February 24 letters from the Director of the State Board Appeals Office. Under these circumstances, we dismiss the appeal in this matter with prejudice for failure to perfect.

April 5, 2000

Date of mailing __ /;_P_R_ _'J_2_D_,1J_O_ _

18-00

IN THE MATIER OF THE TENURE :

HEARING OF DONALD PANTALONE, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE SOMERSET : DECISION ON REMAND

COUNTY VOCATIONAL SCHOOL, :

SOMERSET COUNTY. :

_____:

SYNOPSIS

Board certified tenure charges of inefficiency and other just cause against respondent teacher. The Commissioner rejected a previously proposed settlement for failure to comply with the *Cardonick* standards for review of settlements in tenure matters and remanded the matter to the OAL.

On remand the parties drafted an amended settlement agreement which respondent refusel to sign because it contained the disputed charges against him which he felt placed an aura of inappropriate guilt upon him, notwithstanding that the charges were unproven and the settlement expressly stated he disputed the charges. Finding that respondent disputed the format, but not the substance, of the settlement agreement, the ALJ deemed that respondent signed the agreement and ordered the matter settled.

The Commissioner did not accept the ALJ's resolution to respondent's failure to sign the amended settlement agreement. Upon review of the record, it was determined that, notwithstanding that the Commissioner had rejected the prior settlement and remanded 'the matter to the OAL, the parties had impermissibly executed the terms of the rejected settlement, which resulted in respondent's resignation effective June 30, 1998 and the Board's payment of salary and benefits. It was also determined that the modified settlement agreement still did not document that respondent was advised that the matter would be transmitted to the State Board of Examiners; thus, the matter remains subject to remand to the OAL on this point. However, in light of respondent's resignation from the district in 1998 and his refusal to sign the modified settlement agreement, the Commissioner determined that remanding the matter again to OAL would not, at this juncture, be in the public interest. The Commissioner, therefore, determined that the matter would be deemed withdrawn and no longer in controversy before him. A copy of the decision shall be transmitted to the State Board of Examiners.

Januar;yl3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OALDKT. NO. EDU 04177-98S
(EDU 04141-97S Remanded)
AGENCY DKT. NO. 135-4/98

BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL SCHOOL, SOMERSET COUNTY,
Petitioner,
v.
DONALD PANTALONE,
Respondent.

Judith A. Babinski, Esq., for petitioner (Bivona, Cohen, Kunzman, Coley, Yo&pin, Bernstein & Difrancesco, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: October 29, 1999 Decided: November 23, 1999

BEFORE **JEFFS. MASIN,** ALJ:

This matter was previously before the Office of Administrative Law and the parties agreed upon a settlement of the tenure dispute. However, the Commissioner of Education remanded the matter in a decision dated April *2S,* 1998, because the Commissioner was not satisfied that the reasons for the settlement had been appropriately spread on the record. The parties thereafter drafted an amended settlement agreement which set forth reasons for the

settlement including the fact that Mr. Pantalone had resigned from his position and that the Board would realize substantial economic savings in not having to proceed with the case which it anticipated would be very lengthy and which Mr. Pantalone would have disputed with regard to many if not most of the allegations. In addition, the Board believed that evidence would have established that Mr. Pantalone had not previously been involved in any matters resulting in charges and that evidence that would have been produced would have suggested that his conduct in the matter was aberrational. The Board believes, and this administrative law judge agrees, that the resolution agreed upon between the Board and counsel for Mr. Pantalone which involves him being deemed to have submitted his in-evocable resignation with the Board on June 30, 1998, having waived all rights to his tenured position, and having been paid his salary from September 1, 1997 to June 30, 1998, less all sums already paid to him by the Board for that salary period in addition to the provision of health benefits to him until June 30, 1998, and the exchange of mutual releases constitutes a reasonable resolution of the charges. A settlement agreement (attached hereto) incorporating these terms, spelling out the obligation of the Commissioner under *Cardouick v. Brooklawn Board of Education,* OAL DKT. NO. EDU 7093-81 (February 17, 1982); Commissioner of Education (April 7, 1982); State Board (April 6, 1983) is set forth in the agreement.

Subsequent to the drafting of the agreement, it was forwarded to Mr. Pantalone for his signature. Mr. Pantalone refused to sign the document and the Board, arguing that a binding settlement agreement had been entered into, filed a motion with this judge seeking to enforce the settlement and compel Mr. Pantalone to sign the agreement. In opposition thereto, Mr. Pantal,one filed an affidavit, which is attached hereto and made a part hereof, in which he indicated that he had signed the original settlement agreement which was approved by this judge on March 19, 1998, and that he had subsequently received the modified settlement agreement sent to him by his counsel which had been executed by the president and secretary of the Board of Education. Mr. Pantalone indicates in the affidavit that he chose not to sign the modified agreement because he felt that the document was "incriminating by making the suggestion that I exhibited inappropriate conduct. While I realize that the document also stated that I disputed the charges against me, I felt that the listing of the charges themselves, although unproven, would place an aura of inappropriate guilt on me." Mr. Pantalone goes on to note that he acknowledges that the Board

> lived up to the tenns of the first settlement agreement and I feel that I, likewise, lived up to the tenns of the first settlement, by signing it and effectively resigning my position. It is only with the second settlement agreement and the inappropriate aura of guilt that I felt it suggested that caused me to refrain from signing it. I calmot in good faith, accordingly, dispute that we did resolve this matter short of litigation. I can only state that to my understanding, and despite the language in the second settlement which acknowledges that I dispute the charges, the settlement should not include a public listing of the charges against me.
>
> 9. Quite simply I would be prepare to voluntarily sign a settlement if there was no public listing of the unproven charges against me and no accompanying aura of guilt.
> [6/22/99 Affidavit of Donald Pantalone]

Having considered Mr. Pantalone's expressed reasons for refusing to sign the settlement agreement, I concluded that indeed the parties had resolved the matter and that the only reason that Mr. Pantalone was refusing to sign the agreement was not because he disputed his interest in resolving the matter, nor that he insisted upon his right to dispute the charges at a hearing and prove his lack of any violation of standards, but that while the agreement openly acknowled ed his dispute of the charges he was concerned about the "public listing" of the charges. It is not uncommon, in fact in light of the *Cardonick* standards it is probably highly appropriate, that the nature of the charges against an individual facing tenure charges be set forth in the settlement agreement. However, the mere fact that charges are listed does not in any way suggest that the respondent is guilty of the charges set forth and in this very agreement Mr. Pantalone's dispute with many if not most of the allegations is stated. Therefore, while Mr. Pantalone's concern l;lay be somewhat understandable, the agreement acknowledges openly his lack of agreement with the underlying charges and his dispute with them. Under these circumstances there appears to be no basis for concluding that Mr. Pantalone did not knowingly and with appropriate counsel agree to the tenns and conditions of the settlement. His dispute with the format of the settlement is not with the substance, not with the tenns of the agreement, not with the underlying reasons for resolving the matter, but simply with a document that says more than he would like about why this case was before the Commissioner.

Based upon the above, I entered an Interlocutory Order on July 27, 1999, (attached hereto) ordering that the matter be presented to Mr. Pantalone for execution and that he do so within ten days of the date of the order and that if he failed to do so within the timefrarne

indicated, he would be deemed to have signed the revised settlement agreement which would then be submitted to the Commissioner for approval. Based upon a letter received from counsel to Mr. Pantalone on October 29, 1999, (attached hereto) in response to my request for information, it appears that although the settlement agreement was forwarded to Mr. Pantalone on August 20, 1999, (cover letter attached hereto) with a letter from counsel advising as to his need to sign the document or in the absence thereof that he would be deemed to have signed the same, Mr. Oxfeld indicates he has received no response from Mr. Pantalone. Based upon Mr. Oxfeld's representation in his October 29, 1999, letter and the terms of the interlocutory order issued on July 27, 1999, it is **HEREBY DEEMED** that Mr. Pantalone has signed the settlement agreement and based upon the previous discussion concerning the nature of the settlement, it is **HEREBY ORDERED** that the matter is settled, subject to review of this modified settlement agreement by the Commissioner pursuant to the *Cardonick* standards.

I hereby **FILE** my initial decision with the **COMMSSIONER OF THE BOARD OF EDUCATION** for consideration.

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

November 23, 1999
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

11/29/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 30 1999
DATE

Barbara A --
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachments

SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into on March 2nd, 1998, by and between the SOMERSET COUNTY VOCATIONAL AND TECHNICAL SCHOOLS BOARD OF EDUCATION hereinafter "Board" having a mailing address of North Bridge Street and Vogt Drive/ P.O. Box 6350, Bridgewater, New Jersey and **DONALD PANTALONE,** hereinafter Pantalone" having a mailing address of 38 Round Top Road, Warren, New Jersey;

WHEREAS, Pantalone is a tenured teacher who has been employed by the Board since September 1, 1976; and

WHEREAS, the Board, by its resolution adopted on April 15, 1997 found probable cause *to* certify sworn tenure charges of unbecoming conduct, pursuant to N.J.S.A., 1BA:6-11, and other just cause which, if true, ware sufficient to warrant , Pantalone's dismissal or reduction in salary; and

WHEREAS, the Charges allege inter a!ia the following:

1. Improper supervision of students in his charge;
2. He left his classroom unattended at certain times;
3. Students were injured while in his charge;
4. Use of inappropriate language with students;
5. Students were observed sleeping in his class, and

WHEREAS, the Board contends that Pantalone's conduct and behavior evidenced a complete and total disregard for applicable law and Board procedure, which constitutes conduct unbecoming a teacher, and

WHEREAS, on April 16, 1997, the Board filed its written tenure charges with the Commissioner of Education, to which Pantalone filed an Answer on April 30, 1997. The Commissioner transmitted the matter to the Office of Administrative Law on May 8, 1997, for a determination as a contested case pursuant to N.J.S.A. 52:14(b)-1 to 15 and N.J.S.A. 52:14(f)-1 to 13; and

WHEREAS, the parties have agreed to a proposed settlement, which is subject to approval by the Commissioner of Education, the terms of which provide as follo s:

A. Pantalone will be deemed to have submitted his irrevocable resignation with the Board on June 30, 1998 and will have waived all rights to a tenured position.

8. Pantalone shall receive his salary from September 1, 1991.to June 30, 11398, less all sums already paid to him by the Board for said 1997-98 salary.

C. The Board shall provide health benefits to Pantalone until June 30, 1998_.

D. Each party releases the other from any and all claims; and

WHEREAS, the parties acknowledge that this proposed Settlement Agreement is conditioned upon the approval of the Commissioner of Education pursuant to the standards set forth on Cardonick v. Brooklawn Bd. of Ed., OAL 0kt. No. EDU 7093081 (February 17, 1982); Commissioner of Education (April 7, 1982); State Board (April 6, 19 3); and

WHEREAS, there has been pretrial discovery conducted by both parties and the parties now contend that the circumstances justify a settlement as follows:

A. Pantalone, having resigned his position effective June 30, 1998, will result in substantial economic savings to the Board which will not have to proceed with its case which is anticipated will take an additional nine months to two-years to bring to a

conclusion, in,Fluding all necessary and applicable periods of time for appeal, during which time the -Soard would have been responsible to continue payment of Pantalone's salary and benefits and that the Board will not be required to expand additional public funds *for* attorneys fees; and

B. Pantalone has not prior instances of charges being brought against him; and

C. Pantalone at trial would have presented testimony, both from himself and others asserting that these instances which gave rise to the tenure charges would be aberrations on a otherwise satisfactory record as a certified teacher; and

D. Pantalone would testify himself and dispute many if not mo.sf of the allegations; and

E. Many of the students involved have now graduated high school and might be difficult·to locate and/or reluctant to testify.

F. The Board believes that the charges and settlement have made Pantalone fully aware of the serious nature of his behavior; and

WHEREAS, before entering into this Agreement, Pantalone had full opportunity to consult with legal counsel who is experienced in this area and fully explained the meaning of the settlement to him; and

WHEREAS, the parties understand that this Agreement will became effective only when it is approved by the Office of Administrative Law and the Commissioner of Education; and

WHEREAS, this settlement fully disposes of all issues in controversy, and

WHEREAS, any disapproval shall not interfere with the rights of the Board to pursue this matter further.

Attest:

The Somerset County Vocational and Technical Sctiools

TIMOTHY M. STYS, SECRETARY

MONCRIEFF I. FISHER, PRESIDENT

SANFORD R. OXFELD, ESQ.

DONALD PANTALONE

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

RECEIVED
JUN 09 1999
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SOMERSET COUNTY VOCATIONAL AND TECHNICAL SCHOOLS BOARD OF EDUCATION, Petitioner, **vs.** **DONALD PANTALONE,** Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: EDUTH 04177-98S** **Agency Ref. No.: 135-4/98** **AFFIDAVIT**

Donald Pantalone, being duly sworn according to law upon his oath depbses and says:

1. I am the respondent in the above matter and I make this affidavit in response to the moving papers filed by Judith A. Babinski, the attorney for the Somerset County Vocational Schools, dated June 3, 1999.

2. I began employment with the school district in 1976. I possess certification as a Teacher of Vocational Related Subjects and Teacher of Biological Sciences. For the last four years I was teaching courses in Diesel, Auto Body, Automotive Electrical, Construction, and Small Engine Repairs.

3. It is true as stated in the Board's papers that tenure charges were filed against me on April 18, 1997. At that time, I had been in the district for 22 years and felt it was appropriate for me to continue with my career elsewhere. Accordingly, after

consulting with Mr. Oxfeld, my NJEA attorney, I determined it was in my best interest not to fight the charges against me, but rather to enter into a settlement agreement.

4. Consequently, I signed the "Settlement Agreement Between the Somerset County Vocational and Technical Schools Board of Education and Donald Pantalone" (attached to the Board's papers as Exhibit A). Pursuant to that settlement I agreed to resign my position, in exchange for receiving one year's salary, having my benefits paid until the end of the 1997-98 school year, and finally, the tenure of the settlement was to remain confidential.

5. That Settlement Agreement was approved by the Administrative Law Judge on March 19, 1998 (Appendix 8). However, the Commissioner was "compelled to reject such agreement as it is currently structured", as it did not "meet the Cardonick standards for settlement of tenure matters" (Appendix C). Consequently, the Commissioner remanded the matter to the OAL "for further revision of the documents and expansion of the record..."

6. Subsequently I did receive a modified "Settlement Agreement" (Exhibit E). It was sent to me by Mr. Oxfeld after having already been executed by both the President and Secretary to the Board of Education.

7. However, I chose not to sign this Agreement. My reason was I felt the document was incriminating by making the suggestion that I exhibited inappropriate conduct. While I realize that the document also stated that I disputed the charges against me, I felt that the listing of the charges themselves, although unproven, would place an aura of inappropriate guilt on me.

8. I acknowledge that the Board lived up to the terms of the first settlement agreement and I feel that I, likewise, lived up to the terms of the first settlement, by signing it and effectively resigning my position. It was only with the second settlement agreement and the inappropriate aura of guilt that I felt it suggested that caused me to refrain from signing it. I cannot in good faith, accordingly, dispute that we did resolve this matter short of litigation. I can only state that to my understanding, and despite the language in the second settlement which acknowledges that I dispute the charges, the settlement should not include a public listing of the charges against me.

9. Quite simply, I would be prepared to voluntarily sign a settlement if there was no public listing of the unproven charges against me and no accompanying aura of guilt.

10. I wold like to conclude by indicating that during the past several y ars I have been teaching on either a substitute or per diem basis. I attach hereto my evaluation for the course I taught. I also enclose a thank you note from the teacher for whom I acted as substitute. I am pleased to report that in both schools, Branchburg Central Middle School and Morris County Vo-Tech, my performance was excellent and truly appreciated by the school's administration.

Isl Donald Pantalone
DONALD PANTALONE

Sworn and subscribed to before
me this 22nd day of June, 1999

Isl Sanford R. Oxfeld
SANFORD R. OXFELD
An Attorney at Law of
New Jersey

MORRIS COUNTY VOCATIONAL SCHOOL

OBSERVATION FORM

Name of Staff Member: DONALD PANTALONE

Narrative Report:

Strengths

DONALD'S KNOWLEDGE OF THE SUBJECT IS VERY EXCELLENT. HE PRESENTS THE LESSON USING DIFFERENT APPROACHES IN AN ATTEMPT TO REACH STUDENTS WHO MAY BE AT DIFFERENT LEVELS OF ACHIEVEMENT.

Area of Growth:

CONTINUE TO DEVELOP AND MAINTAIN A HIGH QUALITY WORK CLASS USING A VARIETY OF INSTRUCTIONAL METHODS.

Conrments:

DONALD DISCUSSED THE RESULTS OF THE OHM LAW THEN GAVE A PRACTICAL APPLICATION. STUDENTS WERE GIVEN A HOMEWORK ASSIGNMENT AND TOLD THAT HE WILL COLLECT WORK AT NEXT CLASS.

Evaluator's Signature: [signature]

Staff Member's Signature: [signature]

No Conrnent _____ Corrment Attached _____

White - Superintendent Copy | Canary - Principal Copy | Pink - Staff Member Copy

MORRIS COUNTY VOCATIONAL-1ECHNICAL SCHOOL

TEA.Cl-ER **OOSERVATIOO** REPCRT

Teacher _____ Prog rem _____ Top 1 _____ De te of Obs er vat ion _____

LESSON PRESENTATION

Leason Planning:	S•	S	S-	u
Evidence of:				
Lesson objective (sl	✓	—	—	—
Thorough preparation	✓	—	—	—
Attention to detail	✓	—	—	—
Lesson Presentation end Development:				
Adequacy end clarity of explanation	✓	—	—	—
Skill in questioning	—	✓	—	—
Materials end media of instruction used	✓	—	—	—
Utilization of learning situation	✓	—	—	—
Presentation of material et appropriate student level	—	✓	—	—
Lesson Culmination:				
Summarizing highlights	—	✓	—	—
Provision for student practice of skills	—	✓	—	—
Stimulation of critical thinking	✓	—	—	—
Assignment and/or other follow-up **activities**	✓	—	—	—
Student Responsiveness				
Preperednesa	✓	—	—	—
Attentiveness	✓	—	—	—
Cooperation	✓	—	—	—
Ability to execute essignad tasks	✓	—	—	—
Awareness	✓	—	—	—
Attitude	✓	—	—	—

Teacher's Performance:	S+	S	S-	u
Teaching Techniques				
Concern for individual differences	✓	—	—	—
Class supervision end control	✓	—	—	—
Classroom Environment:				
Bulletin boards b displays	✓	—	—	—
Classroom routines	✓	—	—	—
Room appearance	✓	—	—	—
Health b safety conditions	✓	—	—	—
TEACHER STUDENT RELATIONSHIPS				
Acts decisively b with good judgment	✓	—	—	—
Shows respect for ell students	✓	—	—	—
Provides for student participation	✓	—	—	—
Teacher/student rapport	✓	—	—	—
PERSONAL QUALITIES				
Enthusiasm	✓	—	—	—
Appropriate vocabulary	✓	—	—	—
Thoughts expressed clearly, logically end distinctly	✓	—	—	—
Sense of humor	✓	—	—	—
Professional cooperation	✓	—	—	—

KEY

Unchecked erees indicate that this phase was not applicable during this observation

•S - More then satisfactory

S - Satisfactory

s- - Less then Setiafectory

U - Unsatisfactory

No **Comment**_____ Comment Attached_____

Tee ch er ı ll signe t ure _____ Eva lue tor' s Signe t ure _____

Jete_____ Data _____

MORRIS COUNTY VOCATIONAL SCHOOL

OBSERVATION FORM

Name of Staff Member: Don Pantalone

Narrative Report:

Strengths

Don continues to be a [illegible] Teacher. A clean [illegible] of class [illegible] Teaching style [illegible] suited to [illegible] adult learners.

Area of Growth:

Continue to provide a [illegible] educational experience for your [illegible]

Corrments:

Don used a [illegible] of techniques, methods to hold and reinforce the lesson. Students seemed attentive and interested. Nice job!

Evaluator's Signature: [illegible] 2/6/06

Staff Member's Signature: [illegible]

No Corrment ☐ Corrment Attached ☐

White - S perintendent Copy | Canary - Principal Copy | Pink - Staff Member Copy

MORRIS COUNTY VOCATII •TECHNICAL SCHOOL

TEACIER OOSERVATIOO REPOOT

Teacher ___ Program ___ Topic ___ Date oF Observation ___

LESSON PRESENTATION

Lesson Planning:	S+	S	S-	U
Evidence of:				
Lesson objective ts]	✓			
Thorough preparation	✓			
Attention to detail				
Lesson Presentation and Development:				
Adequacy and clarity of explanation	✓			
Skill in questioning		✓		
Materials and media of instruction used		✓		
Utilization cf learning situation		✓		
Presentation of material et appropriate **student level**				
Lesson Culmination:				
Summarizing highlights	✓			
Provision for student practice of skills	✓			
Stimulation of critical thinking	✓			
Assignment and/or other follow-up **activities**	✓			
Student **Responsiveness**				
Preparedness	✓			
Attentiveness	✓			
Cooperation	✓			
Ability to execute assigned tasks	✓			
Awareness	✓			
Attitude	✓			

reacher's Performance:	S+	S	S-	U
Teaching Techniques				
Concern for individual differences	✓			
Class supervision and control	✓			
Classroom Environment:				
Bulletin boards & displays	✓			
Classroom routines	✓			
Room appearance	✓			
Health & safety conditions	✓			
TEACHER STUDENT RELATIONSHIPS				
Acts decisively & with good judgment	✓			
Shows respect for all students	✓			
Provides for student participation	✓			
Teacher/student rapport	✓			
PERSONAL QUALITIES				
Enthusiasm'.	✓			
Appropriate'vocabulary	✓			
Thoughts expressed clearly, logically and distinctly	✓			
Sense of humor	✓			
Professional cooperation	✓			

KEY

Unchecked arees indicate that this phase was not applicable during this observation

+S - More than satisfactory

S - Satisfactory

S- - Less th n Satisfactory

U - Unsatisfactory

No Comment_____ Comment Attached_____

Teacher's Signature_____ Evaluator's Signature_____

□ate_____ Oats 2-/c/1;7

December 18, 1998
Branchburg Central Middle School
220 Baird Road
Somerville, NJ 08876

Dear Mr. Pantalone,

Thank you for taking over the duties of teaching my seventh grade Earth Science classes at Branchburg Central Middle School during my eight week extended medical leave. You did a fine job of completing my lesson plans and attending to the many associated duties and activities of our Explorer Team.

All of you fine efforts are truly appreciated, and may you enjoy continued success in science.

Sincerely,

Mary Ann Roupas
8th grade Earth Science teacher
Explorer Team

State of New Jersey
OFFICE OF ADMINJSTRATIVE LA\V

INTERLOCUTORY ORDER
OAL DKT. NO. EDU 04177-98S
(EDU 4141-97 Remanded)
AGENCY DKT. NO. 135-4/98

BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL SCHOOL, SOMERSET COUNTY,
Petitioner,
v.
DONALD PANTALONE,
Respondent.

BEFORE **JEFF S. MASIN,** ALJ:

This matter having been opened to the Office of Administrative Law ("OAL") upon motion of Judith A. Babinski, Esq., attorney for the Board of Education of the Somerset County Vocational School, Somerset County, ("petitioner") and having read and considered the papers submitted by both parties, and for good cause shown,

It is on this 21st day of June, 1999, **ORDERED** that the Motion for Enforcement of Settlement be and hereby is **GRANTED** in favor of petitioner; and

It is furth r **ORDERED** that Donald Pantalone ("respondent") execute the revised Settlement Agreement within ten days of the date of this order to enable the parties to submit the revised Settlement Agreement to the OAL and the Commissioner of Education for approval,

Mr. Pantalone's expressed reasons for not signing a settlement, the essential terms of which he concedes he agreed to, are insufficient to overturn an agreement reached between the parties. The fact that satisfaction of the Commissioner's *Cardonick* request requires that the settlement recite the nature of the allegations made against Pantalone in order to apprise the Commissioner of the charges, (while at the same time indicating that Pantalone disputed many if not most of the allegations), is not a sufficient basis for reneging on a settlement the terms of which have not been altered. "Settlement of litigation ranks high in [the] public policy" of New Jersey. *Lahue v. Pio Costa,* 263 *N.J. Super.* 575, 595 (App. Div. 1993), quoting *Pascarella v. Bruck,* 190 *N.J. Super* 118, 125 (App. Div. 1983), certif den., 94 NJ. 600 (I 983). The present case was clearly settled. The settlement will be enforced.

It is further **ORDERED** that if respondent fails to execute the revised Settlement Agreement within the time frame indicated above, respondent shall be deemed to have signed the revised Settlement Agreement to enable the parties to submit the same for approval by the OAL and the Commissioner of Education; and

It is further **ORDERED** that a conformed copy of this order be served upon all counsel and parties of record within seven days from the date hereof

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* I: 1-18.6.

July 22, 1999
DATE

JEFF S. MASIN, ALJ

mjm

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RESPOND TO: NEWARK

October 29, 1999

Honorable Jeff S. Masin, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
Trenton, New Jersey 08625

RE: SOMERSET COUNTY VOCATIONAL AND TECHNICAL SCHOOLS BOARD OF EDUCATION vs. DONALD PANTALONE
OAL Docket No. EDUTH 0-4177-98S
Agency Reference No. 135-4/98

Dear Judge Masin:

After our last round of communications I wrote the enclosed letter to my client asking him what he wanted to have done. He has never gotten back to me. Accordingly, I suggest that you proceed as per your decision sans my client's signature on any appropriate documentation.

Respectful!, youiS,

BALK, OXFELD, MANDELL & COHEN, P.A.
By:

SANFORD R. OXFELD

SRO:mr
encls.
cc: Judith A. Babinski, Esq.

LAW OFFICES

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RESPONO TO: NEWARK

August 20, 1999

Donald Pantalone
38 Roundtop Road
Warren, New Jersey 07055

RE: SOMERSET COUNTY vs. **PANTALONE**

Dear Mr. Pantalone:

I enclose herewith a copy of the Interlocutory Order of Judge Mason. As you can see he is directing that you sign the settlement papers. He has also found the alternative that if you refuse to sign the settlement papers they will be deemed to be signed.

Would you kindly let me know if you actually want to sign the papers if you just merely want to have them deemed as being signed.

Very truly yours,

BALK, OXFELD, MANDELL & COHEN, P.A.
By:

S;◆R◆◆;E::-·,.,,_·,,. ____ _

SRO:mr
encls.
cc: Jim Loper, New Jersey Education Association

OAL DKT. NOS. EDU 4141-97 and EDU 4177-98 (On Remand)
AGENCY DKT. NO. 135-4/9?[1]

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD PANTALONE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE SOMERSET	:	DECISION ON REMAND
COUNTY VOCATIONAL SCHOOL,	:	
SOMERSET COUNTY.	:	
	:	

The record and Initial Decision on Remand issued by the Office of Administrative Law (OAL) in the form of a Settlement Agreement have been reviewed. No exceptions were filed by the parties.

A review of the record in this tenure charge matter indicates that on April 28, 1998, a settlement entered into by the parties was rejected by the Commissioner because, contrary to the standards for review of a settlement in a tenure hearing matter as articulated in *Cardonick, supra,* the settlement failed: (1) to explain why the charges could no longer be pursued or why it was in the public interest not to pursue them, and (2) to document that respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure hearing determinations to the State Board of Examiners for possible revocation of certification. Among the terms of the rejected settlement were a stipulation that, by execution of the Settlement Agreement, respondent would be deemed to have resigned as of June 30, 1998

[1] It is noted for the record that there is an error in the Agency Docket Number cited on the Initial Decision and transmittal form to the OAL. The correct Agency Docket Number is 135-4/97.

and an agreement thaf the Board would provide to him one year's salary, less all sums already paid for the 1997-98 school year, and benefits from September 1, 1997 to June 30, 1998.

Notwithstanding the fact that the Commissioner expressly rejected the Settlement Agreement and remanded the matter to the OAL, and in contravention of the legal principle that a settlement agreement may not be executed until approved by the Commissioner (*Cardonick, supra),* respondent, pursuant to the terms of the rejected settlement, resigned his teaching position effective June 30, 1998 and the Board paid him his salary and benefits in accordance with the settlement terms.

As set forth in the Initial Decision on Remand, respondent refused to sign the revised settlement presented herein because, *inter alia,* he felt that by listing the charges against him in the settlement agreement, it would place an aura of inappropriate guilt on him, notwithstanding that the charges were unproven and the settlement expressly stated he disputfd the charges.

Further, the Affidavit which sets forth respondent's reasons for refusing to sign the agreement conveys that he believed that the settlement was to remain confidential.[2] (Affidavit at p. 2) This is, however, a misconception concerning the confidentiality of the tenure charges and terms of a settlement agreement. By law, the entire record of any proceedfng adjudicated before the Commissioner pursuant to ***N.J.S.A.*** 18A:6-9 and ***N.J.A.C.*** 6:24-1.1 *et seq.* is a matter of public record, unless for good cause the record is ordered sealed. Thus, tenure charges and settlement terms, such as herein, are matters of public record.

[2] The Commissioner notes that Term 5 of the rejected settlement states that respondent "agrees to keep all terms of this Agreement confidential and shall not disclose any terms of this Agreement to any employees of the School District." Such term speaks only to *Mr. Pantalone's* disclosure of information. It does not in any way alter the fact that the tenure charges themselves and any record of or determination related to same are a matter of public record.

Upon review of the record and Initial Decision on Remand, the Commissioner first notes that while the modified settlement appears to be in accord with the *Cardonick* standards for approval of the settlement of tenure charge matters, it still does not document that respondent was advised that the matter would be transmitted to the. State Board of Examiners; thus, the revised settlement remains subject to remand to the OAL on this point.

Secondly, upon review of the record, the Commissioner agrees with the finding of the Administrative Law Judge (ALJ) that "[respondent's] dispute with the format of the settlement ***is*** not with the substance, not with the terms of the agreement, not ***with*** the underlying reasons for resolving the matter, but simply with a document that says more than he would like about why this case was before the Commissioner." (Initial Decision on Remand at p. 3) The Commissioner does not, however, accept the ALJ's resolution to respondent's failure to sign the modified settlement agreement, *i.e.,* deeming the settlement as having been signed b1 Mr. Pantalone.

Upon consideration of the factual circumstances of this matter where the respondent has so vigorously refused to sign the proposed revised settlement agreement, the Commissioner is disinclined to approve *it.* On the other hand, however, the Commissioner does not believe that the public interest would be served by remanding the matter for plenary hearing[3], given that respondent resigned from the District effective June 30, 1998 and the Board avowed that it would be costly and difficult to proceed with the matter because (1) the charges were filed in April 1997, thus, many of the students needed to testify no longer attend the Somerset County Vocational School and (2) the Board, in accordance with statute, would have to continue to pay

[3] In the Commissioner's decision of April 28. 1998, which rejected the proposed settlement and remanded it to the OAL, it is expressly stated that if the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.

respondent until a final decision on the merits of the tenure charges was issued by the Commissioner. Therefore, the Commissioner determines that the disposition of this matter shall be construed as a withdrawal of the tenure charges by the Board, not as a settlement.

Accordingly, the matter is deemed withdrawn and no longer in controversy before the Commissioner. A copy of this decision shall be transmitted to the State Board of Examiners for review and such action, if any, as it deems appropriate.[4]

IT IS SO ORDERED.

COMMISS!OtF EDUCATION

January 13, 2000
Date of Mailing, January 14, 2000

[4] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARY JANE DOOLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OAL DKT. NO. EDU 7338-98
AGENCY DKT. NO. 220-7/98

MARY JANE DOOLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant *toN.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approYes the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 5, 2000

B.M., on her own behalf and on behalf of her grandson, M.B.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 5, 2000

OAL DKT. NO. EDU 11287-98
AGENCY DKT. NO. 518-11/98

B.M., on her own behalf and on behalf of her grandson, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by \he Office of Administrative Law pursuant to *N.J.A.* C. 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequ ntly, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

21-00

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

January 5, 2000

OAL DKT. NO. EDU 1081-99
AGENCY DKT. NO. 529-11/98

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *NJ.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 5, 2(X)

22-00

WILBERT JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND RICHARD DIPATRI, THE STATE DISTRICT SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

OAL DKT. NO. EDU 9843-97
AGENCY DKT. NO. 352-9/97

'WILBERT JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND RICHARD DIPATRI, THE STATE DISTRICT SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by \he Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the v,:ithdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 05, 2000
Date of Mailing, January 18, 2000

23-00

WILBERT JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 05, 2000

OAL DKT. NO. EDU-9805-98
AGENCY DKT. NO. 445-9/98

WILBERT JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 05, 2000

CORRECTED COPY

24-00

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATION OF	:	
ROBYN GROSCHEL, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
ESSEX FALLS, ESSEX COUNTY.	:	
	:	

January 24, -2000

OAL DKT. NO. EDU 9804-98
AGENCY DKT. NO. 389-8/98

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATION OF	:	
ROBYN GROSCHEL, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
ESSEX FALLS, ESSEX COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

25-00

EILEEN COMMIKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 5, 2000

OAL DKT. NO. EDU 1342-97
AGENCY DKT. NO. 559-11/96

EILEEN COMMIKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to **N.J.A.C.** 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to ***N.J.S.A.*** 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 5, 2000

26-00

JOAN BAILY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OAL DKT. NO. EDU 3672-99
AGENCY DKT. NO. 35-3/99

JOAN BAILY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to **N.J.A.C.** 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to **N.J.S.A.** 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

January 5, 2000
Date of Mailing, January 27, 2000

·CORRECTED COPY

27-00

B.S. AND M.S., on behalf of minor child, S.N.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

. January 5, 2000

OAL DKT. NO. EDU 11670-98
AGENCY DKT. NO. 521-11/98

B.S. AND M.S. on behalf of minor child, S.N.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by tqe Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

28-00

J.A.D., on behalf of minor child, J.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged Board's residency determination.

At the OAL the parties entered into a settlement agreement providing payment of tuition owing for the period of the 1998-99 school year that petitioner's son, J.D., was ineligible, pursuant to *N.J.S.A.* 18A:38-l, to attend respondent's schools free of charge, but petitioner failed to make the initial payment The Board moved for summary decision. The ALJ granted the motion and ordered petitioner to pay respondent $7,317 within 30 days of receipt of the final decision and order of the Commissioner in this matter.

The Commissioner adopted the recommended order but modified it to require payment within 60 days, consistent with the provisions of *N.J.A.C.* 6:24-l.16(c) for the award of post-judgment interest when a party fails to satisfy a claim.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2124-99

AGENCY DKT. NO. 39-3/99

J.A.D. ON BEHALF OF MINOR CHILD J.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TO\VNSHIP OF MARLBORO,

Respondent.

J.A.D., petitioner, *prose*

Ellen Marie \Valsh, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: November 5, 1999 Decided: December 1, 1999

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter is a residency and tuition payment dispute between the petitioner and a district board of education. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for detem1ination as a contested case, pursuant to *N.JS.A.* 52: 14F-1 through-13.

The matter was calendared for September 30, 1999. By letter dated September 28, I999, the Board's counsel indicated that the matter had been resolved. Counsel had foiwarded a stipulation of dismissal to the petitioner for her signature. The hearing set down for September 30, I999, was adjourned.

Subsequently, the Board's counsel advised the judge that J.A.D. had not honored the tenns of the settlement. The judge immediately calendared the matter for hearing on Friday, November 5, 1999. At the appointed time, no appearance was made by or for the petitioner. The notice of hearing sent to the petitioner was not returned as undelivered or undeliverable. It is presumed that the petitioner had notice of the hearing.

N.J.A.C. 1:1-14.4 (c) provides:

> If the appearing party requires an initial decision on the merits because of the failure to appear, the party shall ask the judge for pennission to present *ex parte* proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the *ex parte* proofs, provided the failure to appear is memorialized in the decision.

J.A.D. made no attempt to contact the judge or the Board, despite knowledge of the hearing scheduled for November 5, 1999. The Board was given leave to present *ex parte* proofs.

Cindy S. Barr-Rague, Board Secretary and School Administrator, testified. J.A.D. and her husband advised the Board that they were moving into the district in or about September 1998. The Board admitted J.A.D. to attendance in the Marlboro Public Schools. Closing on the house the petitioners were to occupy was delayed. In the pleadings, the parents allege they advised the Board of delays, but the Board denies receiving notice. On February 16, 1999, the Board ordered payment of tuition up to March 10, 1999 and disenrollment of J.A.D., effective March 10, 1999.

The petition of appeal asked that the Board's actions be set aside. In the alternative, the petitioners seek determination of tuition "based upon the actual services rendered to the Petitioner."

The witness stated that the parties entered into a settlement (R-1). J.A.D. and her husband both executed the settlement. The witness explained that the settlement provided for payment of the tuition owing in fifteen payments. The petitioners agreed to make one payment of S1,000 by September 24, 1999, then to make thirteen monthly payments of $500 each due on the fifteenth day of each month beginning in October 1999 and to make a fifteenth and final payment of$110 on November 15, 2000.

The witness acknowledged that there is an error in the agreement. The amount owed to the Board is not S7,600 as stated, but is $7,317. See, tuition for 1998-99, exhibit R-2.

The witness stated she received a $1,000 check from the petitioners on or about September 22, 1999. She was asked by Mrs. D. to hold the check for approximately five dp.ys. The witness held the check for five days. Mrs D. and the Board's counsel then spoke by telephone. After an additional, agreed-to delay, the check was deposited. Approximately one week later, the witness learned that the check was returned because of insufficient funds.

Upon conclusion of the Board Secretary-School Business Administrator's testimony, the Board moved for summary judgment. For the reasons that follow, the motion is **GRANTED**.

The petitioners infonned the Board that they would be moving into the district in or about September 1998. Based on the representation, the Board admitted J.A.D. to attendance. The family did not re-located to Marlboro. On February 16, 1999, the Board ordered payment of tuition up to March 10, 1999, and diseruollment of J.A.D., effective March 10, 1999., The parents filed an appeal and this action ensued. Prior to the first scheduled date of hearing, the petitioners entered into an agreement with the Board, the details of which are recited above. The petitioners have not made any payment as agreed to in Exhibit R-1. One check was received by the Board and was returned because of insufficient funds.

If this matter were merely dismissed, the Board would be at a disadvantage in that it would have to go to the Superior Court of New Jersey for relief, essentially having to relitigate the entire matter when a remedy exists here. Thus, "the circumstances require decision on the merits." *N.J.A.C.* 1:1-14.4(c).

In *O'Toole v. Board of Education of the Borough of Ramsey,* 212 *NJ. Super.* 624 (App. Div. 1986), Cecilia O'Toole, fonnerly a teacher employed by the Ramsey Board of Education, appealed from portions of a final decision of the State Board of Education which determined, among other things, that she had received from the Board duplicate salary payments totaling $4,036.50. The Ramsey Board cross-appealed from that part of the State Board decision that held the State Board was without authority to order O'Toole to reimburse the Board and that such recoupment must be sought through civil action in a court of competent jurisdiction. *Id.* at 626. O'Toole argued that, because the State Board found it had no jurisdiction to order her to make reimbursement, the question of amount should not have been passed upon at all. The Ramsey Board, on the other hand, urged that the State Board had, and should have exercised, jurisdiction to order O'Toole to make restitution. The Appellate Court stated:

> The position of the State Board is that it "declined to assert jurisdiction to order recoupment from the teacher because it did not infer such a grant of authority as incidental to the Commissioner's and the State Board's statutory power."
>
> We are satisfied that the State Board took too naiTow a view of its authority. O'Toole's disentitlement to receive both salary and retirement benefits for the same period of time arises by application of the school laws. . . . The Commissioner and the State Board have jurisdiction to hear and detennine such a dispute. . . .

The reasoning applies equally here. The Commissioner has jurisdiction over this matter because it arises under *N.J.S.A.* 18A:38-3. To require the filing of a separate Law Division action in order to transform this initial decision into an order to pay would be pointless and wasteful. *Cf Bd. of Ed., City of Newark v. Levitt,* 197 *NJ. Super.* 239, 247-248 (App. Div. 1984).

Based upon the foregoing, it is **ORDERED** that J.A.D. and J.D., husband and wife, remit to the Marlboro Township Board of Education the sum of$7,317 within 30 days of receipt of the final decision and order of the Commissioner in this matter.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF TJIE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. 0. Box 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

I 7)t; LJCR I q19
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/2/99

DNA

Mailed to Parties:

DEC 3 1999
DATE

Barbara A Hernes
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS

For petitioners:

None

For respondent:

R-1 Agreement between J.A.D. and J.D. and the Marlboro Township Board of Education, September 22, 1999, (3 pp.)

R-2 Tuition for 1998-99, Marlboro Township Public Schools, August 3, 1998

R-3 Check in the amount of $1,000 from J.A.D. to Marlboro Board of Education, September 22, 1999

\VITNESSES

For petitioners:

None

For respondent:

Cindy S. Barr-Rague

OAL DKT. NO. EDU 2124-99
AGENCY DKT. NO. 39-3/99

J.A.D., on behalf of minor child, J.D.,	:	
PETITIONER,.	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner adopts the Administrative Law Judge's recommended order that petitioner shall pay to respondent the sum of $7,317 for tuition incurred during the period of the 1998-99 school year that petitioner's son, J.D., was ineligible, pursuant to *N.J.S.A.* 18A:38-l, to attend the Township of Marlboro Public Schools free of charge. However, the Commissioner modifies that portion of the recommended order which requires that petitioner's payment to respondent must be made within 30 days. Consistent with the provisions of *N.J.A.C.* 6:24-l.16(c) for the award of post-judgment interest when a party fails lo satisfy a claim, the Commissioner finds 60 days from petitioner's receipt of this decision to be the appropriate period within which petitioner must satisfy the amount of $7,317 owing and due to respondent.

Accordingly, respondent, J.A.D., is ordered to pay forthwith to the Marlboro Township Board of Education the sum of $7,317 for tuition for her son, J.D., for the reasons set forth in the Initial Decision.•

IT IS SO ORDERED.

CO MISSI EDUCATION

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6:2-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 18, 2000

Date of Mailing, January 19, 2000

SB/28-00

EDU # 12270-95
SBE #478-06/98-205
SB# 28-00

IN THE MATTER OF THE CERTIFICATES : STATE BOARD OF EDUCATION

OF JOY NORTHROP DEVINCENZI. : DECISION

Decided by the State Board of Examiners, November 4, 1999

For the Petitioner-Respondent, Michelle L. Miller, Deputy Attorney General
(John J. Farmer, Attorney General of New Jersey)

For the Respondent-Appellant, Beth L. Finkelstein, Esq.

Joy Northrup DeVincenzi (hereinafter "respondent") is challenging a five-year suspension by the State Board of Examiners of her certification to serve as a School Administrator, Assistant Superintendent of Business and School Business Administrator.[1] The Board of Examiners took this action on the basis of a decision rendered by the Commissioner of Education in Board of Education of the Borough of Lincoln Park v. Board of Education of the Town of Boonton, 97 N.J.A.R.2nd (EDU) 592 (hereinafter "Lincoln Park v. Boonton"). In that case, Lincoln Park, a sending district, challenged the actions of the Boonton Board and the respondent, who was Superintendent of Schools in Boonton, in relation to the selection of a principal for Boonton High School. Adopting the Initial Decision of the Administrative Law Judge ("ALJ"), the Commissioner held that the Boonton Board and its Superintendent had acted arbitrarily, capriciously, in bad faith and in violation of the spirit of the agreement

[1] Respondent also possesses certification as a teacher, but the Board of Examiners did not take action against any of her teaching endorsements.

Aug. 2, 2000

between the two districts for the selection process for a new principal. As a result, the Commissioner concluded that the appointment that had been made by the Boonton Board was invalid, and he directed that a new selection process be developed and implemented. The Commissioner discounted as inappropriate the Lincoln Park Board's suggestion that he remove the respondent from the selection process, but he directed that a copy of his decision be forwarded to the State Board of Examiners for its review.

The State Board of Examiners issued an order to show cause on the basis of the ALJ's findings as they had been adopted by the Commissioner. After reviewing the charges and the papers filed by the respondent in response to the order to show cause, the Board of Examiners determined that no material facts related to the respondent's conduct were in dispute. Then, affirming that it could "rely on the facts as found at the tenure hearing ... when determining whether an individual has engaged in conduct unbecoming a teacher," the Board of Examiners found that the respondent's actions constituted "conduct unbecoming a certificate holder." Board of Examiners' Decision, slip op. at 6. The Board of Examiners concluded that the respondent's actions constituted just cause to act against her certificates pursuant to N.J.A.C. 6:11-3.6(a)1. As articulated by the Board of Examiners:

> In this instance, De Vincenzi deviated from the behavior expected of a chief school administrator. While her own board may extend her broad latitude, she still had some obligation to both districts to choose the best principal using the process agreed to by the selection committee. Unilaterally changing the process or imposing different criteria for selection may be acceptable to her board (which was involved in an ongoing dispute with Boonton [sic]), but is clearly unacceptable to the ALJ, the Commissioner and this Board. Thus, these actions point squarely to a finding of conduct unbecoming a certificate holder.

Board of Examiners' Decision, slip op. at 7.

Acknowledging that the respondent had found herself in a difficult situation and that all of her actions were taken with the knowledge and approval of her employing board, the Board of Examiners found that revocation of the respondent's certificates would be too severe a penalty. However, underscoring the need to "send a strong message regarding appropriate administrator conduct and the regulation of the teaching profession," id. at 8, the Board of Examiners concluded that the respondent's "lapses as superintendent were sufficiently serious ... to warrant her suspension from the profession as an administrator for a substantial period of time." & at 9 (emphasis in original). It then held that a five-year suspension of the respondent's administrative certificates would protect the public while not unduly punishing the respondent.

Respondent appealed to the State Board of Education from the Board of Examiners' decision. She argues that the Board of Examiners' decision should be reversed because the Commissioner's decision upon which it relied did not focus on her conduct as it related to her employment. She also contends that there are issues of material fact involved that preclude a grant of summary decision.

After a careful review of the record, including the Commissioner's decision in Lincoln Park v. Boonton, we agree with the respondent. Although the respondent was also named as a respondent in the Lincoln Park matter, that case challenged the propriety of the implementation of a principal selection process under an agreement between the Lincoln Park Board and the Boonton Board. The relief being sought by Lincoln Park was an order from the Commissioner vacating the appointment made by the Boonton Board and directing that the Boonton Board conduct the selection process

anew. Accordingly, during the proceedings before the Administrative Law Judge, the respondent's conduct was at issue as it related to the propriety of the appointment at issue, and there is no indication in the ALJ's decision that she considered the respondent's actions in the context of her employment as a superintendent for the Boonton Board.

As set forth in the Commissioner's decision, Lincoln Park filed exceptions to the ALJ's determination seeking, in addition to other relief,[2] an express prohibition against any participation in the selection process by the respondent. Lincoln Park further sought a recommendation from the Commissioner "that the State Board of Examiners initiate proceedings to revoke all of [the respondent's] certificates."

Until that time, the respondent had been represented by the same counsel as the Boonton Board. The Commissioner's decision indicates that once Lincoln Park's exceptions were filed, the respondent sought to be represented by separate counsel. In the absence of objection from the other parties, the Commissioner granted the respondent's request, and counsel for the respondent filed exceptions on her behalf.

After reviewing the exceptions of the parties and the replies thereto, the Commissioner rejected as inappropriate Lincoln Park's "suggestion" that he remove the respondent from the principal selection process. Further, although he directed that a copy of his decision be forwarded to the Board of Examiners, the Commissioner did not recommend, as he had been urged by Lincoln Park in its exceptions, that action be taken against the respondent's certificates.

[2] In its exceptions, Lincoln Park also sought further relief with respect to its representative on the Boonton Board.

Under these circumstances, the ALJ's decision in the Lincoln Park case alone cannot be considered to provide a sufficient evidentiary basis for the action taken by the Board of Examiners in this matter. Quite simply, the question of respondent's conduct was not litigated in relation to her employment. Because the respondent was not on notice that her employment was at issue, she was not represented by independent counsel during the hearing before the ALJ. Consequently, the issues involved here that relate to her ability to be employed as a school administrator were not fully and fairly litigated in the proceedings in Lincoln Park v. Boonton. It would be inconsistent with the principles of due process and fundamentally unfair to bar respondent from employment as a school administrator in any capacity by any board of education in New Jersey for five years on the basis of the findings in that decision.

We therefore remand this matter to the State Board of Examiners with the direction that it be transmitted to the Office of Administrative Law for further proceedings consistent with our decision herein in order to determine whether the respondent's conduct in relation to the principal selection that was invalidated in Lincoln Park v. Boonton warrants suspension of her certification as a school administrator.

August 2, 2000

Date of mailing AUG 02 2000

29--00

ROBERT CRYSTAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS.

Petitioning Board member appealed respondent Board's censure of him for violating Board Policy No. 090, Article IX, prohibiting any Board member from making a presentation regarding any Board-related matter or releasing information concerning the Board's business until that member has notified all other Board members at least five days prior to presentatioh or dissemination.

At the OAL the parties cross-moved for summary decision. The ALJ denied petitioner's motion for summary decision and entered summary decision for respondent, concluding that petitioner violated the Board policy, causing the Board to impose the discipline of censure for his act, by speaking to the media after a closed session of the Board discussing potential ethical complaints against him. The ALJ further determined that the policy did not violate petitioner's First Amendment rights since it exempts members from its provisions if they issue a disclaimer that they are speaking as private citizens and they do not disseminate privileged, executive session material that has not been declassified. Thus, the ALJ concluded that the Board's action was not arbitrary, capricious or unreasonable.

The Commissioner agreed with and adopted as his own the recommended decision of the ALJ.

State of New Jersey
. OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2398-99

AGENCY REF. NO. 37-3/99

ROBERT CRYSTAL,

Petitioner,

v.

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

Respondent.

Robert Crystal, petitioner, *prose*

Paul Carr, Esq., for respondent

Record Closed: October 18, 1999 Decided: November 30, 1999

BEFORE **LILLARD E. LA\V,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a member of the Board of Education of the Township of Barnegat (Board) alleges, among other things, that the Board's action to censure petitioner for his alleged violation of the Board's Policy #090, Article IX, was arbitrary, capricious and unreasonable. Petitioner seeks to have the censure removed and expunged from his record.

Petitioner propounded a Motion for Declaratory Judgment before the Commissioner of Education (Commissioner) wherein petitioner requested the Commissioner to construe the provisions of the Board's censure of petitioner for violation of its policy by making certain statements was arbitrary, capricious and unreasonable. The Commissioner declined to consider the matter as one for a declaratory ruling and, pursuant to his discretionary authority under *N.J.A.C* 6:24-2. l, the Commissioner determined that the matter should proceed as a Petition of Appeal.

The Board provided no Answer to petitioner's Motion or the Commissioner's determination.

The matter was then transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52: 14F-1 to -13. A prehearing conference was held on August 19, 1999, at which, among other things, the issues to be determined by this tribunal were set forth and the parties agreed to cross-move for summary decision on stipulated facts.

ISSUES

The issues for determination, as set forth in petitioner's Motion for Declaratory Judgment and as agreed upon by the parties as evidenced by the Prehearing Order, are as follows:

Issues

1. Whether the Board's action to censure petitioner was arbitrary, capricious or unreasonable?

2. Whether the Board denied petitioner's right to due process?

3. Whether the Board violated its own rules and procedures?

4. Whether the Board violated petitioner's right of free speech?

On October 18, 1999, the undersigned was in receipt of the stipulated facts as agreed by the parties and which constitutes the close of the herein hearing record.

STIPULATED FACTS

1. The Barnegat Board of Education convened into closed session pursuant to section *[N.J.S.A.]* 10:4-10 of the Open Public Meetings Act, which permits the exclusion of the public. The purpose of the closed session meeting was to discuss potential ethics complaints against Board Member Robert Crystal, including but not limited to, unauthorized use of school district telephones and undue influence in the hiring of a school district employee.

2. Prior to the meeting Mr. Crystal contacted the New Jersey School Boards Association (NJSBA) legal staff for an opinion regarding his right to be represented by an attorney. The opinion was that since the matter was administrative this issue is discretionary with the Board.

3. After the closed session meeting Mr. Crystal was interviewed by a newspaper reporter. The reporter asked Mr. Crystal whether he would hire an attorney or not. Mr. Crystal repeated the opinion he received from NJSBA. Since the Board considered the issue a closed session subject matter a vote was taken and passed by a majority of the Board to censure Mr. Crystal for discussing closed

session issues with the press.

4. Mr. Cl)'stal filed the within petition alleging that the Board acted arbitral)', capricious and beyond its' discretion.

The motion to censure. petitioner for violation of Policy 090 was by a roll call vote of the members present at the Board meeting. The measure was adopted by a vote of five in favor of censure and three opposed. Petitioner's vote was recorded as a "no."

The Board· s Policy, No. 090, Article IX, adopted on October 23, 1995, provides as follows:

> The Barnegat Township Board of Education recognizes the importance of keeping community members well informed about all aspects of the school system. Therefore, consistent with good boardmanship, School Board Member Code of Ethics, and common courtesy, any Board member who wishes to make a presentation regarding any board related matter, before any community group, at any board owned or any community owned facility, or private clubhouse or meeting place shall inform all other Board members at least five days in advance of any such presentation. (Attached to Petition of Appeal)

The Policy, No. 90, Article IX was amended by the Board, on a date not set forth on the record, which provides as follows:

> No Board member will act to notify or release information concerning the business of the Board until and unless they have informed eve!)' other Board member no less than five days before such dissemination. Telephone notice by either the individual member or the Board office acting upon their request is acceptable.
>
> Any allegation that an individual governed by this policy has violated this policy will result in the issue being placed on the agenda of the next scheduled Board meeting for discussion. It will then be left to the Board to evaluate the allegation(s) and

> recommend any possible remedial or disciplinary action(s) allowed by the-Board's rules of procedures or. absent same, Robert's Rules of Order.
>
> The Board recognizes, of course, any Board member's First Amendment rights and it is not the intent of this policy to interfere with same. Accordingly, the Board deems a member exempt from the provisions of this policy providing they issue a clear disclaimer to any media or other informational outlet that they are speaking as a private citizen and they do to intend their remarks to represent any position, opinion or will of the Board and that the information, data, etc., they disseminate is not privileged, executive session material that has not been declassified. (Attached to Petition of Appeal)

Neither party set forth any legal arguments, citations of statute or regulations or case law by way of briefs or memoranda of law.

CONCLUSIONS

The standard for granting or denying summary judgment has been set forth by our Supreme Court in the matter of *Judsou v. Peoples Bank & Trust Company of Westfield,* 17 *N.J* 67 (I954). The standard was subsequently modified by the Court in *Brill v. Guardian L!fe ins. Co. of America,* 142 *N.J.* 520 (1995). The *Brill* Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:3 7-2.(b) and for determining motions for judgment under *R.* 4:40-1 (Motion for judgment at trial) and *R.* 4:40-2 (Reservation of Decision on Motion: Motion for judgment notwithstanding the verdict). The courts considering motions for summary judgment are not required to engage in the same type of evaluation and analysis, or sifting of evidential material in light of the burden of persuasion that applies as if the matter goes to trial. The *Brill* Court held that:

> Under this new standard, a determination whether there exits a "genuin issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." ... Credibility determinations will continue to be made by a jury and not a judge. If there exists a single unavoidable resolution of the alleged disputed issue of fact that issue should be considered insufficient to constitute a "genuin " issue of material fact for purposes of *Rule* 4:46-2 .•. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, ... , the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

As observed hereinbefore, neither party sets forth any affidavits, legal arguments, citations to cases on point, or reference to any statute or regulations with respect to the issues to be determined. The Appellate bench in *D 'Amato by McPherson v. D 'Amalo,* 305 *N.J.Super.* 109, cited with approval of the Supreme Court's decision in *Brill, supra.,* and went on to state: t

> Although *Rule* 4:46-5(a) states that the mere allegations or denials of pleadings are not evidence which can defeat a motion for summary judgment, there is no particular form of evidential material that either party to a summary judgment is required to present. *Rule* 4:46-2(a) states that a motion for summary judgment may be submitted *"with or without supporting affidavits,•·* and *Rule* 4:46-2(c) provides that the motion shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, *if any,* show that there is no genuine issue as to any material fact challenged." (emphasis added). Construing the similar provisions of FRCP 56, the Suprem·e Court concluded that a party may demonstrate its entitlement to summary judgment without presenting any affidavits or other simibr materials.
>
> > (W]e find no express or implied requirement in *Rule* 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.. . . [R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should,

> be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, ••. is satisfied.
>
> *[Celotex Corp. v Carrell, supra.,* 477 *U.S.* at 323, 106 *S. Cl.* at 2553, 91 *LEd. 2d.* at 274.] */J'Amato,* 305 ***N.J.*** *Super.* at 114.

Thus, where the instant matter merely consists of petitioner's Petition of Appeal together with the parties stipulation of the facts, and nothing more, the matter may proceed to summary decision where it is shown there is no genuine issue as to any material fact. ***Jllddm11, supra.,*** *Brill, supra.* ***D*** *'Amato, supra.*

The only evidence proffered by the parties is the Policy No. 090, Article IX, adopted by the Board on October 23, 1995 and the Amendment to the Policy, at a date not given, and the action by the Board to censure petitioner, again on a date not specified on the record.

Issue No. 4 \Vhether the Board Violated Petitioner's Right of Free Speech?

Petitioner claims that the Board violated his right of free speech when it took action to censure him for his alleged violation of the Board's Policy 090, Article IX. The Commissioner and the New Jersey Courts have dealt with employee challenges to alleged violations of First and Founeenth Amendment rights to free speech and due process. Chief Justice Weintraub, writing for the New Jersey Supreme Court in the matter of *Board* <?f/:.a., *Borough of Union Beach v.* ***N..J.E.A.,*** *et al* 53 *NJ* 29 (1968) said:

> lndi\·iduals, severally or in association, of course have the right to denounce a public body, its officers, and its programs, in the most searing terms, and even with a wide margin of error.
>
> *Id.* at 40

Chief Justice Weintraub's observation in *Union Beach* acts as a two edged sword'with respect to the instant matter; *i.e.,* petitioner has the right, individually, to denounce the Board as a public body and, the Board severally, maintains the same right to denounce petitioner as an officer

of the Board. Chief Justice Weintraub continued to observe in *Union Beach* among other things, that:

> It need hardly be said that freedom of speech does not include the right use speech as an instrument to an unlawfully end. Id. at 42.

The question now to be resolved is whether petitioner's actions constitute an "unlawful" act?

Pursuant to *N.J.S.A.* 18A:11-1, the statute provides local boards of education with certain mandatory powers and duties. These powers and duties include the following:

> The board shall --
>
> a. Adopt an official seal;
> b. Enforce the rules of the state board;
> c. *Make, amend and repeal mies, 110I co11sisle11I with this title or with the rnles of the state hoard, for its own govemment* and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes, and
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.
>
> (Emphasis added)

The Courts have held that:

> It is, of course, fundamental that local boards of education, as creations of the State, are capable of exercising only those powers which are granted expressly or by necessary or fair implication by the Legislature. *,Jee, Wagner v. Newark,* 24 *N.J* 467, 474-475 (1957); *Belvidere Bd. of Ed v. Bosco,* 138 *NJ. Super.,* 368, 376 (Law Div. 1975); *Resnick* v. East *Brumwick TJ). Bd.* <?f Hlf., 135 *NJ. Super.* 257, 260 (Ch. Div. 1975), aff'd 144 *NJ. Super.* 474

> *(App.* lJil'. 1976): *Bolkin v. Westwood,* 52 *N.J. Super.* 416, 427 *(App. Div.* 1958), app. dism. 28 *N./.* 218 (1958). The Legislature has expressly vested local boards of education with traditional management prerogatives, including the power to adopt rules ... *Fair Lawn Ed. Assu. v. Fair /,awn Bd. of !:a.,* 161 *N.J. Super.* 67, 72 (1978), affd. 79 *N.J.* 594 (1979).

Thus, the Board herein adopted and amended Policy 090, Article IX which provides, among other things, disciplinary action against petitioner in the event he acted to release information to the media concerning business of the Board without informing the Board within five days of the release of the information. The Amended Policy 090, Article IX recognized petitioner's First Amendment rights of free speech, providing petitioner issued a clear disclaimer to the media that he was speaking as a private citizen and that his remarks did not intend to represent any position, opinion or will of the Board and that the information released by petitioner did not contain executive session material that had not been declassified.

I **CONCLUDE** that petitioner did not commit an unlawful act. He did, however, and I so **CONCLUDE,** commit a violation of Board Policy 090, Article IX, which was clearly articulated and pursuant to *N..I.S.A.* 18A: 11-1 and which caused the Board to impose the discipline of censure for his act. I **FURTHER CONCLUDE** that under the stipulated facts, the cited case law, the statutes and the Board's policy, that petitioner's First Amendment rights were not violated nor was the Board's action to censure petitioner arbitrary, capricious or unreasonable.

Given these conclusions, petitioner's application for summary decision is thus defeated and, therefore, must be dismissed. Having so concluded, it is not necessary to address the remaining issues proffered by petitioner.

ORDER

Accordingly, it is **ORDERED** that petitioner's application for Summary Decision, pursuant to *N..I.A.C.* 1: 1-12.5 is hereby **DISMISSED and SUMMARY DECISION is hereby ENTERED on BEHALF OF THE BOARD.**

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

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

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

30 November 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/2/99
DATE

Drvff
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC-3-1999
DATE

Barbara A Heinad
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 2398-99
AGENCY DKT. NO. 37-3/99

ROBERT CRYSTAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge to dismiss the petitioner's application for summary decision and to enter summary decision on behalf of the Board for the reasons set forth in the Initial Decision.

Accordingly, the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to N.J.S.A. lSA:6-27 *et seq.* and N.J.A.C. 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 18, 2000
Date of Mailing, January 19, 2000

LYNN P. SHERMAN *ET AL.,*	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents appealed Board's decision to abolish the half-day, four-year-old kindergarten program (K/4) in favor of a full-day, five-year-old kindergarten program to replace K/4 and the half-day, five-year-old kindergarten program (K/5).

At the OAL the respondent Board moved for summary decision. The ALJ granted respondent's motion, concluding that petitioners failed to demonstrate affirmatively that the District's decision was arbitrlry, capricious or unreasonable. The ALJ also determined that the Board's alleged misrepresentation to the K/5 teacher, who resigned upon information that the K/5 program would not be a full-time program for two or three years, was not an affirmative demonstration of the District's arbitrary, capricious or unreasonable conduct. The ALJ further concluded that the Board was permitted the discretion to consider sound economics and business principles as may be necessary for the lawful and proper conduct of the schools in matters such as the abolition of the K/4 program and that the Board was authorized to transfer funds among line items and program categories of its budget to operate the full-day kindergarten program. Finally, the ALJ concluded that it was unnecessary to consider whether the District violated terms of the Open Public Meeting Act (OPMA) when it considered elimination of the K/4 program without including same in its agenda for the June 21, 1999 meeting since adequate notice of the Board's intent to consider elimination of K/4 was provided in the agenda published for a subsequent meeting on October 7, 1999.

The Commissioner agreed with and adopted as his own the ALJ's recommended decision granting the Board's motion for summary decision, concluding that the ALJ properly applied the standard for summary decision set forth in *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995) in determining that petitioners failed to demonstrate that the decision to eliminate K/4 was arbitrary, capricious or unreasonable. Notwithstanding this holding, however, the Commissioner determined that the June 21, 1999 meeting agenda did not comply with the intent of the OPMA since it did not provide sufficient notice that possible elimination of the preschool program would be discussed. Although the Commissioner agreed with the ALJ that there is no basis upon which to grant the relief sought by petitioners, given that the Board later provided adequate notice of its intent to consider elimination of K/4 in its October 7, 1999 meeting agenda, the Commissioner cautioned the Board that it must at all times and in all matters recognize and effectuate the intent of the OPMA.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 6647-99
AGENCY DKT. NO. 239 8/99

LYNN P. SHERMAN, ROSEMARY KING, MARY LOUISE FREYBERGER, TOM M. KELLY, H. SAMAi'\fTHA KELLY, AUDREY P. \VHITCRAFT-\VEBBY, DAVID J. \VEBBY, DENISE AYERS, JOSEPH C. AYERS, JANINE ENOS-KLEBER, ROMEO ROBLES, SHARON L. VOISINE, E\IILL D'ELETTO, EDITH J. PHARO, ELEANORE. PHARO, AUDREY IVANICH, NANCIE SAMUELSON, ANTHOi\'Y IVANICH, DALE SAMUELSON, DEAN A. CLELAi'\"D, JACQUELINE D'ELETTO, CLAYTON J. VISINE, JR., CLAUDIA DEN UYL, JOANN CLELAND, AND DEBRA I\IcGLYNN, ON BEHALF OF MINORS ENROLLED IN BEACH HAVEN SCHOOL K-1 CLASS,

Petitioners,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,

Respondent.

John F. Rodgers, Jr., appeared for petitioner

Kim C. **Belin,** Esq., appeared for respondent (Capehart & Scatchard, P.A. attorneys)

Record Closed: November 17, 1999 Decided: November 30, 1999

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners request that respondent school district be compelled to reinstate the half-day kindergarten for four-year olds program which the school district had discontinued after 14 years. Petitioners allege that no educational purpose existed for the school district's action, that the school district acted in bad faith, and the school district's actions were arbitrary, capricious and unreasonable.

On August 18, 1999 this matter was transmitted to the Office of Administrative Law as a contested matter pursuant to *N.J.S.A.* 52:14b-1 to -15 and *N.J.S.A.* 14F-1 to -13. Oral argument on petitioners' motion for emergent relief was scheduled for August 26, 1999 at Mercerville, New Jersey and heard that date. An Order Denying Emergent Relief was entered on August 27, 1999 and the matter scheduled for plenary hearing on October 20, 1999. On October 14, 1999 the school district filed a Notice of Motion for Summary Decision and requested an adjournment of the scheduled hearing date. A letter order was issued on October 26, 1999 fixing the date for petitioners to file a response and fixing November 17, 1999 as the date for oral argument. The documents submitted by the parties in support of their respective positions are listed in the appendix. The hearing record closed on November 17, 1999 at the conclusion of oral argument.

FACTUAL FINDINGS

The petitioners originally alleged that the Beach Haven district operated a half-day kindergalien program for the four-year old children of the district for 14 years. As the children left the four-year old kindergarten program (K/4) they entered the half-day kindergalien program

for five-year olds (K/5) the following September. Funding for the kindergarten programs has been provided in annual school district budget, and so explained to the Beach Haven voters.

The school district invited the prospective K/4 students to the annual orientation day at the school held on May 5, 1999. At its meeting held on June 21, 1999 and under agenda item 7.1-Discussion: All day kindergarten (Exhibit P-B), the Board of Education "after discussing a five-year old full kindergarten program [considered] a motion... to eliminate the two half-day kindergarten program in favor of a full day five year old kindergarten program as ... more educationally sound ... ". (Exhibit R-C). The motion passed by a roll call vote of 4 yes and 1 no.

The K/4 kindergarten program had been taught by Ms. Labin in school year 1998-99; Ms. Giordano taught the K/5 program. Ms. Giordano, a tenured kindergarten teacher, met with Superintendent Johansen in April 1999 to inquire whether the K/5 program was to become a full-time class "anytime in the future." Upon Giordano being told by Johansen that full-time kindergarten for 5 year olds "would not happen for two or three years," Giordano tendered her resi g n ation to Johansen. (Exhibit P-C). Giordano's resignation was "accepted with regrets" by the board of education at its meeting of April 26, 1999 (Exhibit R-A). Ms. Labin, a non-tenured teacher, was hired for the full-time kindergarten program.

After the hearing on petitioners' motion for emergent relief, the school district, pursuant to item 5.0 - "Discussion on creating a full-day kindergarten program and eliminating the KI program. Action will be taken. "the published agenda for its meeting of October 7, 1999 (Exhibit R-G), re-adopted the resolution to eliminate the "part-time pre-kindergarten [K/4] and pan-time kindergarten [K/5]" and provide "a full day kindergarten program." (Exhibit R-H). The board of education also ratified its actions of June 2L

ANALYSIS AND DISCUSSION

Petitioners submitted affidavits of Sharon Voisine (Exhibit P-E) and A. Samantha Kelly (Exhibit P-F), „Titten statements of Rosemary King (Exhibit P-6) and Rosemary Walsh (Exhibit P-H), a letter written by Audrey Ivancich to Board of Education President Patrick Kelly (Exhibit

P-K), a report published by the National Association for Education of Young Children (Exhibit P-I), several newspaper articles (Exhibit P-J), a transcript of Superintendent Johansen's testimony during his cross-examination by Mr. Rodgers (Exhibit P-L), and the list of Ocean County communities which have pre-school programs (Exhibit P-M). At the outset it is necessary to consider whether the contents of the aforesaid exhibits, if accurate, are material to the outcome of this matter. "When deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Insurance Company of America,* 142 *NJ* 520,523 (1995).

A board of education has the power and duty to "perfom1 all acts and do all things... necessary for the lawful and proper conduct, equipment and maintenance of the public schools of [its] district" *N.JS.A.* 18A: 11-1 (d). "The board of education may establish a kindergarten sch9ol or ... department ... and may admit to such kindergarten ... any child over the age of four and under the age of five and shall admit to such kindergarten ... any child over the age of five and under the age of six years old who is a resident of the district." *N.JS.A.* 18A:44-2. In its use of the words "may" and shall in legislation authorizing the establishment of a kindergarten, the Legislature clearly differentiated the mandatory kindergaiien programs for children five years of age which boards of education shall establish from the kindergarten programs for four year,old children which boards of education are pem1itted to establish, at the board's discretion. Neither the statutes nor the Constitution of the State of New Jersey mandate a free public education for a child under the age of five years although, pursuant to *N.JS.A.* 18A:7F-1 6, regulation, and at the cost of the State the Department of Education, all three-and four-year old children the Abbott District Urban Reform program are to offered a half-day preschool program *(N.JA.C.* 9:19A-3.3(a)). Beach Haven is not an "Abbott" district.

Petitioners argue that the school district's decision was arbitrary, capnc1ous or unreasonable and therefore receivable under *Parsippany-T'oy Hills Education Association v. Board of Education of Parsippany-Troy Hills Township,* 188 *NJ Super.* 151 (App. Div. 1983).

Petitioners submit in their brief that the school district made "its long-term policy decision" to expand the K/5 program to a full day and to eliminate the half-day K/4 program "long before April 1999." And the resignation of Giordano afforded the convenient opportunity to the school district to implement its decision. The decision of the school district was not motivated by the lack of educational benefit of the half-day K/4 program (which is conceded to be of educational value), nor by its conclusion that a full day K/5 program was educationally sounder than a half-day K/5 program (also acknowledged to be accurate), but rather by the school district's consideration of personnel and finance factors. Is the school district precluded from effecting "its long-tenn policy decision" because of the opportunity to avoid a reduction in personnel and not over spend its budget? It is for these reasons that I **CONCLUDE** that petitioners' aforementioned exhibits do not raise issues of material fact.

I CONCLUDE that the petitioners have not affirmatively demonstrated that the school district's decision was arbitrary, capricious or unreasonable. I **CONCLUDE** that a board of education is pennitted the discretion to consider sound economics and business principles as may be necessary for the lawful and proper conduct of the schools in its district insofar as the abolition of the K/4 program.

That Giordano may have had good cause to file and prosecute a grievance to retain her tenured status in the new kindergarten program is not an affirmative demonstration of arbitrary, capricious or unreasonable conduct by the school district.

Petitioners submitted a copy of the 1999-2000 school budget as approved by the voters of Beach Haven with their motion for emergent relief (Marked P-8). I cannot find a specific appropriation for the K/4 or K/5 kindergarten program. The school district's recitation and reliance upon *N.J.S.A.* 18:22-8.1 and 8.2 without response by petitioners leads to the presumption that petitioners believed that the K/4 was to be funded as a general fund expense authorized at *N.J.S.A.* 18A:44-4:

> The expenses of preschools or . . . kindergarten schools or departments shall be paid out of any moneys available for the general fund expenses of the schools, and in the same manner and under the same restrictions as the expenses of other schools or

> departments are paid, except when wholly or partly subsidized by restricted funding sources or restricted endowments.

Unless prohibited at *N.J.S.A.* 1SA:22-8.2, a board of education may transfer amounts in its budgets among line items and program categories of the budget as the board of education deems necessary. *N.J.S.A.* 1SA:22-8. L "Early childhood program aid" was not listed in the 1999-00 budget among the sources of revenue available for budget purposes *(N.J.S.A.* 18A:22-8(a)(3), and therefore I **CONCLUDE** the board of education was authorized to make such transfer, if any, as might be necessary to operate the full day kindergarten program.

I **CONCLUDE** that it is no longer necessary to consider whether the school district violated the terms of the open Public Meeting Act *(N.J.S.A.* 10:4-6 *et seq.)* when it considered the elimination of theK/4 program without including the same in its agenda (Exhibit P-B). Adequate notice of the board of education's intent to consider the elimination of the K/4 program was provided in the agenda published for the October 7, 1999 meeting (Exhibit R-G).

ORDER

Accordingly, it is **ORDERED** that the respondent school district's motion for summary decision dismissing petitioners petitioner is **GRANTED.** It is further **ORDERED** that the petition in this matter is **DISMISSED.**

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

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

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

Juu ,1t:J99 1
DATE

Anthony D'Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

12/3/99
DATE

DIVr+
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 t999
DATE

Barbara A t.A}_ . A
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

For petitioner:

P-A Petition

P-B Agenda for June 21, 1999 meeting of Beach Haven Board of Education

P-C Affidavit of Terry Giordano (11/3/99)

P-D Affidavit of Terry Giodano (11/3/99)

P-E Affidavit of Sharon L. Voisine (8/25/99)

P-F Affidavit of A. Samantha Kelly (8/26/99)

P-G Statement of Rosemary King

P-H Statement of Rosemary Walsh

P-I Report of National Association for Education of Young Children (1996)

P-J The Star Ledger editorial (10/27/99), and 3 newspaper articles

P-K Letter from Audrey Ivanich to President of Beach Haven Board of Education (10/7/99)

P-L Transcript of cross-examination testimony of Superintendent Eric Johansen (8/26/99)

P-M Survey of pre-school programs in Ocean County communities

For respondent:

R-A April 26, 1999 Minutes of Beach Haven Board of Education meeting

R-B May 24, 1999 Minutes of Beach Haven Board of Education meeting

R-C June 21, 1999 Minutes of Beach Haven Board of Education meeting

R-D Report of Dr. Ruth Adams with suppoliing documentation purported to have been presented on June 21, 1999

R-E Petition

R-F Order Denying Emergency Relief (8/27/99)

R-G Agenda for Beach Haven Board of Education meeting on October 7, 1999

R-H Resolution to eliminate paii-time Pre-kindergarten and part-time kindergarten programs and provide full day kindergaiien program

R-I Letter from Acting Commissioner Douglas B. Groff to petitioner (8/9/99)

OAL DKT. NO. EDU 6647-99
AGENCY DKT. NO. 239-8/99

LYNN P. SHERMAN *ET AL.,*	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to **N.J.A.C.** 1:1-18.4. The Board's reply exceptions, upon granting of an extension, were likewise timely filed.

Petitioners except to the Administrative Law Judge's (ALJ) conclusion that numerous exhibits submitted in opposition to the Board's Motion for Summary Decision did not raise issues of material fact to demonstrate affirmatively that the Board's action to eliminate the preschool program for four-year-old children (K/4) was arbitrary, capricious and unreasonaole. They also except to the ALJ's failure to consider the Giordano grievance an affirmative showing of arbitrary, capricious and unreasonable action by the Board. Petitioners further object to the ALJ's "interpretation of the budget and the application of funds," arguing, *inter alia,* that if the Board has a surplus of $75,000, there is no economic reason that the Board should not or could not keep the four-year-old program. (Petitioners' Exceptions at 7-8) Lastly, petitioners take

exception to the AU's failure to rule that the Board was in violation of the Open Public Meeting Act (OPMA), at least until October 7, 1999.

The Board's reply exceptions urge affirmance of the ALJ's recommended decision, averring that all of petitioners arguments, except for the one relative to a $75,000 surplus, merely rehash arguments properly rejected by the ALJ. Moreover, the Board argues that the exception alleging that the Board's actions were not based on sound economic and business principles because the District has a $75,000 surplus should not be permitted to be raised at this juncture because "[t]his allegation and its implication transgresses the well established principle that an administrative tribunal's decision must be based upon evidence that is part of the established record." (Reply Exceptions at 1-2) It further argues, *inter alia,* that:

> The amount of undesignated general fund balances, commonly known as surplus funds, is regulated by law.*** For example, *N.J.S.A.* 18A:7F-7 requires local boards, like Beach Haven, to designate at least 6% of its budget or $75,000 (whichever is greater) as surplus funds. **N.J.A.C.** 6: 19-2.5 also mandates that local boards estimate the amount of surplus funds a year in advance.
>
> The use of surplus, on the other hand, is regulated by law only if the surplus exceeds the statutory limit. Specifically, N.J.S.A. 18A:7F-7c provides that if Beach Haven's surplus exceeds the 6% or $75,000 limit, the excess must be reserved and designated in the following year's budget. Aside from these requirements, the use of surplus is a matter of board discretion. *(Id.* at 2)

Upon thorough consideration of the record of this matter, the Commissioner agrees with and adopts as his own the ALJ's recommended decision granting the Board's Motion for Summary Decision for the reasons set forth in the Initial Decision, except as noted below. After comprehensive review of the entire record, the Commissioner concludes that the ALJ properly applied the standard for summary decision as set forth by the court in *Brill, supra,* and,

therefore, adopts the ALJ's conclusions that no genuine issues of material fact exist in the matter which would require a plenary hearing.

The Commissioner further concludes that the ALJ correctly determined that petitioners have failed to show that the decision to eliminate the K/4 preschool program was arbitrary, capricious and unreasonable. *N.J.S.A.* 18A: 11-1 grants a board of education broad discretionary powers to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." Thus, the Board herein had the discretionary authority to abolish the half-day program for four-year-old children and create a full-day kindergarten program. Further, it is well-settled law that when a board acts within its discretionary authority, its decision "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable." *Thomas v. Bd. of Ed. of Morris Tp.,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966).

The standard of review for determining whether or not a board of education action was arbitrary, capricious or unreasonable is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey courts states:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. ***Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *(Bayshore Sew. Co. v. Dep't. of Env., N.J.,* 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974) (citations omitted)

In applying this standard to the instant matter, the Commissioner finds and determines that the record does not establish that the Board herein took willful or unreasoning action, without consideration and in disregard of the circumstances. On the contrary, it shows that the Board acted based upon educational and economic reasons, notwithstanding petitioners' arguments to the contrary regarding a $75,000 surplus they allege exists. Further, upon review of the parties' arguments and the documentary evidence in support thereof, the Commissioner agrees with the ALJ's conclusion that the Giordano grievance is not an affirmative demonstration of arbitrary, capricious and unreasonable conduct by the Board.

Consequently, the Commissioner agrees with the ALJ that the Board's abolishment of the preschool (K/4) program was a proper exercise of its discretionary authority. Notwithstanding this holding, however, the Commissioner believes that petitioners raise legitimate concerns about the adequacy of notice provided to the public about the possible elimination of the preschool program, given that the agenda for the June 21, 1999 meeting merely stated that there would be discussion of all-day kindergarten.

On the issue of the OPMA and adequate notice, the Board argues, *inter alia,* that:

> The [OPMA] entitles the public to be present at a meeting, however, it does not mandate or guarantee public participation. A board of education retains the right to permit, prohibit or regulate active public participation at any meeting. *N.J.S.A.* 10:4-12a.
>
> Here, the Board exercised this right and permitted public discussion of [the controverted] issue at two board meetings. (Exhibits B - Board minutes of May 24, 1999, and C - Board minutes of June 21, 1999.) Thus, Petitioners' allegations that the Board violated the Act when it failed to allow public discussion are blatantly false. Accordingly, this claim must fail.
>
> ***At the May 24th Board meeting, four members of the public commented about the preschool program during the public discussion portion of the meeting. Exhibit B. Twelve people spoke

at the June 21st meeting. Exhibit C. *** (Brief in Support of Respondent's Motion for Summary Judgment, at 9-10)

Moreover, while the Board argues that petitioners have failed to establish an OPMA violation, it is clear from the record that the Board recognized the need to take action to address any possible violation of the OPMA. Of this, the Board states:

> At the emergent relief hearing, [the ALJ] commented that he believed the agenda notice for the June 21, 1999 meeting did not comply with the pirit of the Sunshine Law. Item 7.1 of the June 21, 1999 agenda provides: "Discussion: All day Kindergarten." The Judge stated that this did not adequately inform the public that action would be taken to eliminate the preschool program.
>
> The Sunshine Law does not require agenda information to be published for regularly scheduled meetings. (Citations omitted) However, if an agenda is voluntarily published, it must be complete and adequately disclose what matters are to be considered. ***Based upon the Judge's comments, the Board sought to take corrective action pursuant to *N.J.S.A.* 10:4-15a. This statutory provision states:
>
> > Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person ***provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section ...
>
> Accordingly, a special meeting was held on October 7, 1999. The Board published a new agenda which specifically states that the Board would discuss creating a full day kindergarten, and eliminating the preschool program, and action would be taken.***This corrective action effectively positions the Board in full compliance with the Act. *(Id.* at pp. 10-11) *See also* August 26, 1999 Transcript at 95-96.

Upon review the record on the issue of notice, the Commissioner determines that, even though the Board may have been in technical compliance with the requirements of OPMA through its publication of an agenda including full-day kindergarten as an item of discussion (7.1 Discussion: All day kindergarten), it failed to honor the intent of the law by wording the agenda in such a way that the public could not have reasonably been expected to realize that elimination of the preschool program would be discussed as part of that item. Thus, the Board effectively precluded the public from having sufficient notice of the discussion so as to enable all interested persons to attend the meeting in question. Notwithstanding this determination, however, the Commissioner agrees with the ALl that there is no basis upon which to grant the relief sought by petitioners to reinstate the preschool program, given that the Board took official action on October 7, 1999 to ratify an action, otherwise lawful, to discontinue the preschool (K/4) program and create a full-day kindergarten program. However, the Borough of Beach Haven Board of Education is cautioned that it must at all times and in all matters adhere to the OPMA, not just in terms of technical compliance, but also in terms of the law's intent.

Accordingly, for the reasons set forth in the Initial Decision as elaborated herein, the Board's Motion for Summary Decision is granted and the Petition of Appeal is dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 18, 2000
Date of Mailin January 19, 2000

30-00

EDU #6647-99
C# 30-00
SB# 15-00

LYNN P. SHERMAN ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 18, 2000

For the Petitioners-Appellants, John F. Rodgers, Jr., Esq.

For the Respondent-Respondent, Capehart & Scatchard (Kim C. Belin, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We stress in so doing that our decision, which is based upon the facts in this particular matter, does not in any way diminish our support for preschool programs.

June 7, 2000

Date of mailing JUL 05 2000

G.E.A., on behalf of minor child, J.G.A., :

:

PETITIONER,

:

V. : COMMISSIONER OF EDUCATION

:

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, : DECISION ON REMAND

:

RESPONDENT. :

:

SYNOPSIS

Petitioning parent contested the Board's residency determination. The Board sought the appropriate amount of tuition due and owing for the time petitioner's son attended its schools illegally. The ALJ previously concluded that, as a matter of law, petitioner was not a bona fide resident of the City of Atlantic City from October 1997 through June 1998, petitioner's son was not entitled to a free public education at Atlantic City High School during that period and tthe Board was due the educational cost for the education provided J.G.A. from October 1997 through June 1998. The petition was dismissed. The Commissioner concurred with the ALJ that petitioner was responsible for the tuition payment to the Board for J.G.A.'s educational expense for the period J.G.A. was a nonresident pupil in the Board's school but remanded the matter to OAL for calculation of the tuition due.

On remand the ALJ determined that petitioner owed respondent $9,149.40 for 153 days of ineligible attendance at Atlantic City High School during the 1997-98 school year. The Commissioner adopted the recommended decision of the ALJ for the reasons expressed therein, noting that petitioner's exceptions contest the finding of petitioner's son's ineligibility for a free education at Atlantic City High School, a threshold issue which remand of the matter for tuition calculation did not serve to reopen.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2004-99

(ON REMAND EDU 4297-98)

AGENCY REF. NO. 77-3/98

G.E.A. ON BEHALF OF MINOR CHILD, J.G.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

G.E.A., parent of J.G.A., petitioner appearing *prose*

Michael Epps, Esq., respondent

Record Closed: October 7, 1999 Decided: November 24, 1999

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand from the Commissioner of Education (Commissioner) subsequent to this administrative tribunal having issued an initial decision wherein it was determined that petitioner was not a bona fide resident of the City of Atlantic City from October 1997 through June 1998. The undersigned concluded that petitioner's son, J.G.A., was not entitled to a free public education at Atlantic City High School during that period and, therefore, was subject to the payment of appropriate tuition for his education. The Commissioner concurred with the initial decision that petitioner was responsible for the tuition payment to the Atlantic City Board of Education (Board) for the period J.G.A. was a nonresident pupil in the Board's school. The Commissioner could not, however, agree that dismissal of the petition was appropriate because the amount of the tuition costs petitioner was required to pay the Board had not been calculated and, therefore, remanded the matter for a determination of the amount of tuition due to the Board.

On May 6, 1999, a prehearing conference was held at which, among other things, the issues to be determined were agreed upon and a hearing date was established. The hearing was held on July 16, 1999, at the Atlantic City OAL, Adantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record remained open in order for the Board to submit its 1997-98 school calendar. The hearing record closed on October 7, 1999, after the Board's submission.

FINDINGS OF FACT

Pursuant to the school calendar for the Atlantic City Public Schools for the 1997-98 school year, the pupils enrolled in the Board's schools were scheduled to be in attendance 180 days between September 8, 1997 and June 23, 1998. The record shows that petitioner J.G.A. attended the Board's schools as a nonresident pupil from late October 1997 through June 1998. Thus, providing petitioner with all favorable inferences, the period of calculation shall begin on October 21, 1997, the third week in October and continue through June 23, 1998, the last day pupils were required to be in attendance at school.

The Board's Business Administrator/Board Secretary submitted sworn Affidavit which shows that the tuition for the 1997-978 school year to be $10,764. Using the $10,764 tuition cost and dividing that amount by 180, it is found that the daily tuition cost for 1997-98 to be $59.80. Applying the 27 days for September and October when, presumably petitioner was a resident pupil in the Board's schools, petitioner is therefore credited with $1,614.60 against the total tuition cost of $10,764. Subtracting the $1,6 I4.60 from the $I0, 764, it is found that petitioner owes the Board the amount of $9,149.40 for the tuition of J.G.A. as a nonresident pupil for the 1997-98 school year.

ORDER

Accordingly, it is **ORDERED** that G.E.A. reimburse the Board the amount of $9,149.40 for the tuition of J.G.A., a nonresident pupil attending the Board's schools, for the 153 days J.G.A. attended the Board's schools during the 1997-98 school year.

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

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

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

24 November 1999
DATE

Md- 6.
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12-1-27
DATE

DEPARTMENT

Mailed to Parties:

DEC 2 1999
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

G.E.A.

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Statement by the Board's Business/Administrator/Board Secretary

R-2 Affidavit of the Board's Business/Administrator/Board Secretary

R-3 School Calendar for 1997-98 school year

OAL DKT. NOS. EDU 2004-99 and EDU 4297-98 (On Remand)
AGENCY DKT. NO. 77-3/98

G.E.A., on behalf of minor child, J.G.A.,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

This matter was remanded to the OAL for the sole purpose of determining the specific amount of tuition owing to respondent as a result of the Commissioner's decision, issued on March 10, 1999, in which it was determined that petitioner was not domiciled in Atlantic City from October 1997 through June 1998, thus making his son ineligible to attend Atlantic City High School free of charge. In his exceptions, petitioner does not set forth any specific exceptions to the amount of tuition the Administrative Law Judge (ALJ) determined was owing in this matter; rather, petitioner pleads that the Commissioner not assess him tuition costs due to a myriad of circumstances and adversities which, in petitioner's view, militate against such assessment.

While-petitioner eloquently states his position, it must be emphasized that the *only* issue on remand which may properly be before the Commissioner at this time is the amount of tuition owed because, as indicated above, a final decision on the threshold issue of petitioner's son's ineligibility for a free education at Atlantic City High School was already reached by the Commissioner in March 1999. Remanding of the matter for tuition calculation did not serve to reopen that threshold issue.

Accordingly, the Al.J's recommended decision ordering that petitioner reimburse respondent the amount of $9,149.40 for 153 days of ineligible attendance at Atlantic City High School during the 1997-1998 school year is adopted by the Commissioner for the reasons set forth in the Initial Decision on Remand.'"

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

• This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* lSA:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.
Jar:uary 18, 2000
Jate o,f Mailing, January 19, 2000

31-00

EDU # 6138-98
C # 140-00
SB # 31-00

IN THE MATTER OF THE TENURE HEARING OF NEAL A. ERCOLANO, SCHOOL DISTRICT OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,

AND

NEAL A. ERCOLANO,

RESPONDENT/PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY.

PETITIONER/RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Remanded by the Commissioner of Education, June 25, 1998

Decision on Motion by the Commissioner of Education, April 17, 2000

Decided by the Commissioner of Education, May 1, 2000

For the Respondent/Petitioner-Cross/Appellant, David B. Rubin, P.C. (David B. Rubin, Esq., of Counsel)

For the Petitioner/Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (John F. Croot, Jr., Esq., of Counsel)

The matter now before us involves an appeal and a cross-appeal from a decision by the Commissioner of Education that directed that Neal A. Ercolano (hereinafter "respondent") be dismissed from his tenured employment as a sixth-grade teacher in

Branchburg and that he be paid back salary for a portion of the period of his suspension commencing in February 1998. The tenure charges that led to the Commissioner's directive of dismissal had their genesis in an incident that resulted in the respondent's conviction in municipal court for simple assault. In addition to the tenure charges, the respondent's conviction also led the district board to seek the forfeiture of his position under N.J.S.A. 2C:51-2. This added to the procedural complexity of the matter now before us.

Both the municipal court proceedings and the tenure charges stemmed from a single incident that occurred on January 17, 1996. That incident involved a sixth-grade student who was out of his classroom without permission. The student was running in the hallway when physical contact occurred between the respondent and the student. On October 10, 1996, the student's mother filed an assault charge in municipal court against the respondent.

On April 23, 1997, a trial was conducted before the Honorable William T. Kelleher. After hearing the testimony of the witnesses, Judge Kelleher found that the respondent had grabbed the student, pushed him against the wall and placed him in fear of bodily harm. Judge Kelleher therefore found that the respondent was guilty of simple assault in violation of N.J.S.A. 2C:12-1(a).

On June 16, 1997, the Board of Education of the Township of Branchburg (hereinafter "Board") voted to withhold the respondent's salary increments for the 1997-98 school year based on the assault conviction. On September 2, 1997, the Board certified tenure charges against the respondent and suspended him without pay.

Prior to certifying the tenure charges, the Board had asked the municipal court to declare a forfeiture of the respondent's position pursuant to N.J.S.A. 2C:51-2(a)(2). However, when the court was informed that tenure charges had been filed, the court declined to exercise jurisdiction over the forfeiture issue.

On September 9, 1997, the respondent petitioned the Commissioner seeking restoration of his increment.

On December 18, 1997, the parties participated in a telephone conference with the Administrative Law Judge ("ALJ") assigned to hear the tenure charges. In a letter dated December 19, 1997, David B. Rubin, Esq., counsel for the Board, memorialized the ALJ's directives from that conference. The first directive was to consolidate the respondent's challenge to the withholding of his increment with the tenure matter. The other three directives involved resolving the forfeiture issue and, related thereto, addressed the question of a stay of the Board's obligation to continue to pay the respondent's salary. As set forth in Mr. Rubin's letter:

> 2. Before ruling on the Board's forfeiture motion, [the ALJ] has afforded [respondent] thirty days to ask the Attorney General or the Somerset County Prosecutor to apply to the Branchburg Municipal Court to waive the mandatory forfeiture provisions of the statute. If they decline to make that application [the ALJ] would then proceed to rule on forfeiture.
>
> 3. If such an application is made to the Municipal Court, all proceedings before [the ALJ] will be stayed until the Municipal Court rules on that application or otherwise relinquishes jurisdiction.
>
> 4. In the meanwhile, the Board's obligation to continue Mr. Ercolano's salary will be stayed effective January 17, 1998 and until the forfeiture issue is disposed of by either [the ALJ] or the Municipal Court Judge.

By letter dated January 20, 1998, the Somerset County Prosecutor's Office advised that it had decided not to apply for a waiver of forfeiture. By letter of February 20, 1998, the State Attorney General's Office advised that it had also determined not to apply for such waiver.

The record closed on February 27, 1998, and, on April 7, 1998, the ALJ issued her initial decision, holding that respondent had forfeited his position.

On June 25, 1998, the Commissioner rejected the ALJ's determination, finding that the ALJ did not have jurisdiction over the forfeiture issue. Accordingly, the matter was remanded to the ALJ for disposition on the merits.

On March 13, 2000, the ALJ granted the Board's Motion for Summary Decision, recommending that the tenure charges against the respondent be sustained and that he be dismissed from his tenured position. The ALJ also directed that the respondent's back salary be paid retroactive to February 27, 1998.

On May 1, 2000, the Commissioner adopted the ALJ's initial decision.

The Board then appealed to the State Board of Education from the Commissioner's determination that the respondent was entitled to salary payments retroactive to February 27, 1998. Respondent cross-appealed from that portion of the Commissioner's decision sustaining the tenure charges and directing his dismissal.

Adding to the procedural complexity of this matter, the Board, following the Commissioner's determination of June 25, 1998 that he did not have the authority to declare a forfeiture of the respondent's position, renewed its motion seeking such declaration from the municipal court. After reviewing the matter, the municipal court

judge entered an order declaring a forfeiture, effective as of the date of the respondent's conviction.

Respondent appealed to the Law Division from the municipal court's determination. The Law Division reversed the municipal court's order of forfeiture, concluding that a district board did not have the authority to seek a declaration of forfeiture.

The Board then appealed to the Appellate Division from the Law Division's determination. As a result of that appeal, on November 28, 2000, the Appellate Division reversed the Law Division's determination and held that a district board does have the authority under N.J.S.A. 2C:51-2(g) to seek an order of forfeiture. In its decision, the Appellate Division also reinstated the municipal court's order declaring a forfeiture of respondent's employment, effective April 23, 1997, the date of his conviction. The respondent sought review of the Appellate Division's decision from the New Jersey Supreme Court. However, on March 20, 2001, the Supreme Court denied his petition for certification.

The Board then filed a motion with the State Board of Education, seeking dismissal of the matter before us on the grounds that both the appeal and cross-appeal are now moot by virtue of the judicial resolution of the forfeiture issue. No response to the motion was submitted on behalf of the respondent.

We agree with the Board that the Appellate Division's decision renders moot both the appeal and the cross-appeal in this matter. That decision settles that termination of respondent's tenured employment was proper. Further, in that the effective date of the forfeiture of respondent's employment, April 23, 1997, predates the certification of the

tenure charges against him and his suspension on September 2, 1997, there is no basis upon which he can claim salary for any portion of his suspension.

We therefore grant the Board's motion and dismiss the appeals in this matter.

June 6, 2001

Date of mailing JUN 08 2001

32-00

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.P. AND R.P., parents of E.P., a minor child,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought tuition payment of $7,637.66 for the period of time during the 1998-99 school year that respondents' son was ineligible, pursuant to *N.J.S.A.* 1SA:38-1, to attend school free of charge in petitioner's District.

Respondents having failed to answer the allegations in the petition, the Commissioner deerried such allegations to be admitted. The Commissioner granted summary decision to the Board and ordered respondents to pay tuition in the amount of $7,637.66 for the period of time in which their son was ineligible for a free education in petitioner's District.

January 19, 2000

AGENCY DKT. NO. 263-8/99

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.P. AND R.P., parents ofE.P., a minor child,	:	DECISION
RESPONDENTS.	:	
	:	

For Petitioner: Ellen Marie Walsh, Esq. (Fogarty & Hara)

This matter, having been brought before the Commissioner of Education by the Board of Education of the Township of Wayne (Board) by way of a Petition of Appeal filed on August 30, 1999, requesting that respondents be ordered to pay the Board tuition in the amount of $7,637.66; and

Whereas, respondent parent, E.P, having been served with the petition by the Board on August 27, 1999 and respondent parent, R.P, having been served with the petition by the Board on September 28, 1999; and

Whereas, the Commissioner having sent to each respondent two separate notices directing that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6:24-1.4; and

Whereas, the Commissioner having notified Respondent E.P. by regular and certified mail on October 5, 1999, and Respondent R.P. by regular and certified mail on December 9, 1999, that if an Answer was not submitted, each count of the petition would be deemed admitted and the

matter would then be decided on a summary judgment basis pursuant to the Commissioner's authority granted by *N.J.A.C.* 6:24-1.4(e); and

Whereas, there is no indication that respondents did not receive such communications; and

Whereas, neither of the respondents, nor any attorney on their behalf, has filed an Answer to the charges against them; thus, each count of the charges against respondents having been deemed to be admitted; and

Whereas, the Commissioner's review of the petition indicates that; (1) respondents' son, E.P., attended the Board's Packanack Lake School commencing on or about September 30, 1998; (2) in or about April 1999, E.P.'s teachers began to suspect that he was not residing with his father in Wayne but with his mother in Paterson; and (3) the Board's attendance officer conducted an investigation which lead to the Board's voting to disenroll E.P.; and

Deeming such charges to be admitted in the absence of an Answer being submitted by either of the respondents, the Commissioner finds that respondents' son was ineligible, pursuant to the provisions of *N.J.S.A.* 18A:38-1, to attend school free of charge in the Wayne School District for the period of time during the 1998-99 school year as set forth by the Board herein; now, therefore

IT IS ORDERED on this 20th day of January 2000, that summary decision shall be granted to the Board of Education of Wayne Township and that respondents spall pay tuition in the amount of $7,637.66, as requested by the Board, for the period of time in which their son, E.P., was ineligible for a free education in the Wayne Township School District.*

COMMISSIONER OF EDUCATION

January 19, 2000
Date of Mailing, January 20, 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Bonrd of Education pursuant to ***N.J.S.A.*** 18A:6-27 *et seq.* and ***N.J.A.C.*** 6:2-Ll *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

34-00

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

SYNOPSIS

Petitioner, a nontenured fourth-grade teacher, appealed the District's suspension and ultimate termination of her employment for unprofessional and inappropriate conduct.

After hearing testimony, the ALJ found that petitioner engaged in a tug-of-war with a student who attempted to sit after being directed by petitioner to stand in class, resulting in the student falling down, and permitted an uncle of a female student to administer a beating to the student in her presence, failing to inform the school principal or the State Division of Youth and Family Services of the beating incident. The ALJ rejected petitioner's contention that the District improperly denied her due process by failing to provide her with an investigation or hearing prior to her dismissal, noting that, pursuant to established law, the decision to terminate petitioner was within the District's discretion and, as a nontenured teacher, petitioner was only entitled to a statement of the reasons for her dismissal. Here, the District investigated the incidents, concluded that they had occurred and provided petitioner with a statement of the reasons for her dismissal, the receipt of which petitioner did not dispute. Thus, the ALJ dismissed the petition and recommended referral of this matter to the State Board of Examiners, pursuant to *N.J.A.C.* 6: 11-3 .6, based on her finding that petitioner testified untruthfully at the hearing.

The Commissioner agreed with and adopted as his own the recommended decision of the ALJ for the reasons well expressed therein and ordered a copy of this decision to be forwarded to the State Board of Examiners.

State of New Jersey
OFFICE OF **ADMINISTRATIVE LAW**

INITIAL DECISION
OAL DKT. NO. EDU 1509-96
AGENCY DKT. NO. 490-12/95

LYDIA ANDERSON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eugene G. Liss, Esq., for the petitioner

Perry L. **Lattiboudere,** Esq., for the respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: August 16, 1999 Decided: September 29, 1999

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

PROCEDURAL HISTORY

On or about December 29, 1995, petitioner, Lydia Anderson, filed a petition of appeal with the Commissioner of Education alleging that respondent improperly removed her as a teacher in violation of the New Jersey tenure statutes and without due process. She sought reinstatement to her position as a teacher. On February 2, 1996, the Department of Education, Bureau of Controversies and Disputes, transmitted

this matter to the Office of Administrative Law as a contested case pursuant to *N.J. S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on February 26, 1996, and a telephone prehearing conference was scheduled for May 2, 1996. On that day, the issues were isolated. The parties identified the issues as whether petitioner was entitled to tenure in her position and whether respondent violated petitioner's tenure rights by terminating petitioner without complying with the tenure statute, *N.J.S.A.* 18A:6-11. The parties contemplated filing cross-motions for summary decision. Counsel failed to comply with the time frames established in the prehearing order for motions to be filed, because petitioner was also litigating the same issues in other forums. Subsequently, counsel for petitioner requested that hearing dates be established. As a result of conferences held with counsel, the parties agreed that petitioner is not a tenured teacher. Thus, the issue to be determined was whether petitioner received the rights to which she was entitled on termination. The parties agreed to a briefing schedule. Thereafter, counsel failed to file a joint stipulation of facts and comply with the briefing schedule; counsel indicated that a hearing would be necessary. The parties were unavailable for a hearing in December 1997 and a hearing was scheduled for August 6, 7, 10 and 11, 1998. Settlement discussions were held on August 6, 1998. A settlement was not reached, and the matter was heard on August 10 and 11, 1998. As a result of petitioner's conduct at the hearing, the case remained open. Settlement discussions were held with counsel and respondent mqved to dismiss petitioner's complaint. The undersigned judge held a hearing on March 26, 1999, during which respondent's motion to dismiss was denied and additional evidence was submitted. The record closed after the submission of briefs.

TESTIMONY

Lydia Anella Anderson was employed by the Newark Board of Education as a fourth-grade teacher. She taught a self-contained classroom at Bragaw Avenue School. She became a United States citizen on June 5, 1996.

The District's determination to remove petitioner was based upon two incidents that allegedly occurred in petitioner's fourth-grade classroom. Specifically, the District alleged that on October 26, 1995, petitioner directed two students to stand in class and subsequently engaged in a tug-of-war with student D.M. when the student attempted to sit. This action by petitioner resulted in the student falling down. Further, the District alleged that on November 15, 1995, petitioner permitted an adult relative (uncle) of a female student, S.J., to administer a beating to the student in her presence. Petitioner failed to inform the school principal or the State's Division of Youth and Family Services (DYFS) of this beating incident. As a result, on November 22, 1995, the District suspended petitioner with pay pending an investigation of her conduct regarding these two incidents.

Petitioner testified that on November 22, 1995, the principal gave her a letter of suspension (J-1) and told her to leave the building. When she received the letter of suspension, she did not know what the suspension was for. She was terminated, by letter dated December 14, 1995 (J-2), which was mailed to her home. She testified that from November 22, 1995, to December 14, 1995, she had no discussions with either the principal or the assistant superintendent. No one asked for her explanation of the charges, nor did anyone advise her of when the Board would make a determination. She provided a handwritten statement regarding the November 15 incident to principal Wilma Findley on November 15, 1995 (J-5), prior to receiving Ms. Findley's request for a written statement, dated November 16, 1995 (J-3). She provided a typed statement the first school day after November 16 (J-4).

In regard to the November 15, 1995, incident, Anderson contended that she had not seen student S.J. being beaten by her uncle because she was helping another student at the time. She heard a belt hitting a coat. Although a union member, Anderson could not recall if she spoke to a union representative after receiving the December 14 letter. She could not recall if she filed a grievance, but agreed that she had not filled out a form.

On questioning by the undersigned, Anderson indicated that she gave the typewritten version of her statement regarding the November 15, 1995, incident to Ms. Findley on November 17. The November 15 date on the statement referred to the date of the ineident. The date on the handwritten version also refers to the date of the incident, November 15. She sent that letter to Ms. Findley shortly after the incident.

Carolyn King, a substitute teacher employed by respondent who was assigned to the classroom next to petitioner's, testified that she was asked about the November 15 incident after Anderson's termination. She said that she also received a letter from Ms. Findley (which she did not have with her at the hearing) asking her to submit a statement about what had occurred. She provided a written response stating that she was unaware of the incident. She was not questioned any further.

Next to testify was student S.J., who was eleven and one-half years old when she testified. She recalled that petitioner was her fourth-grade teacher. S.J. said that her uncle came to Ms. Anderson's class and that an incident occurred between her and her uncle. She stated that no adult asked her about the incident, and that she did not have a meeting with Ms. Findley regarding the incident. A few days after the incident, Principal Findley and S.J.'s uncle talked while she was standing across the hall. Both she and her uncle told her father about the incident. Her father was the only person she told about it.

Elbert Louis McClain testified that he went to Bragaw Avenue School on November 15, 1995, after Ms. Findley called him to say that his niece, S.J., was disrupting the class. Findley explained that she wanted him to talk to S.J.'s teacher, Ms. Anderson. A discussion ensued outside Anderson's classroom among Ms. Anderson, S.J., Findley and McClain. Findley left at the conclusion of the discussion. S.J. put her feet up on the wall and dirtied it. McClain requested that S.J. clean up the wall. A couple days later he had a fifteen-minute discussion with Ms. Findley in Findley's office, during which Findley asked him what had occurred on November 15.

In an effort to rebut the above testimony, respondent offered the testimony of Robert Livingston Copeland, assistant superintendent of School Leadership Team III. At the time of the incidents in question he was acting assistant executive superintendent, responsible for the general administration of sixteen schools located primarily in the South Ward of the city of Newark. In November 1995 he became aware of several incidents involving Ms. Anderson. He recalled having discussions with Principal Findley about an incident involving a tug-of-war over a chair or a desk and an incident involving leaving students unsupervised. In regard to the tug of-war, he recalled that a special assistant met with the parent of the child that was involved. He referred to a note taken by one of his special assistants regarding this incident (R-2). He did not recall receiving a request for a written statement regarding the November 15 incident or discussing that incident with Ms. Findley. He recalled discussing Anderson's suspension with Dr. John A Nolan and concluding that since Anderson was non-tenured, they could terminate her without filing tenure charges.

Questioned on cross-examination as to whether he had a recollection of reviewing documents from Ms. Findley or Dr. Nolan with regard to the October 26 and November 15 incidents, he indicated that he had a "shaky recollection of the last incident with the relative." He recalled having a number of conversations with Ms. Findley concerning Anderson but did not recall any of the specifics and had no recollection of Ms. Findley giving him any documentation in respect to the Novernber 15 incident. Although his file and Ms. Findley's files were the basis of the termination letter, he did not recall reviewing Ms. Findley's files, nor did he recall in-person meetings with Ms. Findley regarding the two incidents. He did not recall seeing Ms. Anderson's statements in regard to the incidents and specifically had no recollection of seeing a November 15 letter to Ms. Findley from Ms. Anderson. He opined that the incidents were reportable to the DYFS, but he was not familiar with Board policy in regard to child abuse and neglect (P-15) in December 1995. Copeland understood that Ms. Findley had asked for Anderson's side of the story in regard to these incidents. He did not specifically recall if Ms. Findley ever asked Ms. Anderson to explain what occurred on October 26, but he believed that it would have been Findley's practice to

obtain statements from all parties involved. He noted that in a State-operated school the hiring and termination decisions are made by the superintendent.

On redirect examination, Copeland said he thought he had spoken to Ms. Findley regarding the November 15 incident, but he could not specifically recall. He recalled speaking to her about the October 26 incident.

Wilma Findley has been the principal of Bragaw Avenue School for the last four years. She testified that she was told of the November 15 incident involving S.J. and her uncle by Carl Beatty, a substitute teacher. While Mr. Beatty was leaving a classroom on the third floor (Room 314) he heard noises that led him to Room 302, where he saw a man whipping a child with a belt. Findley called her vice principal, Lillian Burke (then Lillian Baldwin), who advised her that Mr. Beatty had already spoken to her and the uncle had already left Anderson's classroom. Findley launched an investigation by speaking to each of the students who had been in the classroom at the time of the incident. Findley personally asked the children questions and typed up their responses (R-3). She also solicited written statements from three adults. Both Beatty and King provided statements {R-4; R-5). She had a discussion with Mr. Copeland in which she described what she had learned about the incident from Mr. Beatty and the students. She also spoke to S.J.'s uncle, Mr. McClain, either the afternoon of the incident or the next day and told him about the action she had to take regarding the incident. Findley delivered the suspension notice to Ms. Anderson. She said that Ms. Anderson was aware that Findley had talked to the students, but she was not sure if Anderson was aware that she had spoken to the adults.

Findley testified that in late November, prior to the suspension, she had a discussion with Anderson and Ella Taylor, the union official. They discussed the fact that Findley had reported the November 15 incident to Mr. Copeland and to the DYFS and Anderson gave her impression of the way Findley had treated her. Anderson did not grieve the suspension.

Findley became aware of the October 26 tug-of-war incident when the student involved reported it to her the day it occurred. Findley investigated the incident by speaking to the other students in the class. She wrote down what the students told her (R-6). Anderson told Findley that the students' statements were inaccurate and that the child had pushed her. Findley did not solicit written statements from Ms. Anderson or the students, but she reported the incident to Copeland. She met with the student's mother regarding the incident. She forwarded statements to Mr. Copeland, Human Resource Services and the Labor Relations Department. She became aware that Ms. Anderson had been terminated when she received a copy of the letter of termination.

On cross-examination, Ms. Findley said that she never showed any of the statements regarding the November 15 incident to Anderson, nor did she question her on them. Although Findley could not recall if she received Anderson's statement regarding the incident on November 15 or 16, she recalled that she definitely received it after she asked Anderson for a statement.

Referring to her notes regarding the October 26 incident (R-6), Findley indicated that when she wrote the notes she had already spoken to the students. Findley spoke to Anderson about the incident when Anderson reported that a student had pushed her, and she believed that conversation took place on October 26. She indicated that the report of the incident (R-1) was typed in the offices of Cluster Three based on information she gave. She did not recall having a meeting with Ms. Taylor and ,Ms. Anderson in October 1995. She first had a discussion with Copeland about Anderson when the November 15 incident involving S.J. occurred.

On further questioning, Findley indicated that she started speaking to the students about the November incident on the day that it occurred. She went to thE: vice prindpal's office to speak to the students, but she did not recall whether she went to get the students or asked Ms. Burke to bring the students to her one at a time. She compiled her handwritten notes of the children's statements into the typewritten document. She questioned S.J. but did not have a statement from S.J. (she believed she wrote S.J.'s comments down somewhere). S.J. said that she had gotten a beating

in front of the class and that Anderson, who was present, took her coat. Findley said that Mr. McClain told her that he had whipped S.J. because the teacher had called him on several occasions because S.J. was being disrespectful to the teacher; he wanted to teach her a lesson. Findley did not recall asking him what Anderson was doing while this occurred; she did not go into detail with him. Rather, the statements of the students and Carl Beatty formed the basis of the charges against Anderson. Ms. Findley said that she met with Anderson after the incident. Anderson told her that she knew that S.J.'s uncle was in the classroom, knew about the beating and had left the uncle to carry out the beating. Prior to the incident, Findley had a conference with Mr. McClain, Ms. Anderson and S.J., which occurred when she took McClain up to the classroom to speak with Anderson. Findley left after she spoke to them.

Rebuttal testimony was offered by Lydia Anderson. She claimed that she had not met with the building representative and Ms. Findley between November 15 and November 22 in regard to the incident of November 15. She had a meeting with Ms. Findley and the building representative on October 13 concerning the fact that the children in her classroom were not meeting standards. Ms. Findley also indicated that student D.M.'s mother had requested that Ms. Anderson not call her at home to report D.M.'s behavior. Ms. Taylor told Anderson to conform to Ms. Findley's teaching standards.

Referring to the report of the October 26 incident (R-1), Anderson indicated that D.M. not only pushed her, but punched her in her lower back, necessitating that she go to the doctor. She did not fall over a desk or cut her knee and there was no incident in her classroom with an unknown male. She never wears a necklace since it is prohibited by her religion. She said that Ms. Findley did not direct her to the school nurse or speak with her on the day after the incident. She did not meet with D.M. and Ms. Findley regarding the incident.

Ms. Anderson .testified as to the manner in which the administration obtained statements from her students about the November 15 incident. She stated that on November 17, 1995, Lillian Burke, the vice principal, questioned each student

separately across the hall from Anderson's classroom. It took Ms. Burke from approximately 9:10 to 10:30 a.m. to question the students. To Anderson's knowledge no children were questioned on November 15 or 16 by Ms. Burke or Ms. Findley. Anderson contended that when the students came back to her classroom after being questioned by Ms. Burke they were very upset. They said that Anderson was a good teacher and that they did not like the way she was being treated. The students said that there had been other beating incidents in the school, similar to the one involving S.J. and her uncle, and that the teachers present during those incidents were not treated the way Anderson was being treated. The students decided to write down what Ms. Burke had asked them. Those statements were offered into evidence as having been written by the students, for the purpose of proving that the students were questioned by Ms. Burke and not by Ms. Findley.

Anderson stated that Mr. Beatty came to her classroom the day of the incident involving S.J. When he arrived at her classroom she was next to her door helping a student who was sitting in close proximity to Room 301. Mr. Beatty asked her what was happening in her classroom. She told him that she did not know and to ask Mr. McClain. Beatty did not ask Mr. McClain, but instead asked Ms. King what was happening in Anderson's classroom. Ms. King went to the door of Room 301 and told Mr. Beatty that she was teaching her class and did not know what was happening in Anderson's classroom. Anderson said that when Mr. Beatty came to her classroom McClain was waiting for her to prepare S.J.'s homework for the rest of the week to give to him; he was not hitting S.J. The students' statements (P-1) were received into evidence and Anderson testified that they were actually written by the students.

On cross-examination, Anderson stated that she never requested a meeting with Ms. Taylor and Ms. Fi_ndley regarding the November 15 incident. She did not know why se was suspended, nor did she know that there was an investigation when she received her suspension letter. However, she admitted that she knew that the students were questioned about the beating incident on November 17, prior to her suspension. She then contended that she did not know what they were being questioned about.

On questioning by this judge, Anderson admitted that she knew what the students had been questioned about when they came back to her classroom. She then admitted that she did know before November 22, the date of her suspension, what they had been questioned about, and that she had made an error in saying that she did not know. She testified that she saw the children questioned by Ms. Burke in the hallway outside her classroom, but did not hear the questions asked. Ms. Burke's office was on the same floor and approximately 18 to 20 yards away from her classroom. She claimed that she could not see Ms. Burke's office from her classroom.

Referring to the statements of the students (P-1), Anderson recalled that when they came back to her classroom after being questioned by Burke they were upset and said, "We are going to write down what Mrs. Burke asked us because we don't like the way they are treating you." It was time for their writing exercises and she handed out paper and the students individually wrote their statements. She did not ask them to write anything down. Anderson claimed that she had not written any of the statements, nor had she given Ms. Findley any of the students' statements.

Anderson referred to statements from students J.T. and S.D., which she agreed indicated that Ms. Burke took them out of Anderson's classroom to her office. Anderson claimed that she did not see Burke take J.T. to her office. She reiterated that she saw Ms. Burke do the questioning in the hallway, but she would not say whether J.T. had lied if he said the questioning took place in Ms. Burke's office. Questioned by the undersigned, Anderson contended that Ms. Burke did not *move* from the hallway or direct the children to her office.

On further questioning by the undersigned, Anderson was asked why she did not *give* the children's statements to the principal. She alleged that she did not know that she should have given them to the principal.

Next to testify was Elbert Louis McClain, who indicated that he received a call from Ms. Findley two or three days after the November 15 incident. She asked him

about his involvement in the incident but did not ask about Anderson's involvement. He recalled that when he and S.J. were about to leave the classroom after getting a homework assignment from Anderson, a gentleman stuck his head in the door of the classroom, looked around and walked away.

On cross-examination, McClain explained that he spoke to Findley on the telephone about the incident and Findley told him to come to school to discuss what had happened. He went to school that day and spoke to Findley. Findley did not ask about Anderson's actions.

Wilma Findley was recalled to the stand. She was shown Exhibit P-1, handwritten statements from eleven students, and she testified that she had not seen the students' statements before. She contended that she questioned the children in Room 307, the office used by the vice principal. Ms. Burke escorted the students to and from the classroom and was in and out of the office while Findley questioned the children.

Questioned by the undersigned, Findley recognized the names of the students who gave the statements. She had not gotten handwritten statements from the students and could not imagine the students writing individual statements that all said the same thing. She indicated that the handwriting and spelling on the statements did not look typical of fourth graders. They all had spelled all the participants' nan;1es correctly and all had the same "R," which looked like the "R" of an older person. Noting that these were average students, she doubted that these were their individually handwritten statements. Of import, she said, "Would be to God, I had a class of fourth graders that were this legible all the way through."

Subsequent to the close of the hearing, I scheduled an additional hearing date, which was due to the following events. As the result of Findley's testimony, I was concerned that the statements allegedly written by various students (P-1} were actually not the students' statements. 1conferred with counsel in an effort to determine whether those statements were from the students and suggested various methods for making

such a determination. Subsequent thereto, I received a letter from Mr. Liss, Anderson's attorney, dated August 13, 1998, which read as follows:

> Dear Judge Reiner: Subsequent to your Monday conference call I discussed with Ms. Anderson your recommendation in respect to an analysis of the exhibits submitted representing student letters as to their meeting with Vice Principal Burke on November 17, 1995. Ms. Anderson informed me that the exhibits were written by her and that the exhibits in content were what her students wrote. Ms. Anderson brought me the student letters, which I have attached to the exhibit submitted, as well as a letter from Ms. Anderson which she requested I forward you. I am available for a conference call upon your receipt and review. I have informed counsel for the Board and I am sending him all material I received.

I then received two letters from Ms. Anderson, both dated August 11, 1998. The first letter said:

> I made an error in testimony today. I am sorry for that error. Please accept my apology. In January of 1996 I had rewrote the students' responses to Ms. Burke regarding the incident in ink. I rewrote them in ink because I feared they would have faded . . . or get damaged if they got wet. I could not find the penciled copies this morning. It was my error to have . . . I guess . . . brought you the ink copies instead. I had copied the exact words that the students wrote. Please forgive me for doing that. On my way home something within me kept on saying, go home and search for those penciled copies and let the Judge get them. Again, Your Honor, I apologize for my error, please forgive me. Thank you. Yours respectfully, Lydia A. Anderson. P.S. I have given these copies to Mr. Eugene Liss.

A follow-up letter was received from Ms. Anderson. It stated:

> Dear Judge Reiner: Again I am apologizing for the error I made in my testimony today. Please forgive me, Your Honor, I could not find the students' penciled copies in their own handwriting. It was my error to bring in what I had copied over. I am very sorry, Your Honor, please forgive

> me. On my way home my conscience told me to go home and search for the students' own copies, I did, and I found them. I did not know how to get them to you. At 2:57 p.m. I received a call from Mr. Liss' secretary in Little Falls asking me to call Mr. Liss at the NTU office in Newark. I called Mr. Liss at the NTU immediately. He told me that you were concerned about those handwritten statements. I explained my mistake to him and told him that I came home and searched for the students' penciled copies. He told me to bring them to him at the NTU before 5:00 p.m. I did. I brought them to him at 4:45 p.m. today.
>
> I have enclosed the copies from students' own copies, 11 copies. Mr. Liss has the students' copies, 11 copies original. Again please, Your Honor, please forgive me for this error. I am very sorry about this incident, Your Honor. Please forgive me, Your Honor. I admit, Your Honor, I did not think wisely that I had to bring in the students' own handwriting copies. I explained in my first letter why I had recopied them, Your Honor. Do please forgive me, Your Honor. I am very remorseful about this incident, Your Honor. Do please forgive me Your Honor. Thank you, Your Honor. Have a pleasant day and all the best for the days and years ahead. Please ask Mr. Liss to give you the students' original copies, 11 copies. Again, thank you, Your Honor. Yours respectfully, Lydia A. Anderson.

Copies of the inked letters of the students attached to the penciled letters were received into evidence (J-6), as were the two letters from Ms. Anderson (J-7).

It must also be noted that three requests for an adjournment of the scheduled hearing date were made. Mr. Liss requested two adjournments. First, Mr. Liss claimed that his client was working and could not get out of work for the day. Second, he alleged that Anderson was ill. The third request was received directly from Anderson, who said that she would be present in the morning but due to an emergency could not get to court at the scheduled starting time. I delayed the hearing at Anderson's request and Anderson did in fact appear at the hearing. I noted on the record the three different stories that had been presented in regard to Ms. Anderson's inability to be

present in the courtroom for the continuation of the hearing. The hearing proceeded in regard to the issue of the students' statements.

Ms. Anderson was called by respondent to testify. She was shown the penciled statements (J-6), and claimed that they were written by the students in her class in November 1995. Each student wrote a statement and then handed it to her. She put these original statements in a folder on her desk and took them home, after she received the suspension letter. She took the penciled statements to Mr. Liss in January 1996, and his secretary copied them. At no time did she turn over those penciled statements to the District; she did not know she had to do so. She claimed that she drafted the ink statements in January before she took the penciled copies to Mr. Liss. She never provided the ink statements to the District. Anderson claimed that on the morning of the prior hearing date she was in a rush and could not find the penciled copies. Anderson testified as follows:

> And on my way home my conscience is . . . and even Mrs. King . . . I said Mrs. King, oh, my God, I presented the wrong papers. I made a mistake. But Judge Reiner said she doesn't want no paper after the hearing. And Ms. King said, you better go home, find those papers, and get them to the judge. But I said, she doesn't want no paper.

Anderson then stated,

> I went home, I searched for them, then the phone rang and I told Mr. Liss I had them. And he said that I should bring them to him at the Board that very day.

Anderson admitted at the hearing that she decided to provide the penciled copies after she spoke to Mr. Liss, who told her that the judge was concerned about the handwritten copies. Anderson indicated that Ms. King had been at the hearing that day.

On redirect examination, Anderson was questioned regarding her contention that Ms. King was present at the hearing on August 11 and that Ms. King gave her a ride

home. When told that Ms. King was at the hearing on August 10 and not August 11, Anderson indicated, "Maybe that was my mistake." However, she then alleged that Ms. King "was here on August 11," and gave her a ride home that day.

Next to testify was Manuel Quinones, employed by respondent for the last three years as a special investigator. Provided with the handwritten penciled statements of the students (J-6), he was asked by respondent to get handwriting exemplars from as many of the students as he could. He asked Ms. Findley for the handwriting exemplars of those students. Ms. Findley provided them to Quinones within half an hour of the request (R-7). On *voir dire*, Quinones agreed that he did not see the students write the statements that he received from Ms. Findley and that he was not a handwriting expert. Some of the handwriting samples from the students were taken from their notebooks; they were not asked to write them.

Lydia Anderson testified about the students' handwriting samples (P-2). She stated that it was her students' school work that she had in her possession when she was suspended. The red writing was her handwriting. She contended that these papers were written by her students.

On cross-examination, Anderson explained that she had a folder for each of her students, and one for herself. She placed both corrected and uncorrected work in her folder. At the end of the year, she returned the corrected assignments to the students. She did not ask permission to take the students' work (P-2) home and admitted that she never returned it to the school or to the students. On redirect examination, Anderson admitted that one student's homework must have been sent home, because his mother signed it.

FINDINGS OF FACTS

Based on the above testimony, I make the following Findings of Fact:

1. Petitioner, formerly employed with the District as a non-tenured teacher, was terminated on December 14, 1995, for unprofessional and inappropriate conduct in her capacity as a teacher (J-2).

2. Petitioner received a notice of termination dated December 14, 1995, outlining the reason for her termination (J-2).

3. Respondent alleged that on October 26, 1995, the petitioner directed two students to stand in class and subsequently engaged in a tug-of-war with one of the students when one of them tried to sit. This action by petitioner resulted in the student falling down and risking injury.

4. Respondent alleged that on November 15, 1995, petitioner allowed an adult relative of one of her female fourth-grade students to administer a beating to the student in her presence. The petitioner failed to notify either the school principal or the State of New Jersey's Division of Youth and Family Services of the beating incident.

5. Petitioner was suspended with pay pending an investigation of her conduct.

6. Petitioner was covered by the Agreement between the Board of Education of the City of Newark and the Newark Teachers Union Local 481 A.F.T./AFL-CIO effective July 1, 1991, through June 30, 1994 (hereinafter "CBA").[1] The CBA outlines a grievance procedure which results in

[1] A successor agreement to the CBA was being negotiated at the time of the petitioner's termination in December 1995. Accordingly, if petitioner did file a grievance it would have proceeded in accordance with the procedure outlined in the CBA attached hereto.

binding arbitration in Article III, Step 4. Anderson never filed a grievance regarding her suspension or termination.

7. Petitioner was given an opportunity to present her version of the facts regarding the beating incident prior to the action terminating her employment.

8. By memorandum dated November 16, 1995, Wilma Findley, the principal at Bragaw Avenue School, requested a written statement from Anderson regarding her version of the incident on November 15 (J-3).

9. Anderson provided handwritten and typewritten statements confirming that student S.J. was beaten in her classroom (J-4; J-5). The statements did not attest that she complied with her duty to report the incident to her supervisor and to the DYFS. Principal Findley met with Anderson and her union representative in late November.

10. Anderson was not charged with physically abusing students in violation of District policy; thus, there was no basis for the District to register a complaint about Anderson with the DYFS.

11. Wilma Findley conducted an investigation of the incidents providing the basis for petitioner's termination. Ms. Findley's investigation of the October 26, 1995, incident consisted of speaking with the students present in the classroom and to Anderson.

12. Ms. Findley's investigation of the November 15, 1995, incident included speaking to each student who witnessed the beating and requesting written statements from petitioner and two other teachers (Ms. King and Mr. Beatty) who may have had knowledge of the incident. Findley personally questioned each student and typed their responses (R-3).

13. In the course of her testimony at the August 11, 1998, hearing in this matter, Ms. Anderson represented that certain statements, marked as Exhibit P-1 and submitted as evidence, were accurate copies of statements written by her former students. Anderson testified that the statements were true and accurate copies of the students' submissions in their own handwriting and that she did not write the statements herself.

14. Subsequent testimony by Wilma Findley raised authenticity concerns regarding the students' statements.

15. During a post-hearing telephone conference on August 11, 1998, this judge requested the parties' positions on the issue.

16. Anderson submitted two letters directly to the judge dated August 11, 1998, in which she admitted lying under oath and in which she claimed that the statements submitted were in fact written by her. Anderson said that she had copied the words the students had written. Anderson apologized profusely for her conduct and requested this judge's forgiveness.

17. No determination has been made as to the authenticity of the handwritten statements of the students submitted by Ms. Anderson at the hearing held on March 26, 1999. Moreover, even if authentic, no determination has been made as to the manner in which these statements were adduced.

DISCUSSION

The basis of petitioner's petition is her contention that the District improperly denied her due process by failing to provide her with an investigation or a hearing prior to her dismissal. For the following reasons, petitioner's appeal must be rejected.

The State Legislature has set forth a tenure system which contemplates that local boards of education shall have broad discretionary authority in the granting of tenure. *N.J.S.A.* 18A:28-1 to -18. Once tenure is granted, teachers shall not be dismissed except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:28-5. However, it is settled that boards of education are vested with wide discretion regarding employment considerations, *i.e.*, the hiring or renewing of non-tenured teachers. *Winston v. Board of Educ. of South Plainfield*, 125 *N.J. Super.* 131, 143 (App. Div. 1973), *aff'd*, 64 *N.J.* 582 (1974); *Dore v. Board of Educ. of Bedminster*, 185 *N.J. Super.* 447, 453 (App. Div. 1982); *Union County Reg'l High Sch. Bd. of Educ. v. Union County Reg'l High Sch. Teachers Assoc.*, 145 *N.J. Super.* 435, 437 (App. Div. 1976). "A nontenured teacher, while entitled to protection from arbitrary and capricious action, is not entitled to be treated in a nature in which a tenured teacher would, where there is a proposal of termination of employment." *Costanzo v. Board of Educ. of Rahway*, 93 *N.J.A.R.*2d (EDU) 654, 661, *aff'd*, St. Bd. of Educ., 94 *N.J.A.R.*2d (EDU) 218.

The Supreme Court has held that boards of education are required to provide non-tenured teachers with statements of reasons for not renewing employment. *Donaldson v. Board of Educ. of N. Wildwood*, 65 *N.J.* 236, 246 (1974). The *Donaldson* Court addressed a non-tenured teacher's claim that she was entitled to a statement of the reason or reasons for the school board's refusal to renew her contract. *Id.* at 239. The Court noted that a non-tenured teacher ordinarily does not have a constitutional right to a statement of reasons for her nonretention. *Id.* at 242. However, after reviewing case law and arguments for and against providing non-tenured teachers with statements of reasons, the Court stated that "the very requirement that reasons be stated may serve as a significant discipline against arbitrary or abusive action." *Id.* at 246. Thus, the Court concluded that directing boards of education to provide non-tenured teachers with the reasons for nonretention will safeguard against arbitrary or

abusive exercise of their broad discretionary powers.[2] The Court also suggested that while the plaintiff did not assert that she was entitled to a hearing before the board, a timely request for an informal appearance should ordinarily be granted.[3] *Ibid.*

The Appellate Division reaffirmed the principle that school boards maintain broad discretionary authority in the dismissal of non-tenured teachers in *Dore, supra*, 185 *N.J. Super.* at 453. Similar to the *Donaldson* case, *Dore* involved a petition of appeal by a non-tenured teacher challenging the board's decision not to reemploy him. In referring to the Court's reasoning in *Donaldson*, the court concluded as follows:

> Implicit in this language is the recognition by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.
>
> [*Dore, supra*, 185 *N.J. Super.* at 456.]

Therefore, the court found that the board's determination not to renew the plaintiff's employment contract was within its discretion and not improper. *Id.* at 453-55.

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[2] Following the Supreme Court's decision in *Donaldson*, the Legislature adopted L. 1975, c. 132, § 2, which is codified at *N.J.S.A.* 18A:27-3.2 and provides:

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.
>
> [*Ibid.*]

But note, this provision is inapplicable here because petitioner was terminated for cause. Contract nonrenewal is not at issue here.

[3] The Legislature did not enact a law providing non-tenured teachers with the right to request a hearing regarding termination or contract non-renewal.

The case of *Kufel v. Board of Education of the Union County Vocational-Technical Schools*, 96 *N.J.A.R.*2d (EDU) 446, is similar to the instant matter. A non-tenured teacher was dismissed from employment by the school board following a charge that he acted in an insubordinate and menacing manner during a conference. The petitioner was suspended without pay and subsequently terminated. Neither an investigation nor a hearing was held prior to the termination.

An administrative law judge (ALJ) held that material issues of fact did not exist and granted the board's motion for summary decision. The ALJ found that the teacher could not carry the burden of demonstrating that the board's actions were unreasonable and concluded that the board's reasons for terminating the teacher were conduct-related, not arbitrary or capricious. The Commissioner of Education adopted the ALJ's findings and recommendations and dismissed the petition. Citing to *Dore, supra*, 185 *N.J. Super.* 447, the State Board of Education affirmed the Commissioner's decision. 96 *N.J.A.R.*2d (EDU) at 447. The Appellate Division thereafter affirmed, stating, "[f]iring an employee because of abusive conduct toward a supervisor is a reasonable decision." 97 *N.J.A.R.*2d (EDU) 317, 318.

In the instant matter, petitioner was terminated following two incidents that the District found constituted inappropriate and unprofessional conduct by a teacher. In the October 1995 incident, petitioner engaged in a physical struggle with a student, causing the student to fall. In November 1995, petitioner stood by and allowed an adult relative of a student to strike the student and failed to notify the Division of Youth and Family Services. These actions were investigated by the school principal and found to be inappropriate and unprofessional.

As evident by the case law discussed above, the determination to terminate petitioner was within the District's discretion. As a non-tenured teacher, petitioner was only entitled to a statement of the reasons for her dismissal. In the instant case, the District investigated the incidents, concluded that they had occurred and provided petitioner with a statement of reasons for her dismissal. No statute or regulation exists

requiring the District to provide petitioner with a hearing. Inasmuch as the District's determination to terminate petitioner was reasonable and not arbitrary or capricious, petitioner's appeal should be dismissed.

CONCLUSION

I **CONCLUDE** that the District did not violate petitioner's due process rights by terminating her employment. The District's action was warranted and reasonable in light of petitioner's involvement in the October and November 1995 incidents. The District was not required to provide petitioner with a hearing; petitioner was only entitled to a statement of the reasons for her dismissal. Petitioner did not dispute that she received notice of her termination and the reasons for it. In addition, and based on the findings of fact outlined above, petitioner testified untruthfully at the hearing held in this matter, which conduct only serves to confirm the District's action.

ORDER

It is hereby **ORDERED** that the District's determination to terminate petitioner is upheld and petitioner's appeal is dismissed.

It is further **ORDERED** that the Commissioner of Education refer this matter to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for possible revocation of petitioner's teaching certificate based on her conduct at the hearing.

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

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

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

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

September 29, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Oct. 1, 1999
DATE

D. M. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT - 6 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Lydia Anella Anderson
Carolyn King
Sabrina Niasha Jones
Elbert Louis McClain

For Respondent:

Robert Livingston Copeland
Wilma Findley
Manuel Quinones

List of Exhibits

For Petitioner:

P-1	Handwritten statements from eleven students
P-2	Handwriting exemplars for five students
P-15	Board of Education policy re child abuse

Joint:

J-1	Letter to Lydia Anderson from Beverly L. Hall regarding suspension with pay, dated November 22, 1995
J-2	Letter to Lydia Anderson from John A. Nolan terminating petitioner, dated December 14, 1995
J-3	Memorandum to Lydia Anderson Powell, from Wilma Findley requesting written statement, dated November 16, 1995
J-4	Typewritten letter to Wilma Findley from Lydia Anderson Powell, dated November 15, 1995

J-5 Handwritten letter to Wilma Findley from L. Powell, dated November 15, 1995, regarding incident in her classroom involving S.J. with uncle

J-6 Penciled letters for eleven students attached to inked statements (twenty-two pages)

J-7 Two letters from Lydia Anderson to Judge Elinor Reiner, dated August 11, 1998

For Respondent:

R-1 Report of incident called in, dated October 26, 1995

R-2 Telephone and office memorandum, Division of Cluster Three, October 27

R-3 Typewritten notes

R-4 Memo to Carl Beatty from Ms. Findley, dated November 16, 1995, regarding request for written statement (two pages)

R-5 Memo to Carolyn King from Ms. Findley, dated November 16, 1995, regarding request for written statement (two pages)

R-6 Handwritten memorandum by Ms. Findley, dated October 26, 1995

R-7 Five statements from students

OAL DKT. NO. EDU 1509-96
AGENCY DKT. NO. 490-12/95

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

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. On November 3, 1999, petitioner submitted a Substitution of Attorney notice indicating that Dan S. Smith, Esq. was now her attorney of record in the matter and requesting that a 30-day extension be granted to permit his review of the record and to submit exceptions to the Initial Decision. Consequently, an extension of the 45-day statutory period for the Commissioner's review and issuance of a final decision from November 15, 1999 until December 30, 1999 was requested by the Commissioner and granted by the OAL on November 8, 1999. On November 24, 1999, petitioner's attorney requested an additional three-week extension because he had not yet been able to secure the complete record from petitioner's former attorney. A second extension until January 21, 2000 was then granted by the OAL for issuance of the Commissioner's final decision in this matter.

Petitioner's exceptions were timely filed on December 20, 1999. The Board's reply exceptions were, upon the grant of an extension, timely filed on January 3, 2000.

In her exceptions, petitioner avers, *inter alia*, that the Administrative Law Judge (ALJ) erred in Finding of Fact 10 (Initial Decision at 17) that "Anderson was not charged with physically abusing students in violation of District policy; thus, there was no basis for the District to register a complaint about Anderson with the DYFS." She argues that she *was* suspended and eventually terminated for neglect involving the failure to stop an alleged beating and report such; therefore, she was entitled to due process in accord with the respondent's own policy. Petitioner further maintains that it is totally inconsistent that respondent should not have the advantage of termination based on the neglect of a DYFS regulation on the one hand and the refusal to follow its own DYFS policy on the other hand. Petitioner's exceptions set forth a lengthy discussion of *Nicoletta v. No. Jersey District Water Supply Commission*, 77 *N.J.* 145 (1978) in support of her contention that respondent failed to accord her due process rights, arguing that the ALJ's reliance on *Kufel, supra,* was in error because, she, unlike the petitioner in *Kufel*, was guaranteed due process when a suspension arose with respect to a DYFS matter based upon respondent's own policy.

Respondent rebuts petitioner's arguments with respect to due process, emphasizing that its child abuse and neglect policy is not at issue herein because the sole basis for petitioner's termination was *not* because she was accused of child abuse but because she engaged in inappropriate and unprofessional conduct, *i.e.*, by being aware that a beating incident took place and failing to report the incident, as required. Respondent further argues that, even by petitioner's own acknowledgement, even if the policy were applicable, all that the policy requires is notice of the charges and an opportunity to respond to them prior to disciplinary action. Of this, respondent states, "[i]t is undisputed that Anderson was given notice of the charge and an opportunity to respond; she spoke to administrators concerning the October 26th

incident and submitted handwritten and typewritten statements concerning the November 15th incident." (Respondent's Reply Exceptions at 8) Moreover, respondent urges that the ALJ correctly determined that there is no legal basis requiring that petitioner receive a pre-termination hearing, contending, *inter alia*, that *Nicoletta, supra,* is not applicable to the within matter. Further, as in *Kufel*, petitioner cannot rely upon constitutional constraints or legislation which restrict the otherwise "almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." 96 *N.J.A.R.*2d (EDU) at 447, *quoting Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982).

Petitioner also avers that the ALJ erred in finding that: (1) she failed to notify either the school principal or the State of New Jersey's Division of Youth and Family Services of the beating incident; and (2) the principal questioned each student in the classroom and adults.

Upon comprehensive review of the record, including the transcripts of the hearing and the parties' exceptions, the Commissioner agrees with and adopts as his own the recommended decision of the ALJ dismissing the petition for the reasons well expressed in the Initial Decision. The Commissioner, after thorough consideration of the entire record, finds the ALJ's analysis and discussion of the law and legal principles applicable to the factual circumstances and issues in the instant matter to be cogent and her conclusions fully supported by the record.

Having determined that petitioner has failed to establish that respondent's action terminating her was in violation of her constitutional or statutory rights, the Commissioner hereby dismisses the Petition of Appeal. *Dore, supra*; *Kufel, supra; Randy Pratt v. Board of Education of the Borough of Butler, Morris County,* State Board, decided January 6, 1999.

Further, a copy of this decision shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for review and action, if any, as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

34-00

EDU# 1509-96
C# 34-00
SB# 16-00

LYDIA ANDERSON,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT- RESPONDENT.	:	

Decided by the Commissioner of Education, January 19, 2000

For the Petitioner-Appellant, Dan Solomon Smith, Esq.

For the Respondent-Respondent, Sills Cummis Radin Tischman Epstein & Gross (Cheri L. Maxwell, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education substantially for the reasons expressed therein. In doing so, we reiterate that "absent constitutional constraints or legislation..., local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Twp. Bd. Of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982). Hence, while a non-tenured teacher is entitled to a statement of the reasons for his termination, Donaldson v. Bd. Of Ed. Of No. Wildwood, 65 N.J. 236 (1974); see N.J.S.A. 18A:27-3.2 (teaching staff members entitled to statement of reasons when contract is not offered for the succeeding year), such

FEB. 7, 2001

teachers are not entitled to litigate their terminations in this forum unless the reason for the board's action is in violation of constitutional or legislatively conferred rights. Dore, supra. See Guerriero v. Board of Education of the Borough of Glen Rock, decided by the State Board of Education, February 5, 1986 (district board entitled to summary judgment where non-tenured teacher did not allege that nonreemployment was in violation of constitutional or legislatively-conferred rights).

Moreover, we stress that a non-tenured teacher does not have any protected interest in continued employment under the United States Constitution and, therefore, no right to due process protection under the Fourteenth Amendment. Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972). Nor do such teachers have a right to due process under the New Jersey Constitution. Donaldson, supra. Hence, there was no constitutional requirement that the Board conduct a hearing before terminating petitioner. As petitioner now argues for the first time, she may have had the right to a hearing under the applicable collective negotiations agreement.[1] However, resolution of such claims does not lie within our jurisdiction.

Therefore, for the reasons stated herein, as well as those expressed by the Commissioner, we affirm the Commissioner's decision.

February 7, 2001

Date of mailing FEB 09 2001

[1] We note that there is no indication that petitioner invoked the procedures set forth in the agreement.

35-00

MARY ANNE DE FUCCIO AND DONNA KRAFT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY VOCATIONAL SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

January 21, 2000

OAL DKT. NOS. EDU 1148-99 and 1146-99 (CONSOLIDATED)
AGENCY DKT. NOS. 511-11/98 and 510-11/98

MARY ANNE DE FUCCIO AND DONNA KRAFT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY VOCATIONAL SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 21, 2000
Date of Mailing, January 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1148-98 &
OAL DKT. NO. EDU 1149-99
AGENCY DKT. NO. 511-11/98
AGENCY DKT. NO. 510-11/98

MARY ANNE DE FUCCIO and
DONNA KRAFT,
Petitioner,
v.
PASSAIC COUNTY TECHNICAL
INSTITUTE BOARD OF EDUCATION,
Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Gerald S. Keegan, Esq., for respondent

Record Closed: December 1, 1999 Decided: December 2, 1999

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

These consolidated matters were transmitted to the Office of Administrative Law on January 12, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

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

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

Dec. 2, 1999
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/7/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 9 1999
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 1 2 43 PM '99

MARY ANNE DE FUCCIO
AND DONNA KRAFT
Petitioners
v.
PASSAIC COUNTY TECHNICAL
INSTITUTE BOARD OF EDUCATION
Respondent

COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 511-11/98 & 510-11/98
OAL Docket No. EDU 1148-99 & EDU 1149-99

Settlement Agreement

The parties having amicably resolved this matter between them it is hereby agreed as follows:

1. Both Petitioners shall be reemployed by Respondent as teachers within their areas of certification.

2. The parties agree that petitioners maintain whatever tenure rights they may have under the law.

3. Upon Petitioner De Fuccio's return to teaching at the Passaic County Juvenile Detention Center she will be placed at step 8B of the Respondent's salary guide for the 1998-1999 school year until such time as successor collective bargaining negotiations are settled for the contract year 1999-2000. The base salary shall be $46,500 + 10%, or $51,150 and shall be prorated and paid to Petitioner based on a twelve month school year. However, Petitioner DeFuccio shall only be paid for the time she actually works in the Respondent district.

4. Petitioner Donna Kraft, upon her return to teaching at the Passaic County Juvenile Detention Center, shall be place at step 13C of the Respondent's salary guide for the 1998-1999 school year until such time as successor collective bargaining negotiations are settled for the contract year 1999-2000. The base

salary shall be $57,786 + 10% or $63,564 and shall be prorated and paid to Petitioner based on a twelve month school year. However, Petitioner Kraft shall only be paid for the time she actually works in the Respondent district.

5. Both Petitioners' sick day banks from their prior employment at the Juvenile Detention Center shall be restored to their prior levels. Petitioner DeFuccio shall have 19 days added to her bank to reflect unused days for the 1998-1999 and 1999-2000 school years. Petitioner Kraft shall have 0 days added to her bank. This provision is subject to verification from Passaic County Educational Services Commission.

6. In exchange for the above consideration, both Petitioners shall withdraw the within appeals with prejudice. Petitioners hereby waive any and all claims they may have against Respondent including but not limited to claims for back pay and other emoluments.

7. This agreement shall become effective upon approval by the Respondent Board of Education. All parties waive their rights to file exceptions and/or cross-exceptions to the within agreement.

8. This agreement shall not be deemed a precedent in any subsequent tenure and seniority matters involving Respondent.

9. For purposes of longevity calculations only, both Petitioners shall be deemed to have been hired as of October 1, 1997.

10. The parties agree that Petitioners shall return to work at Passaic County Juvenile Detention Center forty-five days after the Commissioner approves this agreement.

11. The Petitioners agree that Respondent may obtain copies of their personnel files from the Passaic County Educational Services Commission for items contained therein up to June 30, 1998.

Gail Oxfeld Kanef
Attorney for Petitioners

Mary Anne De Fuccio

Donna Kraft

Gerald Sean Keegan
Attorney for Respondent

Diana Lobosco, Superintendent
Passaic County Technical Institute
Board of Education

George Deckar
President, Passaic County Technical
Institute Board of Education

November 9, 1999

SB/35-00

SBE # 520-04/99-207
SB # 35-00

IN THE MATTER OF THE	:	STATE BOARD OF EDUCATION
CERTIFICATE OF PETER LORIA.	:	DECISION

Decided by the State Board of Examiners, February 24, 2000

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

For the Petitioner-Respondent State Board of Examiners, Michael C. Walters, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

The decision of the State Board of Examiners is affirmed for the reasons expressed therein.

October 4, 2000

Date of mailing OCT 06 2000

36-00

C.C., on behalf of minor son, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged Board's residency determination.

After a hearing at the OAL in which the ALJ found petitioner's testimony to be not particularly credible and noting petitioner's concession under cross-examination that information provided by her in various forms was intentionally false and designed to mislead school officials as to the true residence of petitioner and J.H., the ALJ determined that petitioner failed to meet her burden of establishing her domicile in respondent's district so as to entitle J.H. to a free public education. The ALJ dismissed the petition and ordered petitioner to pay respondent $5,664 for educational costs for J.H. for the 1998-99 school year and $37.63 per day for each day of his ineligible attendance for the 1999-2000 school year pursuant to *N.J.S.A.* 18A:38-1b(2).

The Commissioner adopted the Initial Decision of the ALJ for the reasons expressed therein.

January 21, 2000

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01159-99
AGENCY DKT. NO. 549-12/98

C.C. on behalf of J. H.,

Petitioner,

v.

UNION TOWNSHIP BOARD OF EDUCATION,

Respondent.

C. C., *pro se*

Thomas M. McCormick, Esq., for respondent
(McCormick & Matthews, attorneys)

Record Closed: November 24, 1999 Decided: December 1, 1999

BEFORE MICHAEL L. RAVIN, ALJ:

STATEMENT OF THE CASE

Petitioner contests respondent's determination that her son, J. H., is not a school district resident and is therefore not entitled to a free public education in the respondent's district schools. The matter was transmitted to the Office of Administrative Law (OAL) on January 12, 1999 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13. A hearing was scheduled on October 26,1999. On that date, the hearing took place. The record was kept open pending receipt of written submissions concerning the amount of reimbursement to which respondent would be entitled in the event of a decision adverse to petitioner.

The submissions were received on November 24, 1999 and on that date, the record was closed

BURDEN OF PROOF

Pursuant to *N.J.S.A.* 18A:38-1, the challenger to a Board's decision to deny a free public education within its district has the burden to prove to the Commission of Education by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. The statute also provides that no child shall be denied admission during the pendency of such proceedings before the Commissioner and in the event the child is currently enrolled in the district, the student shall not be removed from school during the pendency of the proceedings. If, however, in the judgment of the Commissioner, the evidence does not support the claim of the resident, he/she shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district.

As a result of the current law cited above, the burden rests on the petitioner by a preponderance of the evidence to show that domicile did in fact exist in the district in which the child attended school.

FACTUAL DISCUSSION

The following is not intended to be a verbatim statement of the testimony in this matter. It is the summary of the testimony in evidence which was found by the undersigned to be relevant to the issues in this matter.

1. David H. Van Deventer for respondent

Mr. Van Deventer has been employed by respondent as a residency investigator since September,1992. Between 1968 and 1992, he was employed as a police officer in Union Township.

On November 2, 1998, April DeFrancisco, the Secretary of the Union Township Board of Education, assigned Mr. Van Deventer the task of investigating the residence of J. H. Prior to being given this assignment, Mr. Van Deventer had no knowledge of J. H. or his mother, petitioner C. C. When Mr. Van Deventer was given the assignment,

he was advised that J. H. attended kindergartner in the Washington School in Union Township and that J. H. told his kindergarten teacher, Bonnie Gentesse, that he lived in Irvington with his mother. Ms. Gentesse was suspicious as to J. H.'s residency because the emergency contact card filled out by petitioner at the time of registration contained an out-of-district telephone number.

On November 4, 1998, Mr. Van Deventer commenced his investigation by conducting a surveillance of 2 ____ M ____ Avenue, the address in Vauxhall where petitioner alleged that she and J. H. resided. His purpose was to ascertain whether or not J. H. was exiting that location to attend school in the morning.

Mr. Van Deventer arrived at 6 a.m. in his own automobile. He observed who was leaving the house and who was entering. He stayed until 9:05 a.m., because he knew that J. H. should be in school by that time. He also knew that J. H. was transported by school bus to Washington School and that the bus stop was one and one-half blocks from 2 ____ M ____ Avenue. During his surveillance, Mr. Van Deventer saw no kindergarten aged child depart from the home. He did observe a middle school aged child, who was subsequently identified as petitioner's brother. This child was picked up by a mini-bus which parked across the street from the home. Mr. Van Deventer telephoned Washington School and learned that J. H. arrived at the school on time.

On November 6, 1998 and November 9, 1998, Mr. Van Deventer conducted the same surveillance and made the same observations as he made on November 4, 1998.

On November 10, 1998, Mr. Van Deventer did not conduct a surveillance. He ascertained from the telephone company that the telephone number on J. H.'s Washington School emergency contact card, 973-372-8 - - -, was listed to petitioner at _____ Place, Apartment __, Irvington, New Jersey.

Based on this information, on November 10, 1998, Mr. Van Deventer went to __ _____ Place in the early morning. He described that location as an apartment complex with a square configuration with a courtyard in the middle of the buildings. This configuration prevented him from conducting any surveillance.

At the _____ Place apartment complex, Mr. Van Deventer observed a mailbox marked Apartment No. __ which had petitioner's name next to it. He also

found a doorbell for Apartment __ which had petitioner's name below it. Additionally, in the designated parking space for Apartment _____, Investigator Van Deventer observed a car which appeared disabled. The license plate on the car, New Jersey registration _____, was determined to belong to P. G., who was J. H's grandmother, whose address was 2_ M_____ Avenue, Vauxhall, New Jersey.

Mr. Van Deventer noted that Durand Street and _____ Place intersect at the location of _____ Place in Irvington.

At about 7 a.m. on November 10, 1998, Mr. Van Deventer returned by automobile to the bus stop in Vauxhall in an attempt to determine whether or not J. H. was actually taking the bus to school. According to Mr. Van Deventer, sometimes a child will receive a school bus pass and not actually use the school bus. Mr. Van Deventer arrived at this location around 7:30 a.m. because he knew that the school bus that picks up the children for Washington School stopped there at approximately 8:20 a.m.

Mr. Van Deventer on this occasion took a position where he could see both the bus stop and 2_ M ____ Avenue. Three or four cars pulled up to the bus stop, which was not so unusual. Mr. Van Deventer took notes of the descriptions of the two cars which dropped off children similar in age to the age of J. H. One of the cars was New Jersey registration _____. That car came from the direction of Valley Street, pulled onto M____ Avenue, made a U-turn and came back to the corner, where a child got out of the car. The child got on the bus which Mr. Van Deventer knew was going to Washington School. When the bus left, the car bearing New Jersey registration _____ went down Valley Street onto Springfield Avenue and headed into Irvington. The direction from which that car came was consistent with a car which would be coming from Irvington into Union. The direction in which that car left was consistent with the car which was going from Union to Irvington.

Mr. Van Deventer's "DMV check" on the automobile he had seen revealed that it was registered to Sonia Goodluck, 58 Durand Place, Irvington, which is the same Durand Place that abuts the apartment complex in Irvington where Mr. Van Deventer was earlier in the morning on November 10, 1998.

Mr. Van Deventer did not know on November 10, 1998 that the child he saw get out of the automobile at the bus stop was J. H. However, at 9:15 a.m. on that date, Mr. Van Deventer went to Washington School, had D. H. paged to the office. At the office Mr. Van Deventer positively identified D.H. as the child who was dropped off at the bus stop. He did not question him.

On November 11, 1998, Mr. Van Deventer conducted another surveillance at the bus stop. Once again, he saw J. H. dropped off by the car registered to Sonia Goodluck. He tried to locate that car on Durand Place twice, but was unsuccessful.

On November 16, 1998, Mr. Van Deventer conducted a surveillance of 2_ M____ Avenue in Vauxhall. He observed J. H. come out of the house with one adult, who Mr. Van Deventer could not identify. The adult accompanied J. H. to the bus stop. J. H. got on the bus and went to Washington School.

On November 28, 1998, Mr. Van Deventer conducted another surveillance of the bus stop. He was only able to recall that J. H. did not come out of 2_ M____ Avenue. On November 23, 24 and 25, 1998, Mr. Van Deventer conducted a surveillance of the bus stop and 2_ M_____ Avenue. On those days, the automobile registered to Sonia Goodluck dropped J. H. off at the bus stop and then departed toward Irvington.

In an attempt to confirm that petitioner and J. H. lived at the _____ Place address in Irvington, on November 30, 1998, Mr. Van Deventer telephoned the company that managed that apartment complex. He spoke to an employee of the management company, Delilah Lewis, and asked her who lived at 5____ Place, Apartment No. 2__, Irvington. Ms. Lewis told him that petitioner and her son lived there. Mr. Van Deventer asked Ms. Lewis if she would send him a copy of the lease and she said she could not do so unless the tenant consented. She later telephoned Mr. Van Deventer and told him that the tenant would not consent to the release of the lease to him.

Mr. Van Deventer testified that during his surveillances of 2 __ M_____ Avenue, he watched the entire house. He saw no cars leave that home with the exception of petitioner's mother's van.

Mr. Van Deventer did not ask any of the neighbors at the _____ Place address who lived in Apartment No. ___.

Mr. Van Deventer testified that when he was working on another case, he had a conversation with Ms. Pearl Duboise, a teacher's aide employed by respondent who lives across the street from 2__ M____ Avenue. When Mr. Van Deventer told her that he was investigating the people at 2__ M____ Avenue, she told him "that woman and her child don't live there." According to Mr. Van Deventer, Ms. Duboise also told him that petitioner was at her house recently and requested her to sign a document stating that petitioner lived at 2_ M____ Avenue, but that she would not do it because she did not believe that the petitioner lived there. [Petitioner subsequently testified that she never had that conversation with Ms. Duboise].

2. Harvey Green, for Petitioner

Mr. Green testified that petitioner is his granddaughter and that J. H. is his grandson.

Petitioner and her son moved into 2___ M____ Avenue "for the first time" in August 1995. He did not know when they moved out because he was in and out of the hospital with pancreatitis. He could only remember that some time in June 1998 they moved back in. He testified that J. H. resides at the house at 2__ M____ Avenue and that when petitioner and J. H. moved back in June 1998, it was to help Mr. Green's wife because Mr. Green was ill. Him and his wife occupy a bedroom and his son, Harvey Green, Jr., has another bedroom with two beds in it. Harvey, Jr., J. H. and his other grandson occupy that bedroom. Petitioner occupies another bedroom.

Mr. Green testified that he once visited petitioner at her apartment on ____ Place in Irvington. The last time he was there was "in 1998 I guess." She lived there with J. H.

Mr. Green identified Sonia Goodluck as his grandson Nasciere's father's sister.

Sonia Goodluck, according to Mr. Green, lives on Durand Place in Irvington.

Mr. Green testified that he was in the hospital in the Fall of 1998, which is the relevant time period at issue. He was "back and forth every other week."

Mr. Green testified that he had a lease for 2_ M____ Avenue since August 1995 and the home is owned by a company he worked for, Essex Oil Company, controlled by Daniel Eisenburr.

Mr. Green was shown R-3, a "School District of Union Township." Tenancy Affidavit, dated June 10, 1998. That document reads as follows:

> To the Union Township Board of Education:
>
> This is to state that I, Daniel W. Eisenburr, am the landlord and owner of the property located at 2_ M____ Avenue, Vauxhall, New Jersey. This is to further state that Harvey Green, Pearlie Green, L. Carter, C. and Harvey Green, Jr. are tenants at the above address.
>
> Upon oath, I hereby swear that the above information is true and correct in all its particulars and that if any of the foregoing is false, I am subject to punishment.
>
> Daniel Eisenburr

The document is sworn and subscribed on June 10, 1998 by Sonia Goodluck, "a notary public of New Jersey."

Mr. Green testified that he had "no idea" when the first time he saw that document was, but he recalled seeing it in his house when petitioner was saying that she needed the document for court. He testified that he did not really read the Affidavit of Tenancy and did not know who inserted the names on it. He did not see Sonia Goodluck notarize it and did not see Mr. Eisenburr sign it.

Mr. Green testified that the Affidavit of Tenancy does not indicate that any of his grandchildren, including J. H., lived at 2_ M____ Avenue. He further testified that he did not know that the Affidavit of Tenancy was presented to respondent to attempt to prove respondent where petitioner lived, who she lived with and when.

Mr. Green testified that Sonia Goodluck lived on Durand Place in Irvington and that she and petitioner are close friends.

3. C. C., for Petitioner

Petitioner testified that when her father, Harvey Green, got sick, her mother needed her home. Petitioner had a baby, Nasciere, on April 19, 1998. Therefore, petitioner moved back to 2_ M____ Avenue. She testified that her father was on different medications.

Petitioner testified that when she left the apartment on _____ Place, she had "call forwarding" so that the telephone call of any caller to 973-372-8 - - -, would be forwarded to the 2_ M____ Avenue telephone.

Petitioner was questioned in connection with R-2, the emergency contact form, which was filled in by her. Next to the preprinted words "home phone," petitioner wrote 973-372-8 - - - /908-687-4 - - -. Over the telephone number 973-372-8 - - -, petitioner wrote "office." Petitioner testified that she wrote "office" on top of that telephone number because she did not want the school to think she was living at that number. She also testified that the school contacted her "plenty of times" at the 2_ M____ Avenue telephone number, 908-687-4 - - -.

Petitioner was questioned about another document she prepared, a "Union Township Board of Education Registration Form." Petitioner completed that document on June 16, 1998. Next to the preprinted words "Mother's work number," petitioner wrote 973-994-9 - - -, 973-372-8 - - -. Petitioner was asked whether the second telephone number was truly her work number and she responded that it was not.

Petitioner denied that Sonia Goodluck was driving her son to Washington School on the dates testified to by Mr. Van Deventer. Petitioner testified that she was the one driving him to the bus stop and that she used Ms. Goodluck's car.

When asked if she knew a woman named Pearl Duboise, petitioner testified that Ms. Duboise lives across the street from her at 2_ M____ Avenue and that petitioner "sees her now and then." According to petitioner, Ms. Duboise works for respondent school district.

Petitioner testified that on or about February 4, 1999, she was served with a set of interrogatories in connection with this matter. Among the questions she was asked to answer were:

1. What addresses have you and your family lived at over the past five years?

2. Please provide the names . . . of all individuals residing at B_____ Place, Apartment _, Irvington, New Jersey.

3. Please indicate the utilities that service the property at B____ Place and provide account numbers and the names of the account holders and copies of the last six months' bills.

4. Please provide the names, relationship and ages of all individuals residing at 2_ M____ Avenue, Vauxhall, New Jersey.

5. Please list all employees you have worked for over the past five years.

6. Please provide your 1996-1997 State and Federal tax returns and the 1998 return.

7. Please provide the address and relationship of Sonia Goodluck.

8. Please provide a copy of the lease for premises at B____ Place, Irvington, New Jersey.

Petitioner was asked why she did not answer the interrogatories. Petitioner responded that she did answer them, but she misplaced the answers and the documents requested. She testified that when she misplaced the answers to interrogatories, her attitude was "I'll see [respondent's lawyer] in court."

Petitioner denied telling the manager of the apartment complex at _____Place not to send the lease to respondent. Petitioner stated that on October 28, 1998, when

she issued a check to respondent for a school trip for J. H., the check had an address of 28 Durand Place, Irvington. Petitioner testified that she was just trying to use up old checks and, in fact, she was living at 2_ M_____ Avenue at the time.

In support of her testimony that she lived at 2_ M____ Avenue, petitioner introduced into evidence nine documents, none of them establishing that proposition.

4. Maria Schmidtberg, for respondent

Ms. Schmidtberg is employed by respondent as a residency investigator. She was assigned to interview the owner of 2_ M____ Avenue and verify his signature and the signature of the notary public on R-2, the Affidavit of Tenancy. Mr. Eisenburr was interviewed by Ms. Schmidtberg. When confronted with the Affidavit of Tenancy, Mr. Eisenburr acknowledged that he signed it but that no notary public was present when he did. Ms. Schmidtberg testified that Mr. Eisenburr told her that the names of the family members on the form were not on the form when he signed it. Essentially, according to Ms. Schmidtberg, Mr. Eisenburr told her that he signed his name on a preprinted form which had nothing else on it.

CREDIBILITY

The credibility of the witnesses is of paramount concern in this case. If I believe petitioner, petitioner and her son were living in the township at the time period in question. If I do not believe petitioner, respondent prevails.

I am constrained to say that I did not find petitioner particularly credible. If she had answered the interrogatories sent to her and provided the information requested therein, it would have clearly established the place of residence. Not only did petitioner not answer the interrogatories, but she did not bring the information requested to the hearing. Of all of the possible explanations for her failure to do so, under all the circumstances, the most compelling explanation is that had she produced those documents, those documents would have betrayed her position.

Furthermore, respondent conceded under cross-examination that information provided by her in various forms was intentionally false and designed to mislead the school officials as to their true residence.

On the other hand, I was unable to find any motive for Mr. Van Deventer to fabricate. Finally, with regard to the testimony of Mr. Green, his recollection was vague, sketchy and unreliable.

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to *N.J.S.A.* 18A:38-1, public schools shall be free to persons over five and under 20 years of age who are domiciled within the school district. While there are certain exceptions, this case is not a case of exceptions but instead a case of questioned domicile. It is the position of petitioner that she and J. H. were, at all times pertinent to this case, domiciled in the district of Union Township.

The burden of proving that the petitioner is domiciled in the school district of Paramus falls squarely upon petitioner. It is petitioner's burden to show that she was domiciled in Union Township and that her son was appropriately attending school there. The proof in this case by petitioner falls well short of meeting the burden. As noted above, her testimony that she was living in the district during the relevant time period lacked credibility. The documents submitted by petitioner in support of her claim not only failed to make up for the incredibility of her testimony, but made her testimony appear even more incredible.

As a result of this conclusion, the next question presented is that of tuition reimbursement. *N.J.S.A.* 18A:38-1 permits the assessing of a parent tuition for a student prorated to the time of the student's ineligible attendance in the schools of the district. Respondent has submitted a certification by Karen M. Dunn, the Business Administrator for the Union Township Board of Education. According to the certification, for the school year 1998-1999, the tuition charge for a student enrolled in a kindergarten in the district was $5,664.00. For the school year 1999-2000, the tuition charge for an elementary grade student is $6,773.00 or $37.63 per school day for everyday the child is enrolled in the system for the year.

ORDER

It is hereby **ORDERED** that petitioner's claim be and is hereby **DISMISSED.** It is further **ORDERED** that for the days J. H. attended the schools of respondent, Union Township, petitioner shall pay respondent tuition computed in accordance with the provisions of *N.J.S.A.* 18A:38-1(b)(2).

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

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

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

December 1, 1999
DATE

Michael L. Ravin, ALJ
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

12/7/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 9 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES

For Petitioner

C. C., petitioner
Harvey Green

For Respondent

David H. Van Deventer
Maria Schmidt berg

LIST OF EXHIBITS

P-1 Polaroid photograph
P-2 "VOID" check
P-3 Auto repair order
P-4 Affidavit of Proof of Residency
P-5 Affidavit of Proof of Residency
P-6 Affidavit of Proof of Residency
P-7 Residential Lease
P-8 Photocopy of boat operator's license
P-9 Photocopy of student loan corporation account statement
P-10 Photocopy of motor vehicle services address change acknowledgment

R-1 Residency Investigation Request Form
R-2 Emergency Contact Form
R-3 School District of Union Township Affidavit of Tenancy
R-4 Union Township Board of Education Registration Form
R-5 Photocopy of check
R-6 Interrogatories
R-7 Certification of Karen M. Dunn, Business Administrator

OAL DKT. NO. EDU 1159-99
AGENCY DKT. NO. 549-12/98

C.C., on behalf of minor son, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and relying upon the credibility determinations of the ALJ,[2] the Commissioner concurs that petitioner has failed to establish by a preponderance of credible evidence that she is domiciled in respondent's District so as to entitle J.H. to a free public education.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1b(2), the Commissioner directs that petitioner reimburse the Board the amount of $5,664 representing educational costs for J.H. for the 1998-1999 school year, and an additional $37.63 per day for each day of his ineligible attendance for the 1999-2000 school year.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Although petitioner did file a letter of exception on January 3, 2000, this submission was neither timely filed nor served on the Board and Administrative Law Judge (ALJ), pursuant to *N.J.A.C.* 1:1-18.4.

[2] The Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 21, 2000
Date of Mailing, January 21, 2000

~~173-00~~
36-00

EDU # 5150-95 and 11726-95 (consolidated)
C # 173-00
SB # 36-00

HELEN CHELOC,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 12, 2000

For the Petitioner-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Murrary, Murray & Corrigan (David F. Corrigan, Esq., of Counsel)

Helen Cheloc (hereinafter "petitioner") had been employed as "Assistant Board Secretary/Director of Administration" by the Board of Education of the City of Elizabeth (hereinafter "Board") since 1985. As set forth in the job description adopted by the Board, exhibit P-1, in evidence, the basic functions of the position included acting as a general aide to the Secretary/School Business Administrator and supervising the operation of the district's Division of Administration. The specific responsibilities included supervising the district's purchasing, payroll, accounting and workers' compensation departments, contract administration, timely submission of required financial reports, assisting the Board Secretary/Business Administrator in the

preparation of the annual budget, and maintaining the Board's petty cash accounts. The job description did not include a certification requirement, and the petitioner did not possess certification at the time she was hired.[1]

On December 21, 1994, the Board determined not to award the petitioner a salary increase for the 1994-95 school year, despite a favorable recommendation from the Acting Superintendent.[2] The petitioner filed a petition with the Commissioner of Education, alleging that the Board's action was arbitrary and capricious. The petitioner claimed that, based on past practice, she was entitled to the same benefits as supervisors and administrators who were party to a collective bargaining agreement.

On July 12, 1995, the Board created the position of comptroller and assigned the fiscal supervisory duties performed by the petitioner to that position. The job description adopted by the Board for the new position, exhibits P-30 and R-1, in evidence, required possession of a Bachelor's Degree and a certificate as a Registered Municipal Accountant or Certified Public Accountant, which were not required to be held by the Assistant Board Secretary/Director of Administration. The basic functions of the position, as set forth in the job description, included managing and controlling the financial resources of the district and supervising and managing the operation of the district's Division of Budgeting and Accounting. The specific duties included assisting

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[1] The petitioner subsequently acquired certification as a school business administrator in 1989. Tr. 2/7/97, at 20.

[2] In a memo dated December 7, 1994 to the Acting Superintendent of Schools, Linda King, the Board Secretary/School Business Administrator, related that a salary guide had been established by the Board in January 1992 for business office directors for the term of July 1, 1990 through June 30, 1994. She added that the Board had previously agreed to consider salary increases for these employees at the conclusion of negotiations with the Elizabeth Administrative Supervisory Council. Accordingly, she recommended that the salary for these employees, including the petitioner, be increased by $3,535 in both 1994-95 and 1995-96 and by $3,703 in 1996-97. Exhibit P-5, in evidence.

the Secretary/School Business Administrator in all district financial matters, supervising the district's accounting and payroll units, supervising accounts payable and purchasing, timely submission of all required financial reports, supervising and maintaining financial records, controlling the income and disbursement of monies, assisting the Secretary/School Business Administrator in the preparation of the district's annual budget, evaluating accounting personnel, and supervising the district's debt management.

The petitioner retained her title as Director of Administration, her salary level and her responsibility over the district's workers' compensation department. A new job description adopted by the Board, exhibit P-2, in evidence, made the Director of Administration directly responsible to the comptroller. The basic functions of the position included acting as a general aide to the comptroller and supervising the operation of the Division of Administration.

The petitioner thereupon filed a second petition with the Commissioner challenging the Board's action and seeking reinstatement to her former position as Assistant Board Secretary/Director of Administration. The petitioner contended that the Board's actions were arbitrary, capricious and unreasonable and in violation of her tenure rights. She also claimed that such actions violated the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq., charging that they had been taken in retaliation for her objections to allegedly improper budget-related actions taken by the Board in 1994. Those petitions were consolidated in the Office of Administrative Law.

On April 24, 2000, an Administrative Law Judge ("ALJ") concluded that the Board's action denying the petitioner a salary increase for the 1994-95 school year was

arbitrary and capricious. The ALJ found that Linda King, the Board Secretary/School Business Administrator, "did not provide Cheloc with any written evaluations, negative or positive, and always recommended her for a salary increase. In fact, King was Cheloc's supervisor and she recommended to the superintendent that Cheloc receive the salary increase. However, the Board chose to reject King's recommendation and withhold Cheloc's increase." Initial Decision, slip op. at 9. The ALJ concluded that the Board had failed to give the petitioner sufficient notice that her work was deficient or to afford her the opportunity to take corrective action, and had failed to articulate the criteria used to reject the recommendation of her supervisor.

The ALJ, however, recommended upholding the Board's action reassigning the petitioner's fiscal supervisory functions to the newly-created comptroller position. The ALJ concluded that the Board had reasonable grounds to establish the comptroller position with fiscal supervisory duties formerly assigned to the petitioner. In so doing, the ALJ concluded that the petitioner had not demonstrated that the Board had taken such action in bad faith, finding that the petitioner had failed to prove that there was a connection between her objections to allegedly improper budget-related actions by the Board and the Board's decision to assign her fiscal responsibilities to the newly-created comptroller position. The ALJ did not consider the petitioner's CEPA claim, observing that such claims are beyond the jurisdiction of the Commissioner of Education.

On June 12, 2000, the Commissioner adopted in part and modified in part the ALJ's recommended decision. Initially, the Commissioner determined to consider the petitioner's CEPA claim within the context of her general assertion that the Board's actions were taken in bad faith. The Commissioner found that the petitioner had failed

to demonstrate that the Board's decisions to deny her salary increases for 1994-95 and 1995-96 had been made for retaliatory reasons. In so doing, the Commissioner found that the petitioner was not a teaching staff member subject to payment on a salary guide, pointing out that the job description for Assistant Board Secretary/Director of Administration did not require certification and that the petitioner had not possessed a certificate when she was employed by the Board in 1985. The Commissioner rejected the petitioner's contention that the Board's decisions were made for retaliatory purposes, finding that "the Board contends, and the record substantiates, that petitioner failed to adapt to its site-based management plan, and was too rigid in carrying out her duties...." Commissioner's Decision, slip op. at 20.

Turning to the issue of the Board's reorganization of its business office in 1995, the Commissioner was unable to find on the record before him that the Board's effective abolishment of the petitioner's position, its creation of the comptroller position or its hiring of a properly credentialed individual to fill the new position were arbitrary and capricious. Nor could the Commissioner conclude on the basis of that record that the Board's actions were retaliatory or otherwise carried out in bad faith. Assuming for the purpose of his discussion that the petitioner was tenured in her position as Assistant Board Secretary/Director of Administration,[3] the Commissioner agreed with the ALJ that the record supported the conclusion that the Board had abolished the petitioner's position and created the comptroller position to provide greater assurance of fiscal responsibility. Additionally, like the ALJ, the Commissioner found that the record was

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[3] The Commissioner noted that although the Board had contended in its post-hearing submission to the ALJ that the petitioner had not acquired tenure rights in her prior position, it had not objected to the ALJ's finding that the petitioner had achieved tenure pursuant to N.J.S.A. 18A:17-2.

insufficient to establish a connection between the petitioner's stated concerns about the Board's fiscal practices and the subsequent reorganization. The Commissioner therefore dismissed the petition.

The petitioner filed the instant appeal to the State Board.

On January 16, 2002, the Legal Committee issued a report in this matter in which it recommended that the State Board affirm the Commissioner's determination to dismiss the petition, but that it do so on the basis of a different analysis. The Legal Committee concluded that the petitioner did not achieve tenure as an Assistant Board Secretary and, as a result, that she had no entitlement by virtue of tenure to claim reinstatement as Assistant Board Secretary/Director of Administration. The Committee further concluded that the petitioner did not have a claim with respect to the Board's determination not to provide her with salary increases and that the petitioner had not demonstrated that the Board's action in creating the position of comptroller and assigning the fiscal supervisory duties she had performed to the comptroller was arbitrary and capricious, retaliatory or otherwise carried out in bad faith. The petitioner filed exceptions to that report.

After reviewing the exceptions,[4] the Legal Committee finds it necessary to issue a revised report. As in our first report, we conclude that the petitioner did not achieve tenure as an Assistant Board Secretary and, consequently, that she had no entitlement by virtue of tenure to reinstatement as Assistant Board Secretary/Director of Administration. However, we also conclude that the petitioner has demonstrated that

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[4] We have limited our consideration of the petitioner's exceptions to those arguments based on the record on appeal in this case and have not considered any of the documents appended to those exceptions that were not included in the record on appeal. N.J.A.C. 6A:4-1.8(a). See 6A:4-1.9(b) (supplementation of the record on appeal).

the Board's determination not to grant her a salary increase for the 1994-95 school year was arbitrary and capricious.

Initially, as we did in our first report, we find for the reasons that follow that the petitioner was not tenured as an Assistant Board Secretary. Tenure is a statutory right, and N.J.S.A. 18A:17-2(a) defines with specificity the conditions under which an individual may achieve tenure as a board secretary, assistant secretary or business manager. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). In order to obtain tenure, the precise statutory conditions must be met. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962), certif. denied, 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed.2d 502 (1963). The burden of proving the right of tenure is on the staff member, and that right must be clearly proved. Canfield v. Bd. of Ed. of Pine Hill Borough, 51 N.J. 400 (1968).

Pursuant to N.J.S.A. 18A:17-2(a), a board secretary or assistant board secretary who has "devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years" shall hold such office or position under tenure. N.J.S.A. 18A:17-13, in turn, authorizes a district board of education to appoint an assistant board secretary, who may be chosen from among its members. Under the statute, an assistant board secretary assists a board secretary who has been appointed pursuant to N.J.S.A. 18A:17-5, acts in place of such secretary during his or her absence or incapacity, and performs such other duties as the board may from time to time prescribe. There is no dispute that the petitioner performed such functions for some portion of her time for more than three years. However, it is evident from the record that

given her responsibilities as Director of Administration, she did not devote her full time during that period to service as Assistant Board Secretary.

As previously indicated, the petitioner had been employed as Assistant Board Secretary/Director of Administration from 1985 until 1995. After the Board reassigned her fiscal supervisory functions to the newly-created comptroller position in 1995, she retained the title of Director of Administration with the responsibilities attendant thereto. A comparison of the job description for Assistant Board Secretary/Director of Administration with the job description subsequently adopted by the Board for Director of Administration confirms that the petitioner continued to be responsible for supervising the operation of the Division of Administration. The specific functions retained by the petitioner included contract administration, maintenance of petty cash accounts, and evaluation and in-service training of all personnel assigned to the Division of Administration. In addition, the record indicates that the petitioner continued to administer and supervise the district's workers' compensation program.

Given these circumstances, we find that the petitioner did not devote her full time to her responsibilities as Assistant Board Secretary. Consequently, she did not satisfy the precise statutory conditions for the achievement of tenure as an assistant board secretary pursuant to N.J.S.A. 18A:17-2(a). In this respect, we reject the petitioner's argument that her status as a full-time employee of the Board satisfied the statutory requirement of N.J.S.A. 18A:17-2(a). We find that the words of the statute are clear: in order to achieve tenure as an assistant board secretary, an individual must devote his full time to the duties of that office. "Past practices" cannot alter the meaning of the statutory language.

Since the petitioner did not achieve tenure as an Assistant Board Secretary, the elimination of her duties as Assistant Board Secretary did not trigger any tenure rights, and she had no entitlement by virtue of tenure to claim reinstatement as Assistant Board Secretary/Director of Administration.

We turn now to the petitioner's contention that the Board had improperly denied her salary increases for the 1994-95 and 1995-96 school years. As we indicated in our first report, such action did not constitute a reduction in compensation. See Williams v. Plainfield Bd. of Ed., decided by the State Board of Education, 1980 S.L.D. 1552, aff'd, 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981) (tenure rights do not include future salary expectations). In any event, because the petitioner did not achieve tenure as a result of her service as Assistant Board Secretary, she cannot claim that the Board's action was prohibited by N.J.S.A. 18A:17-2, which provides protection to board secretaries and assistant board secretaries who are tenured in their positions.

Nonetheless, it is also well established that district boards may not act in a manner which is arbitrary or capricious, without a reasonable basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). For the reasons that follow, we conclude that the Board's action in denying the petitioner a salary increase for 1994-95 was arbitrary and capricious.

There is nothing in the record of this case to show that the Board had anything before it when it acted on December 21, 1994 to deny the petitioner a salary increase other than the Acting Superintendent's recommendation that the petitioner receive an increase in the amount of $3,535 for the 1994-95 school year. The record substantiates that the petitioner had, in fact, been recommended for an increase by Linda King, the

Board Secretary/School Business Administrator, who had been the petitioner's supervisor since 1989. Tr. 2/10/99, at 61-62. Specifically, in a memo to the Acting Superintendent of Schools dated December 7, 1994, King recommended that the Board increase the salary for all business office directors in the district, including the petitioner, by $3,535 for 1994-95. Exhibit P-5, in evidence.[5] The record shows that the Acting Superintendent approved King's request on December 12, 1994, id., and recommended to the Board that the petitioner be awarded an increase, along with the other business directors. As set forth above, the Board rejected the Acting Superintendent's recommendation with regard to the petitioner and denied her any increase.

The record does not include any indication of the basis upon which the Board determined to reject the Acting Superintendent's recommendation. In point of fact, the only document in the record to reveal any dissatisfaction with the petitioner's work is an evaluation prepared by King in June 1995, six months after the Board's action. Similarly, the only testimony in these proceedings critical of the petitioner's performance came from King. Such after-the-fact evidence cannot alter the fact that there is nothing in the record before us to show that the Board had any information upon which to conclude that the petitioner's performance was not satisfactory when it acted on December 21, 1994. We reiterate in that regard that King had recommended to the Acting Superintendent that the petitioner receive a salary increase for 1994-95.[6] We

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[5] The petitioner testified that King had informed the business directors at a meeting held on December 4 or 5, 1994, "that there was nothing wrong with our job performance and everyone will be recommended for the salary increase...." Tr. 2/6/97, at 32.

[6] King testified that she did not recommend to the Board that the petitioner be denied a salary increase or otherwise have any discussions with the Board concerning the petitioner's increase. Tr. 2/10/99, at 58, 61, 70.

note, in addition, that the petitioner was the only business office director in the district who did not receive an increase. Tr. 2/10/99, at 37.

Under these circumstances, we conclude that the Board's action in denying the petitioner a salary increase for the 1994-95 school year was arbitrary and capricious. See Meli v. Board of Education of the Burlington County Vocational-Technical Schools, Docket #A-5820-85T7 (App. Div. 1987) (Court held that district board's action in withholding teacher's salary increments was arbitrary and capricious where the Superintendent's recommendation to deny the increment merely cited "attendance" without more and the record showed that the teacher's attendance had improved from the previous year.) We therefore direct the Board to compensate the petitioner for her wages lost as a result of such action.[7]

The petitioner also challenges the Board's action in July 1995 to deny her a salary increase for the 1995-96 school year. As previously set forth herein, and in contrast to the Board's action in December 1994, Linda King had prepared an evaluation in June 1995 which was critical of the petitioner's performance. In that evaluation, King rated the petitioner as "Needs Improvement" in 14 categories and "Average" in the remaining six. Under these circumstances, we agree with the Commissioner that the petitioner has not demonstrated that the Board acted arbitrarily or capriciously when it denied her a salary increase for the 1995-96 school year.

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[7] In response to exceptions filed by the Board to the revised Legal Committee Report, we clarify that the petitioner is entitled to a salary increase in the amount of $3,535 for the 1994-95 school year, which was the amount recommended by the Acting Superintendent. Since the remedy sought by the petitioner was limited to the payment of that increase, the effect that such an increase might have had on subsequent years was not litigated in these proceedings and was not before us on appeal.

With regard to the petitioner's request in her exceptions for counsel fees, it is well established that we do not have the authority to award such fees. Balsley v. North Hunderdon Bd. of Educ., 117 N.J. 434, 442-43 (1990) (the absence of express statutory authority is fatal to a claim for counsel fees).

We also concur with the Commissioner that the petitioner has not demonstrated on this record that the Board's action in creating the position of comptroller and assigning the fiscal supervisory duties the petitioner had performed to the comptroller was arbitrary and capricious, retaliatory or otherwise carried out in bad faith.

Accordingly, for the reasons expressed herein, we affirm in part and reverse in part the decision of the Commissioner.[8]

Orlando Edreira and Edward Taylor abstained.

Attorney exceptions are noted.

July 2, 2002

Date of mailing JUL 05 2002

[8] We deny the Board's request for leave to file a reply to the petitioner's exceptions to the revised Legal Committee Report as not necessary for a fair determination of this matter. See N.J.A.C. 6A:4-1.17(a). We also deny the petitioner's request dated June 25, 2002 for leave "to amend to its exceptions concerning tenure the following case: DORIS A. WALSH, PETITIONER, V. BOROUGH OF LAUREL SPRINGS BOARD OF EDUCATION, RESPONDENT."

37-00

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

January 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU1152-99

AMY DALCERO BERMAN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Respondent.

Eugene G. Liss, Esq, for petitioner

Joseph Verga, Esq., for respondent

Record Closed: November 30, 1999 Decided: December 1, 1999

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on January 12, 1999 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a settlement agreement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

December 1, 1999
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

12/7/99
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 9 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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EUGENE G. LISS
Attorney-at-Law
94 MAIN STREET
1st Floor
LITTLE FALLS, NEW JERSEY 07424
Attorney for Petitioner, Amy Dalcero Berman

AMY DALCERO BERMAN	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Dkt. No.: EDUOR-01152-99N Agency Ref. No.: 532-11/98
v.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER and RELEASE
Respondent.	:	

The State-Operated School District of the City of Newark ("Newark" or "District") and Amy Dalcero Berman ("Berman"), agree to the following terms in full resolution of this matter:

WHEREAS, Berman disputes the basis for the District's withholding of her 1998-1999 increment; and

WHEREAS, it appears that Berman made efforts to improve her performance during the 1998-1999 school year and she received a satisfactory annual evaluation for the 1998-1999 school year; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. The 1998-1999 increment withholding shall remain in effect until the end of the 1999-2000 school year, at which time Newark will review Berman's observations and evaluations. If Berman's annual summative evaluation reflects a satisfactory rating, she shall be placed back on the appropriate step, degree level, and dollar amount of the salary guide, effective September 1, 2000. The withheld monies will not be returned to Ms. Berman.

2. Berman shall, upon execution of this agreement, withdraw with prejudice, the appeal filed in relation to her 1998-1999 increment withholding specifically OAL Docket No. EDUOR 01152-99N.

3. Berman acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that she shall receive no additional payments. In exchange for the above consideration, Berman, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities o whatsoever kind in character, that she has had or may now have against any of them, relative to the litigation herein identified.

4. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

5. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the
City of Newark

Amy Berman
AMY DALCERO BERMAN

By: M. Bolden
MARION BOLDEN, Superintendent

Dated: 11/24/99

Dated: 10/29/99

Eugene G. Liss
Eugene G. Liss
Attorney for Ms.Berman

Joseph Verga 11/3/99
Joseph Verga, Esq.
Associate Counsel
Newark Public School

OAL DKT. NO. EDU 1152-99
AGENCY DKT. NO. 532-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 21, 2000
Date of Mailing, January 21, 2000

37-00

SEC # C17-99
C # 184-00 SEC
SB # 37-00

IN THE MATTER OF FREDERICK CONFESSORE, BOARD OF EDUCATION OF HARRISON, HUDSON COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the School Ethics Commission, April 25, 2000

Decided by the Commissioner of Education, June 16, 2000

Decision on motion by the State Board of Education, February 7, 2001

For the Respondent-Appellant, Michael J. Pecklers, Esq.

For the Petitioner-Respondent, Beth Mitchell, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the reasons expressed by the School Ethics Commission in its decision of April 25, 2000, the State Board of Education affirms the Commission's determination that respondent, an Assistant Superintendent in Harrison who was also a one-third owner of a daycare facility located in the district, violated N.J.S.A. 18A:12-24(b) of the School Ethics Act by his conduct: 1) in representing, for the purpose of being permitted to provide daycare services to the Harrison school district, that the district would need to use all three daycare facilities then licensed in the district to fulfill its responsibilities to provide pre-school services for three- and four-year-old children, and in subsequently sending a letter to the New Jersey Department of Human Services to ensure that no

other daycare facilities would be permitted to provide such services; 2) in sending the correspondence of May 18, 2000 from the daycare facility in which he was a part owner to the residents of Harrison soliciting pre-school children for the center and using his title as Assistant Superintendent; and 3) when, in doing so, he contravened the representations he had made in his request to the School Ethics Commission for an advisory opinion and also violated the Commission's caution to him.

We also affirm the decision of the Commissioner of Education that, based on the findings of the School Ethics Commission, the appropriate sanction under the circumstances of this case is respondent's suspension from his position of Assistant Superintendent for a period of one month. We therefore direct that the respondent be suspended from his position for one month.[1]

We deny the respondent's request for oral argument as not necessary for a fair determination of this matter. N.J.A.C. 6A:4-3.2.

Ronald K. Butcher opposed.

October 3, 2001

Date of mailing OCT 05 2001

[1] We note that the Commissioner deferred implementation of this sanction pending the determination of an appeal by the respondent to the State Board.

38-00

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

January 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11671-98
AGENCY DKT. NO. 513-11/98

KATHLEEN ANDERSON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eugene G. Liss, Esq., for petitioner

Arsen Zartarian, Esq., Associate Counsel, for respondent

Record Closed: November 18, 1999 Decided: December 1, 1999

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

On November 17, 1998, Kathleen Anderson, filed a petition of appeal with the Commissioner of Education claiming that respondent's withholding of her salary increment for the 1998/99 academic school year was arbitrary, capricious and unreasonable. On December 2, 1998, respondent filed an answer alleging that the withholding of petitioner's increment was justified. On December 18, 1998, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52;14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned Administrative Law Judge on February 11, 1999, and a telephone prehearing conference scheduled for April 12, 1999. A telephone prehearing conference was held on that date, and a hearing scheduled for October 4, 1999 at the Office of Administrative Law, 185 Washington Street, New Jersey 07102.

As a result of settlement conferences held between the parties, the parties agreed to a settlement and the hearing was not held. The parties have prepared a voluntary settlement agreement, waiver and release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 3, 1999
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

12/7/99
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 9 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

EUGENE G. LISS
Attorney-at-Law
94 MAIN STREET
1st Floor
LITTLE FALLS, NEW JERSEY 07424
Attorney for Petitioner, Kathleen Anderson

KATHLEEN ANDERSON	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Dkt. No.: EDU 11671-98N Agency Ref. No.: 513-11/98
v.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER and RELEASE
Respondent.	:	

The State-Operated School District of the City of Newark ("Newark" or "District") and Kathleen Anderson ("Anderson"), agree to the following terms in full resolution of this matter:

WHEREAS, Anderson disputes the basis for the District's withholding of her 1998-1999 increment; and

WHEREAS, it appears that Anderson made efforts to improve her performance during the 1998-1999 school year and she received a satisfactory annual evaluation for the 1998-1999 school year; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. The 1998-1999 increment withholding shall remain in effect until the end of the 1999-2000 school year, at which time Newark will review Anderson's observations and evaluations. If Anderson's annual summative evaluation reflects a satisfactory rating, she shall be placed back on the appropriate step, degree level, and dollar amount of the salary guide, effective September 1, 2000. The withheld monies will not be returned to Ms. Anderson.

2. Anderson shall, upon execution of this agreement, withdraw with prejudice, the appeal filed in relation to her 1998-1999 increment withholding specifically OAL Docket No. EDU 11671-98N.

3. Anderson acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that she shall receive no additional payments. In exchange for the above consideration, Anderson, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that she has had or may now have against any of them, relative to the litigation herein identified.

4. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

5. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the
City of Newark

Kathleen Anderson
KATHLEEN ANDERSON

Dated: Nov 16 1999

Eugene G. Liss
Eugene G. Liss, Esq.
Attorney for Ms. Anderson

By: M. A. Bolden
MARION BOLDEN, Superintendent

Dated: 10/29/99

Arsen Zartarian
Arsen Zartarian, Esq.
Associate Counsel
Newark Public School

OAL DKT. NO. EDU 11671-98
AGENCY DKT. NO. 513-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 21, 2000
Date of Mailing, January 21, 2000

39-00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN LISTER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

January 21, 2000

OAL DKT. NO. EDU 1748-97
AGENCY DOCKET NO. 548-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN LISTER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

For the Board: Philip Stern, Esq. (Sills, Cummis, Zuckerman, Tischman, Epstein & Gross)

For the Respondent: Thomas R. Ashley, Esq. (Ashley & Charles)

The record, including respondent's notice to the Office of Administrative Law (OAL) that he was "withdrawing" the within tenure hearing matter because of resolution of the criminal matter against him, have been reviewed.

Upon receipt of the case file from the OAL on December 17, 1999, a letter was sent to respondent requesting that he submit to the record documentation that it was his intention to no longer contest the tenure charges. Respondent was further informed that if this was his intention, each count of the petition would then be deemed admitted by him, whereupon the matter would be decided by the Commissioner on a summary judgment basis. On January 3, 2000, respondent submitted a letter verifying that he no longer wished to contest the tenure charges.

Given that respondent has chosen not to contest the tenure charges of unbecoming conduct certified against him by the State-District Superintendent, the Commissioner finds and determines that, consistent with *N.J.A.C.* 6:24-1.4(e), each count of the tenure charges set forth by the Board is deemed admitted by respondent.

Wherefore, upon consideration of the record, including the statement of evidence and documentary evidence in support of the tenure charges, the Commissioner sustains each charge of unbecoming conduct certified against respondent, finding that respondent knowingly and willfully participated in conduct intended to defraud the State Health Benefits Program resulting in theft of and improper payment of public monies and that such behavior warrants respondent's dismissal.

Accordingly, respondent is hereby removed from his tenured position as coordinator of substance abuse awareness teacher in the State-Operated School District of Newark. The record in this matter shall be transmitted to the State Board of Examiners for review and such action as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

January 21, 2000
Date of Mailing, January 21, 2000

40-00

IN THE MATTER OF THE TENURE HEARING OF DR. H. BENJAMIN WILLIAMS, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

January 24, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8601-98

AGENCY DKT. NO. 423-9/98

IN THE MATTER OF THE TENURE HEARING OF DR. H. BENJAMIN WILLIAMS, BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY.

George G. Frino, Esq., for petitioner

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: December 21, 1999 Decided: December 29, 1999

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

In this matter, petitioner, Board of Education of the City of Atlantic City, filed tenure charges against respondent, Dr. H. Benjamin Williams, school district Superintendent of Schools. This matter was transmitted to the Office of Administrative Law (OAL) on October 2, 1998. As a result of the adoption of L.P. 1998, ch. 42,

effective June 30, 1998, there is a legislative mandate that this and other similar matters be handled in an expeditious and timely manner. By letter order dated October 7, 1998, addressed to counsel, a certain schedule was to be followed in processing this case. Pursuant to this act, the discovery period was to conclude on December 1, 1998, and the matter was scheduled for hearing to commence on December 2,1998.

During the discovery period, both counsel represented and agreed that because of the voluminous documentation in this matter relating to invoices, purchase orders and other related documents, the possibility of completing discovery within the 60 day discovery period was minimal. As a result, attorney for respondent requested an extension of the discovery period and an adjournment of the hearing. I directed that the attorneys appear before me on December 2, 1998, to set forth their positions on the record with respect to this request, and, as a result I ordered an extension of the period of discovery from December 1, 1998 to December 31, 1998, and that the hearing in this matter scheduled for December 2, 3, 8, 14, 15, 16, and 17, 1998, be adjourned and rescheduled to be heard commencing on January 15, 1998 and continuing thereafter on January 19, 20, 21, 22, 25, 26, 28, and 29 and February 1, 2, 4, and 5, 1998.

On October 23,1998, attorney for respondent submitted a notice of motion to dismiss tenure charges based on respondent's alleged refusal to provide public documents as warranting dismissal of charges, the Board's alleged violation of *N.J.S.A.* 18A:6-11 by publicly discussing the charges as warranting dismissal of the charges, based on the argument that the charges are conclusory, lack specific underlying facts, and warrant dismissal, and the charges should be dismissed because they allege inefficiencies and the notice required by *N.J.S.A.* 18A:6-11 was not provided. By a letter order entered on January 13, 1999, I denied the motion.

During the hearing on March 3, 1999, attorney for respondent renewed respondent's prior motion to dismiss the pending tenure charges on the basis that the public action taken by the respondent Board of Education to certify tenure charges against

Dr. Williams causes the tenure charges to be void as a matter of law. Attorney for respondent submitted written argument in support of the motion on March 10, 1999, and attorney for petitioner responded on March 12, 1999. Respondent's renewed motion requesting the dismissal of the tenure charges was subsequently denied.

Hearings were held in this matter on January 15, 19, 20, 21, 22, 26, 28, 29, February 2, 5, 17, 18, 19, 22, March 3, 9, 17, 18, April 13, May 6, and June 29, 1999. At the conclusion of the hearing the record remained open for 30 days after the receipt of transcripts in order to permit the attorneys to submit briefs. The record closed on October 22, 1999, and an initial decision was due on December 6, 1999.

On December 3, 1999, the attorneys for the respective parties contacted my office and represented that the matter had been settled, and they requested that I withhold any further action on the initial decision. On December 6, 1999, both attorneys requested that I reopen the record in this matter for the purpose of considering a settlement agreement resolving this matter which would be forthcoming within approximately two weeks. I agreed to this request and reopened the record for this purpose. On December 21, 1999, I received copies of the agreement signed by all parties.

I will now consider this settlement agreement in light of the principles enunciated in *Cardonick v. Bd. of Educ. of the Boro. of Brooklawn*, In that matter it was held that *In re Fulcomer,* 93 *N.J.Super.* 404, 411-413 (App. Div. 1967) made it clear that the ultimate authority for deciding a tenure matter rests with the Commissioner, and the local board of education does not retain any part of that authority and performs a limited function. The Commissioner held that a local board may not bring a tenure matter to a close without a decision rendered by the Commissioner or by his express approval of any settlement concluded by the parties. The Commissioner indicated that he would look with a jaundiced eye at settlements reached in tenure matters which are opened upon proper charges but which are concluded with lump sum payments made to respondent parties. He made it clear that he will carefully examine the factual circumstances

surrounding the proposed settlement both as to the nature of the charges involved as well as to the exact terms of the settlement in order to maintain the integrity of the Tenure Employees Hearing Act, to preserve the Commissioner's responsibility for rendering decisions in tenure matters and to ensure that determinations reached serve not only the interests of the parties but also the broader public interest.

In affirming the Commissioner's decision, the State Board of Education indicated that the proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher, the ALJ's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest. As part of the agreement, there must also be a disclosure that the teacher was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

In the present matter, the tenure charges against respondent allege that: (a) he permitted expenditures be made in violation of Board policy and education law; (b) he installed, perpetuated and failed to stop a system of purchasing that violated education law and regulations and that had insufficient controls in order to prevent theft and other losses; (c) he failed to adequately and carefully supervise and monitor the expenditure of public funds through the purchase order system; (d) he made a false and misleading statement; (e) these actions constitute a purposeful and/or reckless disregard of respondent's acknowledged duty to steward public funds, oversee and supervise the fiscal and financial affairs of the district in a manner that would comply with his Contract of Employment and the education laws; (f) these actions constitute a breach of respondent's duty to render competent and careful guidance and advice to the Board insofar as reasonably prudent financial practices that would safeguard public funds; (g) he purposely and knowingly solicited and caused the Board to incur obligations in excess of the limit of expenditures provided by applicable law, and to disburse funds in excess of

appropriated and budgeted amounts in violation of his responsibility for the general supervision and control over district finances and fiscal practices. Over the course of the 21-day hearing of this matter, the Board submitted proofs supporting the foregoing charges. Respondent defended his actions as Superintendent contending that his actions were in furtherance of the Board's duly adopted policies and instructions, that the lack of sufficient controls over finances, and that any lack of supervision and monitoring of the expenditure of public funds through the purchase order system were conditions which preexisted his appointment as Superintendent and which he was in the process of attempting to rectify. Respondent submitted proofs that he did not make a false and misleading statement; and he testified and submitted evidence that his actions as Superintendent did not constitute a purposeful and/or reckless disregard of his duty to steward public funds, oversee and supervise the fiscal and financial affairs of the district in a manner that would comply with his Contract of Employment and the education laws.

While not deciding this case, I **FIND** that there is merit to the contentions of both parties, and this supports the acceptance of the proposed settlement. At this stage of this matter, in the absence of my completing a laborious analysis of the extensive and voluminous documentary evidence and without a careful consideration of the issue of credibility when analyzing the testimony of the witnesses, which I remain willing to do, I am unable to conclude that the evidence preponderates to support the position of one party or the other. If the testimony and evidence is viewed with uncertainty by me as the finder of fact, it may also be similarly viewed by the parties. This uncertainty concerning the outcome of this matter further supports a settlement between the parties.

I also **FIND** as a fact that this matter has been pending since June 1998, that it also involves related litigation before the Commissioner of Education (OAL Dkt. No, EDU 6460-98) and in the Superior Court of New Jersey, Atlantic County, Docket No. ATL-L-1986-98, all of which will continue for some undefined time and at great expense. I **FIND** that in the meantime, entitlement to the position of Superintendent of Schools

will remain uncertain, and the students as well as the taxpayers of the Atlantic City School District will face an uncertain future.

I **FIND** that respondent has been made aware by the Settlement Agreement that the Commissioner may exercise his right to refer this matter to the State Board of Examiners for its review. I **FIND** that respondent has been ably represented by counsel throughout this proceeding, and that he has entered into this Agreement with a full understanding of his rights, as is indicated in the Agreement. I **FIND** that the Settlement Agreement which is annexed hereto and is made a part hereof, fully sets forth the settlement terms, fully disposes of all matters in controversy, is consistent with the law and, for the reasons set forth above , it is consistent with the public interest.

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

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

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

Dec 29, 1999
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12-30-99
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1999
DATE

OFFICE OF ADMINISTRATIVE LAW

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1999 DEC 20 P 12:12

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DAVID B. RAND
ROBERT M. TOSTI
ROBERT B. WOODRUFF
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JOHN E. CROOT, JR.
RUSSELL J. SCHUMACHER
KATHRYN J. KINGREE
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OF COUNSEL
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ELLEN S. BASS
TAMARA MARZULLI KRIKORIAN

RONALD M. PFLUG
266 HARRISTOWN ROAD
GLEN ROCK, NJ 07452
201-652-6300

December 17, 1999

TRANSMITTED VIA TELECOPIER AND REGULAR MAIL

Honorable Joseph F. Martone
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625

Re: Atlantic City Public Schools v. H. Benjamin Williams
OAL Docket No.: EDU-08601-98S

Dear Judge Martone:

George Frino and I have conferred and agreed that it would be in all parties best interest to attempt to expedite the Commissioner's approval of the settlement in the above matter.

As Your Honor has already been advised the Board of Education approved the settlement on December 14, 1999. We enclose for your review the language for the settlement document. Please note that there currently exists no one individual document with all original signatures but it is my understanding that all signatures will be obtained and faxed to your office no later than Monday, December 20, 1999. We are enclosing Dr. Williams' faxed signature.

Thank you for your continued cooperation in this matter.

Respectfully submitted,

Robert M. Tosti /cb

ROBERT M. TOSTI

RMT:cb
Enclosure

pc: George G. Frino, Esq. (via telecopier only - w/o enc.)

\williams\martoneltr

RECEIVED
NEW JERSEY

SEPARATION OF SERVICE AGREEMENT, RESIGNATION

AND MUTUAL RELEASES

1999 DEC 20 P 12: 12

This agreement is made between the Atlantic City Board of Education (hereinafter referred to as the "Board") and H. Benjamin Williams, Superintendent (hereinafter referred to as "Dr. Williams"), collectively referred to as the "Parties." The Parties hereby agree to resolve all issues relative to Dr. Williams' employment with the Board, as follows:

WHEREAS, Dr. Williams has been the Superintendent of the Atlantic City School District since March 3, 1997; and

WHEREAS, a dispute concerning his employment has been pending since June 1998; and

WHEREAS, the Parties have engaged in a hotly contested contractual-tenure dispute, and related litigation Atlantic City Board of Education v. H. Benjamin Williams, Docket No. EDU-08601-98S before the Commissioner of Education, Williams v. Atlantic City Board of Education v. H. Benjamin Williams, Docket No. EDU-6460-98 before the Commissioner of Education and Williams v. Atlantic City Board of Education, Superior Court of New Jersey, Atlantic County, Docket No. ATL-L-1986-98; and

WHEREAS, the Parties recognize that unless these matters are settled as set forth herein that the contractual tenure matter will continue for an undefined time and at great expense and that the entitlement to the position of Superintendent of Schools will remain uncertain, and the related litigation will continue, and that it appears clearly in the public interest to resolve these matters and terminate the litigation; and

WHEREAS, the Parties recognize, that notwithstanding the resolution of the matter that the Commissioner my exercise his right to refer this matter to the State Board of Examiners for its review; and

WHEREAS, the Board while neither admitting nor denying liability has determined that it is appropriate to withdraw the contractual-tenure charges currently pending; and

WHEREAS, Dr. Williams is willing to resign from his position of Superintendent of Schools and in lieu of current salary, back pay, front pay, potential damages and attorneys fees is willing to settle all outstanding and pending litigated matters for the lump sum amount of Two Hundred Sixty Thousand Dollars ($260,000), provided however, that Dr. Williams will continue to receive his salary until December 31, 1999 at which time his salary and benefits shall cease (except for medical) and Dr. Williams shall receive the lump sum on or before January 15, 2000.

NOW, THEREFORE, the Parties agree as follows:

1. The Board will withdraw the contractual-tenure charges presently pending in the Office of Administrative Law under Docket No. EDU-08601-98S;

2. Dr. Williams, simultaneously with the withdrawal of the contractual-tenure charges and conditioned upon the payment described herein, submit a binding letter of resignation to the Board effective December 31, 1999 which the Board acknowledges and accepts;

3. The Board will pay to Dr. Williams as noted above, a lump sum settlement of $260,000 to be paid as Dr. Williams so designates, no later than January 15, 2000;

4. Dr. Williams has authorized his attorney to withdraw all pending litigation, and Stipulations of Dismissal with Prejudice have been executed which are to be held in escrow pending final approval of this Agreement by the Board;

5. Dr. Williams will deliver to the Board, no later than January 15, 2000, all personal property of the Board currently in his custody and control; and

6. Dr. Williams shall continue on the Board's medical plan until February 1, 2000, and thereafter have the right to extend group medical, hospitalization, prescription and/or dental insurance coverage, at his expense, under the COBRA law.

As a result of this Agreement, except as specifically set forth herein, the Parties shall have no further obligations to each other.

The Board agrees to indemnify the Superintendent in accordance with N.J.S.A. 18A:16-6 and 16-6.1.

The Superintendent hereby agrees to release and forever discharge the Board, its present and former individual members, successors, assigns, and agents from any and all past, present and future claims, suits, actions and law or in equity of any kind, in any forum that he may have against it or them, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof.

The Board hereby agrees to release and forever discharge the Superintendent from any and all past, present and future claims, suits, tenure charges, actions of law or in equity of any kind, in any forum that it may have against him, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of the Agreement or any provision thereof.

The mutual releases set forth herein are entered into voluntarily and willingly and without any duress or coercion. Both parties agree to be bound by their respective releases and agree that their respective successors shall be bound by the releases and all other provisions of the Agreement.

Specifically, excluded from the Superintendent's release is his right upon cessation of employment with the Board to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), and any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations.

The Parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

The undersigned representative of the Board hereby acknowledges that he or she has been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

This Agreement shall inure to the benefit and responsibility of any successor, estate and/or heirs of the Parties.

In the event of a breach by either Party, the period of limitation for brining an action under any statute of limitations or other rule limiting actions shall be tolled from the date of this Agreement until the date of the breach.

IN WITNESS WHEREOF, the Parties hereunto set their hands and seals this ____ day of December, 1999.

ATLANTIC CITY BOARD OF EDUCATION

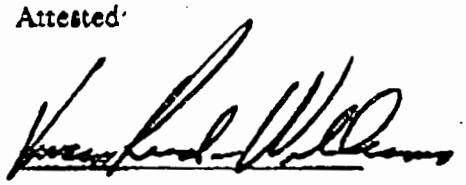
By: _____
Theresa Beebe Thomas

Attested:

_____
Lisa Mooney

Attested:

By: _____
H. Benjamin Williams



\williams\separations.gt

GEORGE G. FRINO, P.A.
ATTORNEY AT LAW
33 CLINTON ROAD
WEST CALDWELL, NEW JERSEY 07006

(973) 882-8708

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
1999 DEC 21 P 3:03

December 20, 1999

Honorable Joseph Martone, A.L.J.
Office of Administrative Law
Quakerbridge Plaza & Quakerbridge Road
Building No. 9
Post Office Box 049
Trenton, NJ 08625

Re: Atlantic City Board of Education, et al. v.
Dr. H. Benjamin Williams, Ed.D.
OAL Docket No. CRT 08601-98S
Agency Ref. No. 423-09/98

Dear Judge Martone:

Enclosed please find the original Separation of Services Agreement, Resignation and Mutual Release Agreement that bears facsimile signatures of the Board President and the Board Secretary in the above matter.

Thank you for your kind attention in this regard.

Respectfully submitted,

GEORGE G. FRINO

GGF/maf

Enclosure

cc: Robert M. Tosti, Esquire (w/encl.)

SEPARATION OF SERVICE AGREEMENT, RESIGNATION

AND MUTUAL RELEASES

This agreement is made between the Atlantic City Board of Education (hereinafter referred to as the "Board") and H. Benjamin Williams, Superintendent (hereinafter referred to as "Dr. Williams"), collectively referred to as the "Parties." The Parties hereby agree to resolve all issues relative to Dr. Williams' employment with the Board, as follows:

WHEREAS, Dr. Williams has been the Superintendent of the Atlantic City School District since March 3, 1997; and

WHEREAS, a dispute concerning his employment has been pending since June 1998; and

WHEREAS, the Parties have engaged in a hotly contested contractual-tenure dispute, and related litigation Atlantic City Board of Education v. H. Benjamin Williams, Docket No. EDU-08601-98S before the Commissioner of Education, Williams v. Atlantic City Board of Education v. H. Benjamin Williams, Docket No. EDU-6460-98 before the Commissioner of Education and Williams v. Atlantic City Board of Education, Superior Court of New Jersey, Atlantic County, Docket No. ATL-L-1986-98; and

WHEREAS, the Parties recognize that unless these matters are settled as set forth herein that the contractual tenure matter will continue for an undefined time and at great expense and that the entitlement to the position of Superintendent of Schools will remain uncertain, and the related litigation will continue, and that it appears clearly in the public interest to resolve these matters and terminate the litigation; and

WHEREAS, the Parties recognize, that notwithstanding the resolution of the matter that the Commissioner my exercise his right to refer this matter to the State Board of Examiners for its review; and

WHEREAS, the Board while neither admitting nor denying liability has determined that it is appropriate to withdraw the contractual-tenure charges currently pending; and

WHEREAS, Dr. Williams is willing to resign from his position of Superintendent of Schools and in lieu of current salary, back pay, front pay, potential damages and attorneys fees is willing to settle all outstanding and pending litigated matters for the lump sum amount of Two Hundred Sixty Thousand Dollars ($260,000), provided however, that Dr. Williams will continue to receive his salary until December 31, 1999 at which time his salary and benefits shall cease (except for medical) and Dr. Williams shall receive the lump sum on or before January 15, 2000.

NOW, THEREFORE, the Parties agree as follows:

1. The Board will withdraw the contractual-tenure charges presently pending in the Office of Administrative Law under Docket No. EDU-08601-98S;

2. Dr. Williams, simultaneously with the withdrawal of the contractual-tenure charges and conditioned upon the payment described herein, submit a binding letter of resignation to the Board effective December 31, 1999 which the Board acknowledges and accepts;

3. The Board will pay to Dr. Williams as noted above, a lump sum settlement of $260,000 to be paid as Dr. Williams so designates, no later than January 15, 2000;

4. Dr. Williams has authorized his attorney to withdraw all pending litigation, and Stipulations of Dismissal with Prejudice have been executed which are to be held in escrow pending final approval of this Agreement by the Board;

5. Dr. Williams will deliver to the Board, no later than January 15, 2000, all personal property of the Board currently in his custody and control; and

6. Dr. Williams shall continue on the Board's medical plan until February 1, 2000, and thereafter have the right to extend group medical, hospitalization, prescription and/or dental insurance coverage, at his expense, under the COBRA law.

As a result of this Agreement, except as specifically set forth herein, the Parties shall have no further obligations to each other.

The Board agrees to indemnify the Superintendent in accordance with N.J.S.A. 18A:16-6 and 16-6.1.

The Superintendent hereby agrees to release and forever discharge the Board, its present and former individual members, successors, assigns, and agents from any and all past, present and future claims, suits, actions and law or in equity of any kind, in any forum that he may have against it or them, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof.

The Board hereby agrees to release and forever discharge the Superintendent from any and all past, present and future claims, suits, tenure charges, actions of law or in equity of any kind, in any forum that it may have against him, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of the Agreement or any provision thereof.

The mutual releases set forth herein are entered into voluntarily and willingly and without any duress or coercion. Both parties agree to be bound by their respective releases and agree that their respective successors shall be bound by the releases and all other provisions of the Agreement.

Specifically, excluded from the Superintendent's release is his right upon cessation of employment with the Board to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), and any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations.

The Parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

The undersigned representative of the Board hereby acknowledges that he or she has been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

This Agreement shall inure to the benefit and responsibility of any successor, estate and/or heirs of the Parties.

In the event of a breach by either Party, the period of limitation for brining an action under any statute of limitations or other rule limiting actions shall be tolled from the date of this Agreement until the date of the breach.

IN WITNESS WHEREOF, the Parties hereunto set their hands and seals this ____ day of December, 1999.

ATLANTIC CITY BOARD OF EDUCATION

By: _____
Theresa Beebe Thomas

Attested:

_____
Lisa Mooney

Attested:

By: _____
H. Benjamin Williams

_____

\williams\separation.agt

OAL DKT. NO EDU 8601-98
AGENCY DKT. NO. 423-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. H. BENJAMIN	:	
WILLIAMS, SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF ATLANTIC CITY,		DECISION
ATLANTIC COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to the OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 24, 2000
Faxed and Mailed, January 24, 2000

41-00

41-00 R

E.G.P., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning grandmother challenged Board's residency determination.

On remand, the ALJ found, based on written submissions to the record and Board testimony, that although petitioner is a domiciliary of the District and M.B. resides with her, petitioner is not M.B.'s legal guardian. The ALJ concluded that M.B. is a resident of, but is not domiciled in, the District since the law is clear that a child's domicile is where his or her parents reside, which, in this case, is outside the District. The ALJ further determined that petitioner failed to demonstrate a verifiable family or economic hardship establishing that M.B.'s parents are incapable of supporting or providing care for him, thereby entitling M.B. to a free education in the District. Thus, the ALJ ordered petitioner to reimburse respondent $28,798.32 for M.B.'s educational costs.

The Commissioner reversed the recommended Initial Decision, finding that this matter, which deals with a child's entitlement to attend school in a District where he has been living for a minimum of 7-8 years, is not amenable to summary resolution based on this record since there continue to be contested material facts which must be resolved before this matter may be fairly adjudicated. The Commissioner remanded this matter again to the OAL for expansion of the record to include testimony of petitioner and her witnesses, noting that, if petitioner continued to be unavailable due to illness, OAL rules provide mechanisms to obtain testimony of essential, unavailable witnesses.

January 24, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON REMAND

OAL Dkt. No. NO. EDU 1162-99

AGENCY DKT NO. 143 5/97

IN THE MATTER OF E.G.P. ON BEHALF OF MINOR CHILD M. B.,

Petitioner,

v.

BOARD OF EDUCATION OF RUTHERFORD, BERGEN COUNTY,

Respondent

E.G.P., petitioner, *pro se*

Ellen Walsh, Esq., for respondent
(Forgarty & Hara, attorneys)

Record Closed: October 20, 1999 Decided: December 6, 1999

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, E.G.P., is the grandmother of M.B. a student in the respondent's school district. On April 31, 1997 petitioner filed a petition with the Commissioner of Education challenging the action of the respondent, The Rutherford Board of

Education, (respondent or District) which disenrolled her grandson from its school district on April 15, 1997. On June 2, 1997 the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. Thereafter, certain preliminary matters were heard by telephone prehearing conference and a hearing was scheduled for March 31, 1998. Due to the petitioner's illness and the fact that she was bedridden, it was agreed that the matter would be heard on the papers. On April 3, 1998, respondent filed a motion for summary decision seeking to dismiss the appeal. On April 14, petitioner filed a letter in support of her "cross motion" for summary decision.

On October 29, 1998, an initial decision was issued wherein the petitioner's cross motion for summary judgment was granted and the respondent's summary judgment motion was denied.

On December 21, 1998, a decision was rendered by the Commissioner of Education that remanded the matter to the OAL for further proceedings to determine (1) the length of time that M.B. has lived with the petitioner, so as to determine that M.B. was not solely living with her to attend the respondent's school district free of charge; (2) whether the petitioner has properly demonstrated, consistent with standards set forth in *J.B.* v. *Board of Education of the Township of Ocean, Monmouth County*, 96 *N.J.A.R.2d* (EDU) 628, remanded by St. Bd. December 4, 1996, on remand February 11, 1997, remanded by St. Bd. Of September 3, 1997, that either family or economic hardship renders M.B.'s parents incapable of caring for and supporting him; and (3) the Board's annual per pupil costs for the grades and school years at issue, citing *Board of Education of the Township of Cranford, Union County v. Andre L. McQuire and Lisa McGuire*, 95 *N.J.A.R.2d* (EDU) 74, aff'd 96 *N.J.A.R.2d* (EDU) 140, rev'd and remanded *App. Div.*, A-4742-95T3, *Slip Opinion* at pp. 8-10.

On January 12, 1999, the matter was accepted and filed at the OAL. Hearings were scheduled for March and 10, 1999. However, the hearings were adjourned to await the outcome of an appeal filed by the petitioner with the State Board of

Education. On June 4, 1999, the State Board of Education affirmed the Commissioner's decision.

Thereafter, hearings were scheduled for October 19 and 20, 1999. On October 12, 1999, petitioner advised that she would be unable to attend the hearing due to illness. Thus, it was requested that this tribunal consider pleadings previously submitted by the petitioner. Additionally, petitioner submitted a letter and additional documents. The respondent objected to any consideration on the petitioner's submission. A hearing was held and concluded on October 20, 1999. The respondent's Motion to Dismiss for failure to prosecute was denied. This hearing was limited to the issues presented in the Commissioner's remand decision.

TESTIMONY

In support of its case, the respondent presented the testimony of Steve Albin, Administrative Assistant to the Principal at Pierrepont School; Hazel E. Ralph, Research Assistant to the Superintendent; Marie Vaccarano, Principal of Pierrepont School; and Danielle Sabato, a 5th grade teacher.

Hazel E. Ralph, Research Assistant to the Superintendent, testified that she had received several complaints from unidentified Rutherford residents that there were "kids" who had moved out of district enrolled in district schools. Thus, a district wide re-registration process was initiated. (R-3, R-5, R-6, R-7, R-8). Only two residents failed to comply with the re-registration. The petitioner did not comply and thus she was sent two letters (R-11 and R-12). Thereafter, she had a conversation with the petitioner explaining the procedure. A follow-up letter was also sent. (R-14, R-15).

Subsequently, petitioner submitted income tax statements for herself and M.B.'s parents. There was no income for the parents on the tax returns.

A notice of disenrollment was forwarded to the petitioner and Mr. And Mrs. B. They were also billed prorated tuition for the 1996-1997 school year of $6,616.92. In

1996-97 the Department of Education tabulated a cost per student on a 4th grade level at $7,924. This amount applies for the 1997-1998 school year. The cost for the 1998-1999 school year was $7,129 and that sum is applicable for the 1999-2000 school year.

Margaret Vaccarano, Principal of Pierrepont, testified that M.B. is a student and has been at Pierrepont since the 4th grade. M.B. is currently living with his father at the petitioner's home. She spoke with the petitioner when M.B. first started school at Pierrepont. The petitioner told her that she used to baby sit M.B. in Clifton and it was only when he began nursery school that he moved to Rutherford to live with her and her husband (the grandparents). The witness noted that M.B.'s Pre-Entrance Physical was signed by the petitioner and his mother. Further, that the Early Screening Inventory for M.B. was completed by M.B.'s parents and grandmother. Medical Emergencies Forms directed that M.B.'s parents be contacted in the event of an emergency. (R-22, R-23, R-24, R-25 and R-25a).

Vaccarano recalled that parent teacher conferences are attended by M.B.'s parents and the petitioner. Further, M.B. told her that his father took him for haircuts.

Danielle Sabato, M.B.'s 5th grade teacher, testified that M.B. was a student in her class during the 1997-1998 school term. She has spoken with M.B.'s parents on the telephone. She recalls that the petitioner was unable to attend two parent teacher conferences and thus Mrs. B. (M.B.'s mother) agreed to do the conference via telephone. Mrs. B. was knowledgeable about her son's progress and acknowledged helping him with his homework. In March 1998, she spoke with Mrs. B. about M.B.'s unattentiveness in class.

Steve Albin, Assistant to Principal Vaccarano, testified that he is well acquainted with M.B. M.B. had numerous disciplinary problems that he has related to the petitioner and M.B.'s parents. (R-38).

Petitioner contends in her pleadings that M.B. has lived with her since 1990. He began living with her prior to starting school in the District. Since M.B. was not a new student in the district she asserts that the re-registration law is inapplicable.

Further, the petitioner submitted "adjusted" income tax returns for 1998 for herself and M.B.'s parents. The petitioner's income tax return shows that she has an "adjusted" gross income of $32,529. M.B.'s parents "adjusted" gross income was reflected of $32,209. It must be emphasized that the income tax returns are not in form as filed with the IRS. Rather, the returns have been spliced, taped and photocopied.

DISCUSSION, FINDINGS AND CONCLUSION

In domicile cases; the burden is placed on the individual to contest a board's decision to forbid access to its schools. *N.J.S.A.* 18A:38-1b(1). Thus, to prevail, petitioner must produce evidence to show that the board's decision to disenroll her grandson is unwarranted. The statute provides.

> Public schools shall be free to following persons over five and under 20 years of age:
>
> . . .
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if her were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that

> the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. . . .
>
> *[N.J.S.A.* 18A:38-1.]

I **FIND** that the petitioner has owned property and resided in the District for approximately thirty (30) years. I **FIND** that she is a domiciliary of Rutherford. I further **FIND** that M.B., the minor child resides with the petitioner. He. has attended nursery school in Rutherford as well as pre-school programs. M.B. has attended the District schools since kindergarten and the school records bears the petitioner's signature as guardian. However, I **FIND** that the petitioner is not M.B.'s legal guardian. I **CONCLUDE** that M.B. is a resident of Rutherford but is not domiciled in the District. The law is clear that a child's domicile is where his parents reside. Thus, while one can have many residences, one can only have one domicile.

If a child is not domiciled in the District, the statute requires a showing of a family or economic hardship. The respondent argues that the petitioner has failed to demonstrate a family or economic hardship.

The petitioner did not present any evidence concerning M.B.'s parents ability or lack thereof to care for M.B. Thus, the record is barren, save, the petitioner's allegation that M.B. lives with her for cultural reasons, why M.B. parents cannot care for him. Since the petitioner is not M.B.'s legal guardian she must make a showing that he meets the criteria established in *N.J.S.A.* 18A:38-1b(1). I **FIND** and **CONCLUDE** that the petitioner has failed to demonstrate a verifiable family or economic hardship, pursuant to *N.J.S.A.* 18A:38-1b(1) that supports that M.B.'s parents are incapable of supporting or providing care for him. Therefore, M.B. is not entitled to a free education in the District.

I **FIND** that the cost to attend the District elementary school in the 1996-97 school year was $7,924 and is to prorated to $6,616.82 for that term. The cost was for 1997-1998 school term was $7,924, for 1998-1999 the cost was $7,129 and for 1999-2000 school term the cost is $7,129. Thus, I **FIND** and that since M.B. was not entitled to attend the district schools, the District is to be recompensed $28,798.82 for providing said education.

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

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

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

12/6/99
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

12-10-99
DATE

Debbie Antavantis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

WITNESSES:

Steve Albin,
Hazel E. Ralph
Marie Vaccarano
Danielle Sabato

EXHIBITS:

R-1 Re-Registration Resolution
R-2 Eligibility of nonresident
R-3 Regulation for nonresident pupils
R-4 Letter dated 11/1/98
R-5 Form Letter December, 1996
R-6 Letter dated 1/6/97
R-7 Final Notice
R-8 Notice of Request for Disenrollment
R-9 Notice of Disenrollment
R-10 Re-registration Statement
R-11 Letter dated January 6, 1997
R-12 Letter dated 2/19/97
R-13 Memo entitled Phone Call from E.P.
R-14 Letter dated 2/25/97
R-15 (2) Letters dated 3/21/97
R-16 Non-resident Affidavit
R-17 Income Tax Returns
R-18 Notice of Disenrollment
R-19 Letter from State Board of Education dated 12/9/98
R-20 Pre-Entrance Physical for Slyvan School

R-21 Early Screening Inventory

R-22 Report of Injuries

R-23 Emergency Information Form

R-24 Emergency Information

R-25 " "

R-25a " "

R-26 " "

R-27 Parent Teacher Conference Report

R-28 Parent Teacher Conference Report

R-29 Parent Conference Report

R-30 Income Tax Return 1996

R-30(a)Cover Letter for Interog.

R-31 1996 Income Return E. Perez

R-32 Remission of Tuition Form dated 5/28/92

R-33 Note From Aubin

R-38 Parent Conference Report

E.G.P., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. The Board filed reply exceptions.[1]

On exception, petitioner again maintains, as she has throughout these proceedings, that M.B. has lived with her continuously since he was three months of age, and that she has served as his "guardian" throughout this period. (Petitioner's Exceptions at 1) She further challenges the veracity of certain testimony adduced at hearing. As an example, she alleges that testimony of Ms. Vaccarino with regard to the attendance of parent/teacher conferences is incorrect: "M.B.'s teachers always contacted me as guardian and I attended all parent teacher conferences prior to my illness." (*Id.*) Petitioner explains that, during her current illness and recuperation period, "M.B. has continued to live in his permanent home in

[1]It is noted that the Board's reply exceptions, filed on January 10, 2000, were untimely. However, a letter enclosed with this submission, along with a certification of counsel, explained that the reply exceptions were originally sent via Federal Express on December 29, 1999, but were, inadvertently, transmitted to the wrong address. Upon discovery of this error, counsel promptly resent the submission. Counsel urges that the reply exceptions be considered since they were technically sent to the Commissioner within the timeframe prescribed by *N.J.A.C.* 1:1-

Rutherford" and is cared for there by his father, with M.B.'s mother remaining in Clifton in order to continue her access to a car pool arrangement necessary for her to maintain her employment. (*Id.*) In conclusion, petitioner states, "[u]nfortunately I am still a patient at the nursing home. I request this case be postponed until I am out of the nursing home and well enough to properly take care of this matter." (*Id.* at 2)

In reply, the Board charges that the statements contained in petitioner's exceptions are, to a large extent, a reiteration of arguments she has previously advanced which the Board has addressed in its briefs submitted to the Administrative Law Judge (ALJ) below. (Board's Reply Exceptions at 1) As an example, it advances that petitioner apparently confuses the terms "guardian" and "legal guardian." "To be M.B.'s legal guardian, she would have had to obtain a court order. Since none has ever been produced, we must conclude that at no point was [E.G.P.] M.B.'s legal guardian." (*Id.* at 2) The Board also challenges the propriety of petitioner's disputing testimony of its witnesses proffered before the ALJ at hearing, advancing that such arguments of petitioner should not be considered by the Commissioner "since petitioner chose not to present the arguments by appearing at the hearing herself." (*Id.*) The Board further contends that petitioner's exceptions attempt to introduce new evidence which, it argues, should have been offered at the hearing where the Board would have been provided an opportunity to cross-examine petitioner's witnesses. (*Id.* at p. 3)[2] If the Commissioner does decide to consider such evidence, it asserts, this evidence supports the proposition that M.B.'s parents are better equipped than petitioner to care for their child, since "petitioner is ill and M.B. is being cared for by his father, albeit on a temporary basis." (*Id.* at 3) Moreover, it maintains, because M.B.'s mother's employment "makes it inconvenient for her to care [for him]," such

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18.4 and were timely transmitted to the petitioner. In view of counsel's certified explanation of the events which transpired, the Commissioner has determined to accept and consider the Board's reply exceptions.

[2]It is unclear what "new evidence" the Board is referring to here. Petitioner's letter dated October 18, 1999, contained in the record before the Commissioner, advised the ALJ that M.B. was being cared for by his father in petitioner's home during petitioner's illness and recuperation.

situation does not establish, nor has petitioner presented any evidence to establish, that M.B.'s parents are incapable of supporting or caring for him due to a family or economic hardship. As such, the Board contends, the decision of the ALJ must be affirmed. (*Id.*) Finally, the Board strenuously objects to any delay of this matter, which, it avers, "has already been delayed significantly." (*Id.* at 4)

Upon his independent review and consideration, the Commissioner determines to reverse the recommended Initial Decision and to remand this matter to the OAL again.

Initially, the Commissioner finds that this matter, which deals with a child's entitlement to attend school in a district where he has been, concededly, living for no less than 7-8 years, is not amenable to a summary resolution based solely upon papers of the type which comprise this record and the controverted testimony of the Board's witnesses. Rather, the Commissioner concludes that, under the circumstances existing here, testimony of this *pro se* petitioner and her witnesses needs to be taken since such testimony is essential to resolve what continue to be contested material facts necessary to the fair adjudication of this matter.

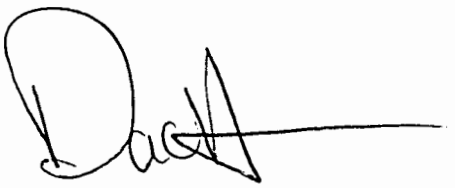
The Commissioner's review persuades him that the purported "delays" in the progress of this matter do not in any way appear to be attributable to connivance on the part of petitioner, which would necessitate, as was urged by the Board below, dismissal of this matter for failure to prosecute.[3] Although the Commissioner recognizes that the within *pro se* petitioner was personally unavailable to attend either the first hearing scheduled in this matter or the hearing scheduled in the instant remand, it is, likewise, fully evident that her unavailability was not due to a deliberate attempt to cause delays but was, instead, a consequence of documented representations of illness. Indeed, petitioner's two absences did not serve to cause any "delay" since the proceedings, on both occasions, moved forward without her.

[3] Indeed, the delay to which the Board alludes appears to be have been occasioned solely by the due course of an administrative proceeding which has involved both a remand and an appeal.

The Commissioner next observes that where, in instances such as the one existing in this case, a matter does not lend itself to determination on a summary basis but, rather, demands testimony of an essential individual who is physically incapable of proceeding on a particular, scheduled date and/or witnesses of such individual, OAL rules contemplate such situations and provide mechanisms to accommodate them. For example, *N.J.A.C.* 1:1-10.2(c) would allow for petitioner's deposition on oral examination, and *N.J.A.C.* 1:1-11.1 would permit witnesses of petitioner, who are believed to have information necessary to the resolution of this matter, to be subpoenaed to testify by either the Board or the court, with or without petitioner being physically present.

Accordingly, the Commissioner, in order to meet his responsibility to fairly decide this matter which, it is again stressed, concerns the entitlement of a child to attend school, reverses the instant Initial Decision and returns this matter to the OAL for expansion of the record, and recommended findings and determinations based upon such expanded record, consistent with the holding herein.[4]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

January 24, 2000
Date of Mailing, January 24, 2000

[4]This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

42-00

42-00

PAUL MEDEIROS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teaching staff member, appealed the District's denial of a bonus check for perfect attendance during the first half of the 1995-96 school year and sought restoration of sick leave for absences beginning on November 21, 1996 which the District charged to his sick leave bank.

The ALJ concluded that petitioner was not entitled to the bonus since he was absent on December 6, 1995 after sustaining an injury which petitioner failed to prove was work related, and, even assuming that such absence was work related, the Attendance Incentive Plan only excused absences for death in the immediate family, jury duty or an approved professional day. As to petitioner's claim that the District wrongfully charged to his sick bank his absences beginning on November 21, 1996, the ALJ determined that petitioner did not sustain his burden since he neither sought nor received a determination from the Division of Workers' Compensation that his absences were work related.

The Commissioner affirmed the Initial Decision for the reasons stated therein.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 5958-96
& EDU 5353-97
AGENCY DKT. NOS. 168-5/96
& 103-3/97

PAUL MEDEIROS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Paul Medeiros, *pro se*

Charlotte Kitler, Esq., appearing for Respondent

Record Closed: October 20, 1999 Decided: December 3, 1999

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

STATEMENT OF THE CASE

Petitioner is challenging the District's action withholding his bonus check and also sought to enjoin the District from denying him from qualifying for future promotion under *OAL Dkt. No. EDU* 5958-96. The parties represented and I accepted their

representation that the issue of enjoining the District from denying Petitioner from qualifying for future promotion is moot. Accordingly, the only issue to be determined in this case is whether the bonus for perfect attendance was properly withheld.

Under *OAL Dkt. No. EDU* 5353-97, Petitioner asserts the District wrongfully withheld his salary when he was cleared of charges of assaulting a student.

These cases were assigned to the undersigned on account of the identity of the parties. They were consolidated by Order dated January 16, 1998, upon consent of the parties.

PROCEDURAL HISTORY

These cases have had a long torturous history of adjournments. They were originally scheduled to be heard on April 1, 1997; they were, however, adjourned by agreement between the parties who were appearing before ALJ Weiss on another matter unrelated to these.

The cases were rescheduled for hearing on June 24, 1997. An adjournment was requested and granted. The record does not reflect the reason for this adjournment.

On March 10, 1998, the next scheduled hearing date, Petitioner and his attorney failed to appear, although the District was ready to proceed. Petitioner's attorney at that time was in Florida and his request for an adjournment had not been received by the undersigned or the Clerk's office.

The next scheduled hearing date, April 20, 1998, was adjourned at the request of the District. On November 4, 1998, the hearing was again adjourned at the request of Petitioner's new counsel. On May 5, 1999, the District requested an adjournment because witnesses were unavailable. As a result of the numerous adjournments, the parties were notified that the October 20, 1999 hearing date was peremptory. This notice was sent on May 25, 1999.

On the morning of the hearing, Petitioner requested an adjournment in order that he might retain counsel. When questioned by the undersigned, Petitioner admitted that he could not afford to pay his prior counsel. Petitioner was asked how long he needed to gather funds to enable retention of counsel; he indicated that he did not know; he was also asked why he had waited until the morning of the hearing to make the request for an adjournment, thus necessitating the appearance of counsel and witnesses for the Respondent. Petitioner could give no answer.

In view of the fact that Petitioner had had three different attorneys representing him on these matters, as well as the fact that he failed to make his request for an adjournment in a timely expedient manner, in addition to the complete failure to appear with counsel at the scheduled hearing of March 10, 1998, he was given the choice of paying the District's counsel feeds for the appearance on October 20, 1999 and receiving the adjournment or proceeding *pro se*.

Mr. Medieros said he could not afford to pay the District's attorney; consequently, the cases were heard and the record closed on October 20, 1999.

FINDINGS OF FACT

Turning first to the case bearing *OAL Dkt. No. EDU* 5958-96 challenging the District's determination not to pay a bonus for perfect attendance, this case was forwarded to the Office of Administrative Law (OAL) on June 18, 1996, in accordance with *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13,.

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Petitioner was a tenured teacher with the District on December 5, 1995, when he reported to the administration that he had been injured while conducting a class. He was told to report to the District's medical personnel.

2. Petitioner was absent from his duties as a teacher on December 6, 1995.

3. Pursuant to the collective bargaining agreement in effect at the time, the District offered an attendance incentive plan for those teachers achieving perfect attendance.

4. Petitioner was paid for December 6, 1995.

DISCUSSION AND CONCLUSION

Petitioner asserts that the reason for his absence on December 6, 1995 was a work related injury; accordingly, he reasoned that the absence should not prevent him from receiving the bonus for the semester from September 1995 to January 1996.

In this case, Petitioner must prove, by a preponderance of the evidence that he is entitled to the bonus. The only evidence he produced that the injury he suffered on December 5, 1995, was work related was his conclusory testimony. Petitioner offered no specific details as to the nature of the injury or the treatment; he offered no records of treatment nor any evidence of having filed a Worker's Compensation claim.

Accordingly, I **CONCLUDE** that Petitioner failed to sustain his burden of proving that the injury he purportedly suffered on December 5, 1995 was work related.

Moreover, assuming *arguendo* that the injury was work related, the provision in the collective bargaining agreement (J-1) states:

Article 28
Attendance Incentive Plan

28-1. Any teacher who has no absences from September 1st to June 30th shall receive a $700 bonus. The bonus will be split in two parts, $350 each semester, for teachers who achieve perfect attendance during the semester. The first semester is September to January 31st; the second, February 1st through June 30th. The only excused absences relative to this policy are: death in the immediate family, jury duty and an approved professional day.

(Emphasis supplied).

The language of the provision is explicit; there are only three types absences which will be considered as excused for the purpose of granting the bonus for perfect attendance. It is a well established principle that where language is specific, as it is here, that which is not expressed explicitly, cannot be inferred.

Accordingly, I **CONCLUDE**, based on the language of the agreement, that even if the injury were work related, Petitioner would not have been eligible for the bonus for perfect attendance.

In the matter bearing *OAL Dkt. No. EDU* 5353-97 was forwarded to the Office of Administrative Law (OAL) on May 19, 1997, Petitioner asserts that days absent should be restored to his sick day bank since, according to Petitioner, he was absent on account of a work related injury.

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

5. Petitioner was charged with assaulting a student during gym class on November 8, 1996.

6. DFYS was notified of the complaint as required by law.

7. Petitioner was removed from his duties as gym teacher and reassigned, first within P.S. 5; subsequently, he was reassigned to duty at Board of Education headquarters pending a determination of the charges at the request of DYFS.

8. On or about November 21, 1996, Petitioner was advised that he could return to his teaching duties.

9. Petitioner received full pay for the period from November 8, 1996 to November 20, 1999, the period of his reassignment.

10. On November 21, 1996, Petitioner returned to P.S. 5; at approximately 9:30, Petitioner was asked to report to the Principal's office for an administrative counseling session in connection with the charges which had been brought.

11. At the counseling session, Petitioner became ill and was sent to the school nurse who later advised the administration that Petitioner had been sent to the hospital.

12. Petitioner was cleared of the charges by DYFS.

13. The purpose of the meeting of November 21, 1996, was to counsel Petitioner with respect to concerns which had arisen regarding his interaction with students and colleagues.

14. Since November 21, 1997, Petitioner has not returned to work.

15. Petitioner exhausted accumulated sick leave as of January 15, 1997. He was paid his full salary up to that date.

DISCUSSION AND CONCLUSION

Petitioner asserts that his accumulated sick leave was wrongfully applied and depleted because his absence, which commenced on November 21, 1996, was work related. Accordingly, Petitioner asserts the time should be restored to him and he should receive compensation in accordance with District policy for those days remaining upon his separation from employment with the District. Thus, the threshold issue to be resolved is whether the illness or injury which Petitioner sustained on November 21, 1996, was work related.

It is well established that the determination of whether an injury or illness is work related is solely within the jurisdiction of the Division of Worker's Compensation. *Veneret v. BOE of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134, citing *Theodore v. Dover BOE,* 183 *N.J. Super.* 407 (App. Div. 1982). Petitioner has offered no evidence that this issue has been adjudicated.

Although applications for disability benefits and disability retirement were marked for identification, no testimony or documentary evidence of a final determination was produced by Petitioner. Moreover, in the course of almost two and a half years of requests for adjournments for various reasons, there is no indication that such a determination was sought by Petitioner.

Accordingly, I **CONCLUDE** that Petitioner has failed to sustain his burden of proof.

ORDER

It is, therefore, hereby **ORDERED** that these consolidated petitions be and hereby are **DISMISSED WITH PREJUDICE**.

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

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

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

December 3, 1999
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

12-10-99
DATE

Debbie Antanaitis/kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 1999
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Paul Medieros

F. Dooley

Exhibits:

P-1 Letter - Petrosky to Medeiros, November 13, 1996

P-2 Letter - DYFS to Mederios, January 13, 1997

R-1 Incident Report, November 8, 1996

R-2 Calendar Record 1996-1997

R-3 Memo – Dooley to Medeiros, November 22, 1996

- R-4 Medical examination by personnel or treating physician
- R-5 To Sinatra from Dr. Sand, March 13, 1997
- R-6 Application for Disability Retirement
- R-7 Application for Disability Benefits

J-1 Contact Agreement – September 1, 1995 to August 31, 1998

- Identification Only.

OAL DKT. NOS. EDU 5958-96 and EDU 5353-97 (CONSOLIDATED)
AGENCY DKT. NOS. 168-5/96 and 103-3/97

PAUL MEDEIROS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his independent review of the record in this matter, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner was ineligible for a bonus check for perfect attendance during the first half of the 1995-96 school year and, therefore, such check was not wrongfully withheld by the District. Similarly, the Commissioner is in agreement with the ALJ's conclusion that, because there is no indication that petitioner has sought or received a determination from the Division of Worker's Compensation that his absences beginning on November 21, 1996 were the result of a work-related injury, he has not sustained his burden of proof that such absences were improperly charged to his sick leave bank by the District.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein and the instant consolidated Petitions of Appeal are hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Janaury 24, 2000
Date of Mailing, January 24, 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

43-00

43-00

VIRGINIA STANTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 24, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 955-97

AGENCY DKT. NO. 24-1/97

VIRGINIA STANTON,

Petitioner,

v.

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

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Joan Kane Josephson, Esq., for respondent (Carroll, Weiss & Josephson, attorneys)

Record Closed: December 8, 1999 Decided: December 8, 1999

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 25, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

Dec. 8, 1999
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

12-10-99
DATE

Debbie Antanaitis/ep
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 13 1999
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

es

CARROLL, WEISS & JOSEPHSON, L.L.P.
3131 Princeton Pike
Building 1B
Lawrenceville, N J 08648
(609) 896-4222
Attorneys for Respondent
Willingboro Board of Education

VIRGINIA STANTON,	:OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:
	: OAL Docket No. EDUOR 955-97S
vs	:
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO,	: STIPULATION OF SETTLEMENT
Respondent.	:

1. Petitioner Virginia Stanton ("petitioner" or "Stanton") is an employee of respondent Board of Education of the Township of Willingboro ("respondent" or "Board"). Petitioner is represented by the Willingboro Education Association ("WEA") and petitioner's terms and conditions of employment are included in an agreement between the Board and the WEA.

2. On or about September 1, 1973, petitioner Stanton commenced employment with respondent Board serving as a Teacher of Art.

3. Petitioner holds an instruction certificate issued by the State Board of Examiners with an endorsement as a Teacher of Art.

4. Petitioner acquired tenure and seniority with respondent Board.

5. Effective June 30, 1985, due to a reduction in force (RIF), petitioner's employment was terminated.

6. On or about September 1, 1994, petitioner was recalled and re-employed by respondent.

7. On or about June 30, 1996, petitioner's employment was terminated due to a reduction in force.

8. Effective November 12, 1996, petitioner was recalled and re-employed by respondent.

9. On or about September 1, 1988 respondent Board employed a non-tenured art teacher to fill a vacancy to teach art. Petitioner was neither notified of the position nor offered the position and she filed the petition that is the subject of this Stipulation of Settlement with the Commissioner within 90 days of discovering same.

10. The parties recognize petitioner's right on September 1, 1988 as a tenured staff member to a full-time position under her Teacher of Art endorsement.

11. Respondent agrees to compensate petitioner for back pay, pension credit, seniority credit, credit for years of service and sick leave credit, minus applicable offsets discussed below, for the period she was not recalled or assigned employment under her Teacher of Art endorsement.

12. When petitioner was riffed in June 1985 she was compensated at Step 11on the WEA teachers' salary guide at the bachelor's degree level. When petitioner was returned in 1994-95, she was placed on Step 12 on the WEA teachers' salary guide at the bachelor's degree level. During the period petitioner was not employed, the number of salary guide steps in the WEA collective negotiations agreement were compressed through collective negotiations and petitioner should have been returned at Step 10. Petitioner was advanced

to Step 13 of the salary guide in 1995-96. In 1996-97 the WEA salary guide was compressed again and petitioner was placed on Step 10; in 1997-98 petitioner was placed on Step 11, where she is currently.

13. In 1988-89 petitioner would have received an annual salary of $28,181. The overpayments she received since her return as the result of having been placed on the wrong salary step of the WEA salary guide amounted to $10,010. The parties agree that the overpayments should be deducted from the 1988-89 entitlement and that a lump sum payment of $18,171, minus applicable taxes and deductions, will be made by the Board to petitioner. The pension credit and deductions for the year 1988-89 shall be based upon the annual salary of $28,181.

14. Petitioner's current annual salary should be $38,736; however, she is receiving $41,386.

15. Petitioner agrees to have her salary of $41,386 frozen for the 1998-99 and 1999-2000 school years when she should be at Step 11 of the 1999-00 salary guide at $41,334. Petitioner's salary increases in the future will be consistent with increases to employees included in the WEA collective negotiations unit and petitioner's obligation as the result of the overpayment will be satisfied.

16. Petitioner hereby agrees that a lump sum payment of $18,171, pension credit, seniority credit, credit for years of service and sick leave credit constitute full and final relief for the claims asserted in the instant petition and Petitioner hereby releases the Board from any and all claims asserted herein.

17. The parties agree that the payment under this agreement constitutes back pay, benefits and emoluments for the school year that petitioner should have been recalled and that the reduction is payment is to reimburse respondent for subsequent salary overpayments.

18. This agreement is contingent upon the approval by the Commissioner of Education, whereupon Petitioner agrees to dismissal of the petition with prejudice. Upon such approval, lump sum payment in the amount of $18,171 will be made to Petitioner within 30 days of the dismissal.

19. This document contains the entire agreement of the parties and may not be altered, amended or modified except by instrument in writing signed by the parties.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for petitioner

by: Richard A. Friedman

CARROLL, WEISS & JOSEPHSON, L.L.P.
Attorneys for respondent

by: Joan Kane Josephson

Petitioner

Virginia Stanton
Dated: 11-23-99

OAL DKT. NO. EDU 955-97
AGENCY DKT. NO. 24-1/97

VIRGINIA STANTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 24, 2000
Date of Mailing, January 24, 2000

44-00

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANCE BADOMI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF ELIZABETH,	:	
UNION COUNTY	:	

January 5, 2000

AGENCY DKT. NO. 389-12/99

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANCE BADOMI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF ELIZABETH,	:	
UNION COUNTY	:	

For the Board, Mary E. Hennessy, Esq. (Murray, Murray & Corrigan)

For the Respondent, Constance Badomi, *Pro Se*

This matter was opened before the Commissioner of Education on December 21, 1999, through certification of tenure charges of chronic and excessive absenteeism, incapacity, incompetency, insubordination, and failure to perform duties against respondent, a tenured teacher, by the Board of Education of the City of Elizabeth. Therein, and in a statement of evidence in support of the charges, the Board alleged that respondent had been absent for 75 days in the past 4 school years, and that, although counseled about such absenteeism by the Board, both verbally and in writing, respondent had failed and/or refused to correct the problem; additionally, that respondent consistently displayed a lack of control over her classroom as well as a lack of instruction, disregarded requests of her principal to submit lesson plan books, and failed to attend a workshop, faculty meetings and back-to-school nights as directed, all of which caused an adverse impact on the school system by compromising the quality and continuity of instruction provided to her students.

Upon filing of the certified charges, the Commissioner directed respondent, via both certified and regular mail on December 22, 1999, to file an Answer to the tenure charges against her. However, on December 28, 1999, the Board advised that its proof of service listed an incorrect address for respondent and further advised that, on December 27, 1999, the tenure charges had been sent to respondent's correct address, with receipt of such charges acknowledged by respondent. Accordingly, the Commissioner directed respondent on December 30, 1999, via both certified and regular mail to her correct address, to file an Answer to the tenure charges against her, providing respondent clear notice that, pursuant to P.L. 1998, c. 42, effective July 1, 1998, an individual against whom tenure charges are certified "*shall have* **15 days** *to submit a written response to the charges to the commissioner,*" and that failure to answer within the prescribed period will result in the charges being deemed admitted and the Commissioner deciding the matter on a summary basis pursuant to *N.J.A.C.* 6:24-1.4(e).

No reply was received from respondent in response to the Board's charges. However, on January 21, 2000, the Board notified the Commissioner that respondent had resigned her employment effective January 10, 2000, and that the Board had accepted such resignation and now wished to withdraw its tenure charges.

In that there is no indication that respondent's resignation is the result of a settlement agreement requiring review by the Commissioner pursuant to *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, the Commissioner concludes that withdrawal of the charges is appropriate in this instance.[1]

[1] In so concluding, the Commissioner notes the Board's statement that it will "cooperate fully with the Commissioner and State Board of Education on any further information required on matters involving Ms. Badomi." (Board's Letter filed January 21, 2000)

Accordingly, the Commissioner approves withdrawal of the instant matter, which is no longer deemed to be a contested case before the Commissioner and is hereby dismissed. By copy of this decision, the State Board of Examiners is notified of the within tenure charges and the circumstances underlying their withdrawal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: January 27, 2000

Date of Mailing: Janaury 27, 2000

45-00

C #45-00L
SB #21-00

ELIGIO CASTRO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 2, 2000

For the Petitioner-Appellant, Eligio Castro, pro se

For the Respondent-Respondent, Michael C. Epps, Esq.

The decision of the Commissioner of Education declining to entertain the petitioner's request for declaratory judgment is affirmed. We find, in addition, that the petitioner's request has been rendered moot by a decision of the Commissioner dismissing his challenge to the termination of his employment. Castro v. Board of Education of the City of Atlantic City, decided by the Commissioner of Education, March 15, 2000. The petitioner has not filed an appeal from that decision to the State Board.

June 7, 2000

Date of mailing JUN 08 2000

46-00

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

February 2, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 5525-98

AGENCY DKT. NO. 133-5/98

ATEO DI FEDERICO,

Petitioner,

v.

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

Respondent.

Thomas A. Cataldo, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: December 9, 1999 Decided: December 14, 1999

BEFORE **RICHARD McGILL,** ALJ:

Ateo DiFederico filed a petition with the Commissioner of Education to contest a determination by the State-Operated School District of the City of Newark denying his request for indemnification for legal expenses associated with a successful defense against an indictment. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on June 16, 1998, for determination as a contested case.

Prior to hearing, the parties agreed to amicable resolution of the matter and submitted a Settlement Agreement and General Release of All Claims. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

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

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

Dec. 14, 1999
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

12-20-99
DATE

Debbie Anastasiou
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 1999
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

cml

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
RECEIVED
DEC 9 10 51 AM '99

SETTLEMENT AGREEMENT AND GENERAL RELEASE OF ALL CLAIMS

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Settlement Agreement") is made and entered into by and between STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK ("District"), with Board Offices at 2 Cedar Street, Newark, New Jersey 07102-3091 and ATEO DIFEDERICO, residing at 48 Pacific Street, Newark, New Jersey 07102, with reference to the following facts:

WITNESSETH:

WHEREAS, ATEO DIFEDERICO has caused to be filed a petition before the Office of Administrative Law entitled Di Federico, Ateo v. State-Operated School District of City of Newark, OAL Docket No. EDCUOA 05525-98N, Agency Ref. No.: 133-5/98 (hereinafter referred to as the "Action"), in which he seeks reimbursement of attorneys' fees pursuant to N.J.S.A. 18A:16-6.1.

WHEREAS, ATEO DIFEDERICO and THE DISTRICT now desire to settle fully and finally all differences between them, including, but in no way limited to, those differences arising from the aforementioned Action.

NOW THEREFORE, in consideration of the recitals above and the mutual promises and obligations herein contained, it is agreed as follows:

The DISTRICT shall pay to ATEO DIFEDERICO the sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00) in the form of a check payable to "THOMAS A. CATALDO TRUST ACCOUNT and ATEO DIFEDERICO" for full and complete satisfaction

of any and all claims ATEO DIFEDERICO or THOMAS A. CATALDO now has or may have against THE DISTRICT.

The parties agree that THE DISTRICT shall make payment to ATEO DIFEDERICO after the completion of all of the following: (a) the execution of this Settlement Agreement by DIFEDERICO; (b) approval and execution of this Agreement by the State District-Superintendent and (c) approval of this Settlement by the Administrative Law Judge and Commissioner of Education.

2. ATEO DIFEDERICO, for and in consideration of the payments made by THE DISTRICT as set forth herein and for other good and valuable consideration, hereby releases and forever discharges, and by this instrument does release and forever discharge, THE DISTRICT and each of its respective present and former directors, officers, employees, trustees, agents, attorneys, insurers, parent corporations, subsidiaries, divisions, related, affiliated, and successor companies and entities, shareholders, representatives, predecessors, successors and assigns, and each and all of them (hereinafter collectively referred to as the "RELEASEES"), from any claim for the payment of ATEO DIFEDERICO'S attorney's fees which exceed the FIFTY-FIVE THOUSAND DOLLARS ($55,0000.00) herein agreed to, and any other type of remuneration of any kind or nature whatsoever, to which ATEO DIFEDERICO had, now has, or hereafter may have against THE DISTRICT and the RELEASEES in any way related to, emanating from or otherwise in respect to his indictment and attorneys fees arising therefrom, or allegations that could have been alleged in the Action. In return for the consideration set forth in this Agreement, ATEO DIFEDERICO releases THE DISTRICT and the RELEASEES from any and all claims under all state and federal rules and regulations and contract or tort law which ATEO

DIFEDERICO may have against THE DISTRICT and the RELEASEES, whether known or unknown, unforeseen, unanticipated, unsuspected or latent, that he, his heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, any action based upon, arising out of, or relating to any claim, demand, or cause of action released herein, except to the extent that any such claim concerns an allegation that THE DISTRICT has failed to comply with any obligations created by this Settlement Agreement.

3. ATEO DIFEDERICO agrees to dismiss with prejudice in its entirety the Action seeking attorneys fees against all defendants named therein. ATEO DIFEDERICO understands that THE DISTRICT is paying him $55,000 to fully satisfy his claim for indemnification of his attorneys fees. ATEO DIFEDERICO understands that he is responsible to his attorneys for any fees over fifty-five thousand dollars ($55,000.00). ATEO DIFEDERICO further understands that THE DISTRICT's obligation to pay any consideration pursuant to this Settlement Agreement is expressly conditioned upon the Entry of an Order dismissing the Action with prejudice in its entirety approved by the Commissioner of Education.

4. ATEO DIFEDERICO agrees and understands that he will fully assume all tax obligations, if any, on any sums paid under this Settlement Agreement and that he shall be exclusively liable for the payment of all federal, state and local taxes which may be determined to be due as a result of any consideration or payment received by him pursuant to this Settlement Agreement. ATEO DIFEDERICO further agrees and hereby represents that he shall pay such taxes, if any, at the time and in the amount required of him. In addition, ATEO DIFEDERICO agrees to fully indemnify and hold harmless THE DISTRICT from payment of any and all taxes, interest or penalties that may be required of it by any government agency at any time as a result

of any payment or consideration paid by THE DISTRICT pursuant to this Settlement Agreement. ATEO DIFEDERICO further acknowledges that neither THE DISTRICT nor any representatives or attorneys of THE DISTRICT have made any promise, representation or warranty, express or implied, regarding the tax consequences of any consideration paid pursuant to the Settlement Agreement, and that he has been advised to consult a tax attorney or accountant regarding the tax consequences of having received the settlement sum set forth above.

5. ATEO DIFEDERICO represents and covenants that, other than the Action, which he will cause to be dismissed with prejudice, he has not filed, initiated, or caused to be filed or initiated, any claim, charge, suit, complaint, grievance, action, or cause of action against THE DISTRICT or any of the RELEASEES, with respect to ATEO DIFEDERICO'S indictment and attorneys fees arising therefrom. ATEO DIFEDERICO further represents, promises, and agrees that he will not file, refile, initiate, or cause to be filed, refiled or initiated any claim, charge, suit, complaint, grievance, action, or cause of action based upon, arising out of, or relating to any claim, demand, or cause of action released herein.

6. ATEO DIFEDERICO covenants that he has made no assignment and will make no assignment of the claims, demands or causes of action released herein and agrees that he will not institute legal proceedings based upon, arising out of, or relating to any claim, demand or cause of action released herein.

7. ATEO DIFEDERICO acknowledges that: (a) the consideration provided pursuant to this Settlement Agreement is in lieu of any consideration that he would otherwise be entitled to receive and the receipt of the consideration set forth in this agreement by ATEO DIFEDERICO is full and complete satisfaction of any and all claims ATEO DIFEDERICO had,

has, or may have against THE DISTRICT and the RELEASEES for any claims that have been released herein; (b) he has been and is hereby advised in writing to consult with an attorney prior to signing this Settlement Agreement; and (c) he has been provided a full and reasonable opportunity to study and consider this Settlement Agreement with legal counsel of his choice before signing it.

8. ATEO DIFEDERICO and THE DISTRICT expressly understand and agree that the payments to and benefits received by ATEO DIFEDERICO pursuant to this Agreement shall be in lieu of any and all other amounts to which ATEO DIFEDERICO or his attorney, Thomas A. Cataldo might be entitled from THE DISTRICT or the RELEASEES as of the date of his execution of this Agreement and, without limiting the generality of the foregoing, ATEO DIFEDERICO hereby expressly waives any right or claim that he may have or assert to attorneys fees, except as otherwise provided in this Settlement Agreement.

9. ATEO DIFEDERICO understands that the foregoing payments and consideration are received in settlement and for compromise of disputed claims and that neither this Settlement Agreement nor the aforesaid promises are to be construed as an admission on the part of any of THE DISTRICT or the RELEASEES of any wrongdoing or liability, nor to be admissible as evidence in any proceeding other than for enforcement of the provisions of this Settlement Agreement. THE DISTRICT does not admit, and specifically denies, any liability, wrongdoing or violation of any law, statute, regulation, agreement or policy. THE DISTRICT is entering into this Agreement solely for the purpose of (a) amicably resolving any and all matters in controversy, disputes, causes of action, claims, contentions and differences of any kind

whatsoever between ATEO DIFEDERICO and THE DISTRICT and the RELEASEES and (b) avoiding the attorneys' fees and other expenses that will result from litigation.

10. ATEO DIFEDERICO and his attorneys acknowledge and agree that the terms and provisions of this Settlement Agreement were made and entered into in strict confidence and must remain confidential. ATEO DIFEDERICO and his attorneys promise, warrant, and represent that they shall not disclose or offer to disclose, and have not disclosed, privately or publicly, any of the terms or provisions of this Settlement Agreement or the negotiations leading to this Settlement Agreement to any person or entity, with the exception of (a) a disclosure required by law or to enforce any obligations hereunder; and (b) a disclosure on a need-to-know basis to ATEO DIFEDERICO's immediate family, attorneys, accountants or financial advisors, who will be advised of the confidential nature of this Settlement Agreement and must agree in writing to be bound by its terms.

11. ATEO DIFEDERICO understands that this Settlement Agreement represents the entire agreement and understanding between the parties and supersedes any prior agreement, understanding or negotiations respecting such subject. No change to or modification of this Settlement Agreement shall be valid or binding unless it is in writing and signed by ATEO DIFEDERICO and a duly authorized officer of THE DISTRICT.

12. This Settlement Agreement shall be governed and construed under the laws of the State of New Jersey.

13. No waiver of any breach of any term or provision of this Settlement Agreement shall be construed to be, nor shall be, a waiver of any other breach of this Settlement Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

14. This Settlement Agreement shall inure to the benefit of and be binding upon the heirs, representatives, successors and assignees of each of the parties to it. Each of the RELEASEES who is not a signatory to this Settlement Agreement is hereby agreed to be a third party beneficiary of this Settlement Agreement and shall be entitled to all rights, benefits and protections of this Settlement Agreement and shall further be entitled to enforce this Settlement Agreement and each of its terms.

IN WITNESS WHEREOF, this Settlement Agreement is executed by the parties hereto as of the date indicated by the signature.

Dated: 11/3, 1999

ATEO DIFEDERICO

Dated: 11/3, 1999

THOMAS A. CATALDO, ESQ.
ATTORNEY FOR ATEO DIFEDERICO

Dated: 11/15/99, 1999

FOR THE STATE-OPERATED SCHOOL DISTRICT OF ~~THE~~ CITY OF NEWARK

OAL DKT. NO. EDU 5525-98
AGENCY DKT. NO. 133-5/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 2, 2000
Date of Mailing, February 2, 2000

47-00

M.C., on behalf of minor child, L.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioners asserted that when they attempted to enroll L.C., a home-schooled student, in respondent's district and sought her placement in tenth grade at the newly established Colts Neck High School, respondent arbitrarily determined that L.C. should be placed in ninth grade at Manalapan High School.

The ALJ found that the District failed to make a reasonable discretionary judgment as to the appropriate grade level placement of L.C. since it did not assess L.C.'s educational status through the means established for evaluating transfer students. The ALJ upheld respondent's denial of petitioner's request for a waiver permitting L.C. to attend Colts Neck High School rather than Manalapan High School, finding no extraordinary or medical reasons to justify a waiver.

The Commissioner adopted the Initial Decision as the final decision in this matter but clarified that the District should have, upon representation by L.C.'s parents as to the grade level of her equivalent instruction, initially placed L.C. in accordance with that level, and then assessed her actual level of academic achievement with respect to the District's specific course proficiencies to ascertain if the initial placement was, in fact, appropriate. The Commissioner emphasized that the District's assessment should not have focused on the equivalency of L.C.'s home-school instruction to the District's specific curriculum, but rather on L.C.'s *level of proficiency* in the context of that curriculum.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8229-98

AGENCY DKT. NO. 420-9/98

M.C. ON BEHALF OF L.C.,

A MINOR CHILD,

Petitioner,

v.

BOARD OF EDUCATION OF

THE FREEHOLD REGIONAL

HIGH SCHOOL DISTRICT,

MONMOUTH COUNTY,

Respondent.

Michael I. Inzelbuch, Esq., for petitioner

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker, Brown and Wilder, attorneys)

Record Closed: June 30, 1999 Decided: October 29, 1999

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner commenced this matter alleging that respondent refused to evaluate L.C., a home-schooled student, prior to enrollment in respondent school district, and requested the placement of L.C. in tenth grade at Colts Neck High School, rather than in ninth grade at

Manalapan High School as determined by respondent. Petitioner filed a petition on September 15, 1998, and the matter was transmitted to the Office of Administrative Law (OAL) on September 15, 1998, for an emergent hearing. Respondent filed an answer on September 24, 1998. The matter was scheduled for an emergent hearing on September 25, 1998, but was adjourned at the request of the parties and rescheduled for September 28, 1998. On that date an emergent hearing was held and concluded and by an Order entered on September 30, 1998, the request for emergent relief was partially denied based on the inability to determine, in the absence of a full evidentiary hearing, whether irreparable harm was being caused to L.C., and whether L.C.'s ninth course grade of study was equivalent to that which was required in order for her to be considered to have completed ninth grade. The Order further provided that emergent relief was partially granted requiring respondent to conduct an educational evaluation of L.C. during the initial phase of L.C.'s placement in ninth grade classes to determine if L.C. has knowledge, ability, and proficiencies which will require that her placement be changed to tenth grade classes, and requiring that this determination be made not more than 30 days from the date L.C. first commenced attending classes. The matter was then scheduled for plenary hearing.

Hearings were held on November 10, 12, and December 16, and 17, 1998. When it was determined that additional dates were required, additional hearing dates were offered and the parties agreed to hearing dates on May 19 and 24, 1999. The testimonial portion of the hearing concluded on May 24, 1999. The record remained open to permit the attorneys to submit closing arguments. These closing arguments were submitted on June 30, 1999, and the record closed on that date. By Orders of Extension, the time within which to file an initial decision was extended to November 15, 1999

ISSUES TO BE RESOLVED

It is noted by way of background that during the hearing of this matter, attorney for petitioner sought to require the testimony of certain employees of the New Jersey Department of Education and issued subpoenas for this purpose. The Attorney General's Office made a motion to quash these subpoenas and by letter order dated November 16, 1998, this motion was denied. The Attorney General's Office then filed an interlocutory appeal with the Commissioner of the Department of Education. By an Order entered on December 3, 1998, the Commissioner

reversed and ordered the quashing of the subpoenas of certain employees of the Department of Education. The Commissioner's ruling is significant because of the Commissioner's holding with respect to the procedures to be followed upon a child entering or returning to a public school following a period of home schooling. The relevant portion of the Commissioner's holding set forth in his decision on the motion to quash the subpoenas is as follows:

> In the case of the information sought from Lally, the Commissioner additionally obviates the need for testimony by providing as follows on the question of how public school districts are to treat homeschoolers upon entry or reentry into the public school system. There being no statutes or rules expressly addressing this circumstance, the Department has consistently advised, and the Commissioner so holds, that when a child enters or returns to a public school following a period of homeschooling, that child is to be treated as would any other new or returning student from a private school or public school outside the district; that is, the district should review and assess the child's educational status, through whatever means the district has established by policy or practice for such purposes, in order to determine the appropriate grade level placement for the child. There are no specific requirements as to precisely how this is to be done; no special privileges or burdens attach to the child's having been previously educated at home rather that at a private or other public school. The school district must simply make a reasonable discretionary judgment as to appropriate placement based on the information available to it, consistent with the district's own programs, policies and procedures. The term "evaluate" as found in the Department of Education publication *Homeschooling in New Jersey* at page 7, and repeated by Lally in his correspondence to petitioner as included in the papers on interlocutory appeal, is used in the ordinary sense of the word, not in the highly prescriptive sense specifically ascribed to it in particular statutory or regulatory contexts such as the laws governing provision of special education.

The Commissioner then added in a footnote to the foregoing that further commentary in this context would not be appropriate, as the question of whether the respondent school district did, in fact, appropriately assess and place petitioner's child is the subject of petitioner's pending appeal.

Based on the clear direction set forth in the foregoing holding, the issues which are to be resolved in this matter are as follows:

1. Whether L.C. has been treated as would any other new or returning student from a private school or public school outside the district?

2. Whether the district has reviewed and assessed L.C.'s educational status, through whatever means the district has established by policy or practice for such purposes, in order to determine the appropriate grade level placement for L.C.?
3. Whether the school district has made a reasonably discretionary judgment as to the appropriate placement based on the information available to it consistent with its own programs, policies and procedures?
4. Whether this evaluation was done in the ordinary sense of the word?
5. Whether the respondent school district did, in fact, appropriately assess and place L.C.?

FACTUAL DISCUSSION

At the hearing of this matter, there was extensive testimony submitted by both parties. What follows is my attempt to summarize the testimony and evidence which I found to be relevant to these issues.

The first witness to testify was Edward Polakowski, the head of the Mathematics Department. Ms. Grey, the Manalapan High School Principal asked him to do an evaluation a few days before August 30, 1998. He was given the materials that L.C. used in the prior year of home schooling in order to determine if the course complied with district curriculum for Algebra 1. He reviewed about one dozen math booklets to see if the specifics of the mathematics course was covered. He identified his written evaluation of L.C.'s ninth grade algebra 1 course materials (P-1) wherein he indicated that the basics of the math curriculum were covered but there were some omissions. The booklets comprise a traditional algebra 1 course and the only topics not covered were the quadratic function and the notion of a function in general. He found an absence of technology (graphing calculators) and real-world problem solving. He indicated that L.C.'s notations and methods of solution appeared sound although he did not know how the material was corrected and evaluated. He also did not have any of L.C.'s scores on standardized tests. He recommended that L.C. be conditionally placed in algebra 2 freshman. He explained that in eighth grade, students take pre-algebra, basic math or algebra 1. Algebra 2 is taken by freshmen or juniors. Although there are no sophomores in Algebra 2 he would not exclude a sophomore.

He is primarily concerned with what mathematics L.C. had previously. He admitted that he never spoke to L.C. or her parents. He also never spoke to Dr. Fruchtman, the Guidance Director, about L.C. He indicated that his philosophy in placing L.C. in algebra 2 is that it is easier to move a student down rather than up. Mr. Polakowski indicated that Dr. Emerman never spoke to him about L.C. He also never used a standardized test score to determine his recommended placement of L.C., although it is possible to do so. He indicated that the Manalapan-Englishtown Middle Schools use the Metropolitan Achievement Test and Iowa Algebra Aptitude Test. They never utilize the California Achievement Test (CAT). He did not look at L.C.'s CAT scores and was not aware that it had been given to her, although he would have looked at it as a factor.

Mr. Polakowski testified that he usually does not meet transfer students and is not consulted by guidance on the placement of transfer students. He has never dealt with a home-schooled student and he indicated that this is an unusual situation and that it is unusual enough to look at standardized test scores.

On cross-examination, Mr. Polakowski indicated that it is easier to evaluate a correct placement if the student is in school. If the student is placed in a course and is failing, a correction can be made. No one told him what he should recommend and he believes that L.C. should have been in freshman algebra 2, and that if she were to start school he would monitor her. He would have made the same recommendation even if L.C.'s CAT scores had been very high. He is not aware whether any transcript existed for L.C. although he has looked at transcripts in making other placement determinations.

Joseph J. Robinson testified that he is the Administrative Supervisor of Curriculum and Instruction and his position encompasses all six school district high schools. He is involved with applied technology, technology, mathematics, science, telephony and media. He has only done one evaluation for a transfer student. He was assigned the task in this matter when he was approached by Ms. Grey and asked to evaluate L.C.'s curriculum materials to compare it to the curriculum of the school district. He believes that he was asked to do this evaluation after school had started. He reviewed nine math books and three or four science books. He never spoke to Dr. Emerman until after the evaluation. He was the last person to look at L.C.'s course materials.

Mr. Robinson testified that the Core Curriculum Content Standards have been adopted and are mandated by the State of New Jersey. These Standards are being integrated into the district at the present time, although they are not broken down into subjects. He never spoke to L.C. and he does not know if there were more course materials which he could have looked at. He identified his evaluation (P-2) and indicated that in paragraph 2 he used the word "there appears" based on the materials that he saw. He saw no evidence of any lab-related activities. There was no web site integration, although he admitted that he was not aware if L.C. was familiar with web sites. He is responsible to enhance the school district's curriculum by integrating technology into it. At the present time the district is experimenting with a district-wide final examination in mathematics and sciences, although they are not presently in use. He was charged with looking at the box of information and as a result of his review, he agrees with the recommendation of Mr. Polakowski with respect to L.C.'s placement in algebra 2.

Kim M. Fox testified that she has been the Science Supervisor since September 1, 1998. She took over as Science Supervisor when the prior supervisor transferred to Colts Neck High School. Previously she was primarily a biology teacher. She was given L.C.'s home instruction materials for a few days before she issued her written report (P-3). She had one day to look through the materials. Ms. Grey asked her to evaluate the materials and it took several hours for her to do so. She never spoke to the student or the parents, although she did see them on one occasion. She was aware that other teachers had also done evaluations of the materials used by L.C. She has never done any prior evaluations of transfer students.

Ms. Fox testified that as a teacher she would talk to transfer students and ask what they had covered. If a student was actively in class, she wanted to make sure that the student had been able to cover all prior materials and would be able to handle the course work. She was asked to evaluate the materials which she received. She indicated that when there is a transfer student she speaks to guidance, the student, the parents and the teacher. She testified that her evaluation was based on the materials she was given. She questioned whether there were any laboratory activities in L.C.'s course work. She admitted that a course known as contemporary biology is an academic course for which there is no laboratory work. However, laboratory biology is a college

preparatory course. She indicated that the course work which she examined was not sufficient for credit in the laboratory biology course.

Charles W. Welsh testified that he is the Supervisor of the Manalapan High School Social Studies Department. He has held that position for two and a half years. He has been a social studies teacher for over 22 years. In the late summer, at the middle or end of August 1998, he was given a box of materials to evaluate by Ms. Grey who needed the social studies materials evaluated, although he indicated the placement issue never came up. Ms. Grey asked him to take a detailed look at the materials. He indicated that this has never come up before.

Mr. Welsh testified that there are usually a handful of transfer students each year. The Guidance office usually handles the assessment and the placement of these students. This is the first time that he was asked to participate in such an evaluation. No guidance was given to him by the Guidance office as to how he was to evaluate the materials. He read the materials carefully and issued a report (P-4). He indicated that he has been involved in a number of curriculum development activities and that Core Curriculum Standards are required to be followed by every high school. The district provides standardized final exams in social studies. He is not opposed to giving standardized tests to find out where a student stands.

Mr. Welsh testified that based upon what he saw, the materials were deficient. He feels that L.C. would benefit by taking a world studies class. The materials clearly had nothing to do with United States history 1 or United States history 2 and it was very apparent the materials he was given to review were consistent with a world studies course.

On cross-examination, Mr. Welsh indicated that the materials he reviewed were appropriate to a higher level elementary class. There was no evidence of any critical thinking. However, he admitted that he has never taught world studies.

Joanne Zayanskosky-Whitaker testified that she is Supervisor of the Health and Physical Education Department. She indicated that the guidance counselor usually determines placement and this is usually a guidance function. This is the first case where she evaluated curriculum materials. It was her understanding that there were four books used for home schooling. She

was not given the student's grades in health. She indicated that where a transfer student is involved, guidance or someone else decides whether to transfer credits. A student is usually given credit for transfer credits for health unless the course is failed or incomplete. She indicated in her report (P-5) that the health curriculum materials she reviewed are very basic in nature and that there was little opportunity for the learner to apply, analyze or evaluate their own health habits and physical fitness habits. Driver education and many components of family living are virtually nonexistent. Updates were also needed in nutrition, drugs and their effects, and common sexually transmitted diseases.

On cross-examination Ms. Zayanskosky-Whitaker testified that she found the materials lacking. There were only trace amounts of family living material. She was told to review these materials and compare them to the health curriculum. She felt that L.C. would benefit from taking a ninth grade health class.

Dr. Patricia Emerman, an Assistant Superintendent with respondent, testified that she reports to Superintendent Wasser, speaks with him daily and coordinates her job responsibilities with him. The objective of the school district is to provide high quality education at all high schools. She indicated that transfer students are referred to the Guidance office of the high school where the student lives. A redistricting problem had arisen because the school district had opened a new high school in Colts Neck. She indicated that Colts Neck High School has an average class size of approximately 20 students as opposed to an average class size of approximately 25 in the other schools. There was an uneven high school population with Marlboro, Howell and Manalapan High Schools being overpopulated. As a result of a Federal court order because of overcrowding she was involved in a redistricting plan which asked for volunteers to attend the new Colts Neck High School for grades nine and ten. These volunteers were requested in areas where busing could be facilitated. As a result letters were sent to all eighth grade students and notices were published in newspapers asking for volunteers.

Dr. Emerman indicated that Manalapan High School is now within its capacity. The school district has always had some students attending other schools and special permission is granted for students to attend other schools under certain conditions. These include when there is a magnet program based on course availability, where there is a special request, referring

specifically to the sibling rule which is the situation where another sibling attends another school, and pursuant to a drug rehabilitation program in order for a student with a drug problem to avoid former peers. Parents' requests are handled on an individual basis. She indicated that she is involved in the waiver process.

Dr. Emerman admitted that in the case of L.C., a letter was submitted by the parents to the school district on July 13, 1998 (P-6). She never forwarded this letter to the school principal, Terry Grey. The parent was advised that a waiver form was required. One of the requirements for a waiver is the ability to facilitate busing. The policy is that there are to be no more than a 35 to 40 students on a bus.

Dr. Emerman testified that students are assigned to schools based upon addresses. Approximately 20 Manalapan students attend Colts Neck High School. They all reside in the Manalapan geographic area, and they volunteered and were granted permission because the school district could facilitate busing in their cases. Under the policy it is not permitted to allow a parent to drive a student to Colts Neck High School. When Mrs. C. requested that L.C. attend Colts Neck High School, she referred Mrs. C. to the waiver process and suggested that she go through the process. She personally discussed the requirements with Mrs. C. and advised her that her request would not be approved because she did not meet the criteria in that her area of residence was not in the area where the school district could provide transportation. She indicated that every attempt was made to accommodate L.C.

Dr. Emerman testified that parents always have the right to request a change in a school assignment based on the best interests of the student. There is no written policy, but if it is in the best interests of the child because the child is not able to function in his or her current high school, the request can be made. She indicated that each situation is addressed by all of the resources of the school. However, in the case of L.C., since she never attended Manalapan High School, her inability to function there could not be the basis for a transfer. She indicated that a medical reason may be another good reason to get a waiver, although she cannot conceive of a valid medical reason for a waiver in L.C.'s case. She indicated that if a student has a peer problem it is better to resolve it at the school. There are no circumstances that she is aware of to justify a placement change in L.C.'s case.

Dr. Emerman testified that on one occasion she spoke to Mrs. Grey, the Principal at Manalapan High School, about the C. family. This conversation occurred on a speaker phone. L.C. had a schedule in hand and Mrs. C. did not want L.C. to have a ninth grade schedule. Ms. Grey also called on another occasion and said that she wanted to have department supervisors review the curriculum used by L.C. Dr. Susan Fruchtman, Supervisor of Guidance at Manalapan High School, had previously reviewed the materials. She indicated that Dr. Fruchtman had spoken to her in early August about L.C. Dr. Fruchtman referred to a box of materials which she had been going through. Dr. Emerman explained that part of the guidance procedures, which is in the guidance books, is to review materials, review the student's cumulative record, review the student's grade history, review attendance history and standardized testing. She does not know what Dr. Fruchtman concluded at that time. She indicated that the guidance counselor could contact the sending district for more information. She does not know if Dr. Fruchtman recommended that L.C. attend tenth grade at Colts Neck High School.

Dr. Emerman never looked at L.C.'s materials. She indicated that when L.C. registered she did not have the academic history and credentials from an accredited high school program sufficient to place her in tenth grade. There was no grade history, no attendance history and no guidance record. She indicated that the school district receives very few students from home schooling. In lieu of credentials, Dr. Fruchtman was given the box of documents. Dr. Emerman was asked if she had ever seen the accreditation information before (P-7) and she indicated she never saw it. She is not aware of what curriculum L.C. used. She cannot recall speaking to John Lally of the State Department of Education. She did receive copies of guidelines on homeschooling from Ms. Goudula of the County Superintendent's office. She indicated that there are other students in the school district who are being home schooled. The parents of such students are requested to send a curriculum guide to the school district and they are obligated to do so. She looks at these and keeps them on file. Mr. Maddaluna, the County Superintendent of Schools, suggested that there be no critical evaluation of such materials. She indicated that Mrs. Goudula never said to administer testing to L.C.

Dr. Emerman testified that the general procedure is to test and evaluate transfer students within 30 days of their enrollment. This may involve the administering of standardized testing,

early warning tests in order to ascertain the basic skills level of the student. The HSPT is required in eleventh grade to determine if students have mastered basic skills in reading, writing and mathematics. She identified an excerpt from the guidance manual (P-8) on registering new students. L.C. was never administered a test in the summer of 1998. She indicated that there is the possibility of doing more testing if the school district more needed information.

Dr. Emerman testified that she was aware of John Lally's letter of August 13, 1998. M.C. asked for a copy of the school district policy in writing and she responded that there was no official Board policy which specifically addresses home schooling and Board policy on this subject is not mandated. While there is no written Board policy there are guidelines based upon Department of Education guidelines. She identified the administrative procedures used for the transfer of home schooling students which is set forth in her letter of August 20, 1998 (P-10). Under these guidelines the principal is not involved, Dr. Emerman is not involved and Mr. Wasser is not involved. Standardized tests are not specified although the CAT could be used. M.C. responded in writing and she saw no need to review Dr. Fruchtman's procedures. She indicated that it is within the discretion of the Board of Education to award or not award credits to home-schooled students. She also testified that she did not give a copy of Mrs. C.'s letter of August 24, 1998 (P-11) to Dr. Fruchtman.

Dr. Emerman testified that the school year started on September 4, 1998, and Ms. Grey told her that Mrs. C. declined to have L.C. attend school at that time and that she would be home schooled. An attendance officer may have sent out a notice (P-12). She indicated that she never produced a section of the guidance manual on homeschooling (P-13). This guidance manual section provides that no credits are given towards a high school diploma for homeschooling courses.

The next witness to testify was Dr. Susan Fruchtman, Guidance Supervisor at Manalapan High School. She testified that she is in her eleventh year in this position. She supervises the Guidance Department and the guidance manual is used at all six high schools in the district. In the Guidance Department she acts a liaison with students, parents and teachers, sets up scheduling for students and sets up testing for the HSPT in the beginning of October of each year. She indicated that the district has no samples of this test. She is not involved in the early warning tests which

are given to eighth grade students in the sending districts. These early warning tests are given in the areas of mathematics, reading, and writing proficiencies. She has never given a Manalapan High School student an early warning test. Both of these tests are secure tests and neither the early warning test nor the HSPT are available at Manalapan High School. The HSPT covers mathematics and reading and is only for eleventh graders given in October of the year and for twelfth graders who have previously failed the test. A ninth or tenth grade student is never given an HSPT.

The Guidance Department deals with transfer students in two ways. Dr. Fruchtman sets up appointments with the guidance counselors and the students. During the summer she does scheduling and meets with students. Transfer students are referred to the Guidance office for the handling of their transfer. Ms. Williams of her staff would make parents aware of what is needed. They are required to provide proof of residency, a birth certificate, shots or immunization records and transcripts from the prior school. She would then sit down with the family of a student and the student is encouraged to come to the meeting. At this meeting she gives an overview of the school, including extracurricular activities which are available, goes over the curriculum newspaper, and explains courses to them in order to differentiate between different course levels. The focus is on where the student is in his or her grade level. Where they are would depend on what they took before. The transcript is looked at for grades.

Dr. Fruchtman testified that she met with L.C. and her mother. They showed her a photobook of a show in which L.C. participated. She indicated that she does not recall seeing any photos of biology laboratory dissections. M.C. brought in to her a tub filled with packets of materials. In the tub were written question and answer booklets. She was also provided with L.C.'s ninth grade transcript but it was an incomplete transcript and the grades only went through April, 1998. She identified a progress report dated August 10, 1998 (P-14). She indicated that this type of report and all of these materials help her in determining where to place a student in class.

Dr. Fruchtman testified that Mr. Wasser, the School District Superintendent, directed to the parent to bring in the materials to have her review the curriculum. She also asked the parents to bring in whatever they had. She then perused the materials for about fifteen minutes and

concluded that there were no text books and that she could not make an evaluation. She did not ask the parents or student to provide the text book which accompanied the written materials. She indicated that the parents had proof of residency, reports of standardized tests, birth date information, records of inoculations, and some transcripts. Mrs. C. provided two standardized test reports, including L.C.'s CAT scores for eighth and ninth grades. She indicated that the school does not require standardized tests for placement. She recalls that the CAT scores for L.C. were quite good and she concluded that L.C. would not need to take a basic skills class. If she was not sure of this she would have given L.C. the Comprehensive Test of Basic Skills. In connection with L.C.'s course work she saw no text books but only saw the booklets. She met with Mrs. C. twice.

Dr. Fruchtman agreed that Manalapan High School is overpopulated, space is tight, and some classes have 31 or 32 students. She is a former school psychologist and agrees that a smaller learning environment is better. The C.'s never told her that they wanted L.C. placed at Colts Neck High School. She indicated that if it is in a child's best interest there may be a change in placement, for example, if there is a severe drug problem and a directive from administration in order to keep the child away from peers. She indicated that a change in placement is decided on a case-by-case basis where the best interests of the child is involved. She is not involved with waivers and is not involved in redistricting. She knew that L.C. was home schooled and her situation is unique and is not typical of transfer students. Usually through an evaluation of the transcript the Guidance office can do an evaluation of the curriculum. However, in the case of L.C. there were no credits, no clock hours and no dates.

Dr. Fruchtman did develop a schedule for L.C. in September 1998. She indicated that after registering, a student is tested within 30 days by the classroom teacher. There are no special tests within that 30 days period. A new student is closely observed and there is an evaluative process which involves direct communication. She indicated that in one case involving a home-schooled student, C.R., he wanted to be an eleventh grader and he was placed in eleventh grade classes. However, he was moved into ninth grade classes by order of Dr. Emerman. In the case of L.C., Dr. Fruchtman told the parents that she would have to speak with central administration and that she could not schedule a student until she did so. She also indicated that no credits have ever been given for home schooling classes (P-13).

Dr. Fruchtman testified that at her second meeting with the parents, she told Mrs. C. that she was a generalist and could not evaluate the materials provided to her. In general, she looks at courses, then sits down with the materials and tells a transferring student the credit he or she will get. She denied ever telling the parents of L.C. that she could not deal with the placement of L.C. After she realized that she did not have the expertise to evaluate the materials, she required input from others. She also indicated that L.C.'s home school is not accredited and being a provisionally accredited school means that it is still in review. Mrs. C. was not given any portion of the guidance manual. She spoke to Mrs. C. on August 19, 1998, the day she returned from vacation, and told her that L.C. had to be registered as a ninth grader and that this was an administrative decision. There was no chance for L.C. to be given any testing. She indicated that at that time L.C. was not a student and that there was only a discussion going on. Mrs. C. was insistent on L.C. being placed in tenth grade. She indicated that she has mixed feeling concerning the CAT and the CAT test grade levels are extremely inflated. Mrs. Grey, the School Principal, eventually ordered the evaluations. Her placement decisions are based on educational evaluations and on social, emotional and age development. It was her opinion based on social and emotional development that it would be best for L.C. to be in the ninth grade.

M.R., the mother of C.R., another home-schooled student, testified that C.R. is presently age 18. She home schooled C.R. for five years and they attempted to register him in eleventh grade at age 15 or 16. He had completed eighth, ninth and tenth grades of the Christian Liberty Academy curriculum through home schooling. At the beginning of June she spoke to Dr. Fruchtman who told her to bring in C.R.'s materials. She brought in his curriculum and some report cards and Dr. Fruchtman said that C.R. would be given full credit. He was given an eleventh grade class schedule and was told that he if had any difficulty with the classes he would be dropped to a lower grade level. C.R. commenced attending eleventh grade classes, but two weeks later he stopped attending because he was told that he would have to be placed in ninth grade classes. She indicated that she called Dr. Emerman who told her to pull him out or place in him ninth grade. Dr. Emerman told her that there would be no credits for any home schooling and no testing.

On cross-examination, M.R. testified that she does not know how C.R. was doing during the first two weeks of school. She indicated that the Christian Liberty Academy program was not an accredited program. He did get a diploma from the Christian Liberty Academy and is scheduled to attend college. In their conversation, Dr. Emerman told her that they could place C.R. in vocational school and he would have to make up ninth and tenth grade credits. Dr. Fruchtman never said anything about evaluating C.R. and her son was never tested or evaluated by Manalapan High School. Dr. Emerman said that she would not test him for placement and that he was going back to ninth grade. M.R. wanted C.R. to be with his friends in the whole classroom environment. She indicated that she had no objection to C.R. being tested and that she wanted him in an appropriate class but that it was absurd to place him in ninth grade.

Anette V. Williams, Guidance Secretary to Dr. Fruchtman testified. She indicated that she did not recall a number of statements which Mrs. C. claimed that she made. She denies saying "There is a lot of cover up going on here". She indicated that she did not recall saying that.

Warren Douglas Crown testified that he is the Chair of the Department of Learning and Teaching for Curriculum and Instruction at Rutgers University and is Professor of Mathematics Education. He testified to his undergraduate and graduate degrees and that he has been at Rutgers for over 20 years. He is one of three authors of the New Jersey curriculum frame work for mathematics and he is knowledgeable concerning core curriculum standards. He indicated that core curriculum standards do not apply to private school students but apply to public school students. He indicated that there is a testing standard, the New Jersey State-Wide Assessment Program, which is starting with those students entering ninth grade in the 1998-99 school year. However, testing would not be required in order to graduate if the student is starting tenth grade. Ninth graders are subject to testing for math and language arts literacy.

Professor Crown testified regarding educational articulation. He indicated that there should be communication between Elementary and Secondary Schools. There is always a recommendation that articulation be improved.

Theresa Grey testified that she has been Principal at Manalapan High School since January 1998. She first became aware of L.C. during the week of August 17, 1998. Dr. Fruchtman

indicated a concern with the placement of a new admission involving a student who had been home schooled. Her mother wanted L.C. entered into tenth grade and provided information, and a decision was required. Materials were available and Dr. Fruchtman wanted Ms. Grey to help her reach a decision, but she had never become involved with a home schooler before, and as Principal she is not involved with placement of transfer students. She generally reviewed the information, including a partial transcript from the home school, test data including the CAT for eighth and ninth grades, and a letter regarding accreditation. She reviewed the guidance manual and a pamphlet from the State. Dr. Fruchtman said that Mr. C. would be calling her. Manalapan High School receives around ten transfer students per year and it is the decision of guidance as to the placement of a transfer student, with Dr. Fruchtman making the decision as to transfer students in the summer.

Eventually Mrs. C. contacted the school and on August 24, 1998, and she returned Mrs. C.'s call at home on August 25, 1998. At that time she had not seen the material and agreed to look at that information. She indicated that the only grades on L.C.'s transcript were up to April 1998, so she was concerned about not having the transcript for L.C.'s full ninth grade year. Ms. Grey requested that the materials be brought to her in order to have department supervisors look at them. The materials were brought in on August 26, 1998, and she then sent the materials to the various department supervisors and requested objective evaluations to look for congruence to core curriculum standards, to district course proficiency standards and to district curriculum. She asked Mrs. C. to provide test books, work books, and every thing that could be provided. She did not know that she did not receive a complete set of materials.

Ms. Grey said that she has never before asked supervisors to evaluate curriculum of transfer students. She was not aware that core curriculum standards do not apply to private schools. She admitted that driver's education is normally given in tenth grade.

Ms. Grey indicated that, to her knowledge, early warning tests are not given in her school. If it were to be given it would be through Dr. Fruchtman. All high school proficiency tests are given through Dr. Fruchtman's office in October and April for eleventh grade students. She felt that Mrs. C. was frustrated. Dr. Emerman was the official communicator with the family. Award of credits is done by guidance counselors. She never ordered a test to be given to L.C. and never

indicated that she wanted to administer a test to L.C. There was no contact by Mrs. C. with her as to a waiver to attend Colts Neck High School and she was not involved in the family's special request for L.C. to attend Colts Neck High School. Eventually Mrs. C. withdrew L.C. from school so the process stopped. She never received a complete report card for L.C. although Mrs. C. said that she would provide it.

Dr. Benedict J. Trigani, testified to his educational background which includes a Ph.D. degree in educational psychology. He is a licensed New Jersey school psychologist and a licensed clinical psychologist. His specialty is psychological evaluation and testing. He testified to his experience including five years experience as a New Jersey licensed teacher and four years experience as a guidance counselor. He is a full professor at Georgian Court College where he has taught for 21 years and is Chief Psychologist at the Jersey Shore Child Evaluation Center. He has also been a consultant for many schools. As a guidance counselor he was involved with many transfer students. He was accepted as an expert in psychology.

Dr. Trigani testified that L.C. had been home schooled for six or seven years after three years of regular classes. L.C. wanted socialization and extracurricular involvement and the parents attempted to have L.C. placed in tenth grade hopefully at Colts Neck High School. He first examined L.C.'s records to see what testing was available. Mrs. C. had provided her with significant standardized testing. He reviewed all materials he had and was provided information as far back as L.C.'s kindergarten. She received a high rating on her readiness test. He indicated that in the second grade, L.C.'s scores on the CAT were in the 95th percentile with reading in the 98th percentile and vocabulary in the 99th percentile. In grade 5 L.C. was given the Iowa Test of Basic Skills and was found to be reading in the 96th percentile. In grade 8 the CAT showed her to be in grade 12+ in the 99th percentile and in grade 9 she was at the top of the CAT in grade 12+ in the 99th percentile. In the Wechsler Intelligence Scale for Children, Third Edition, Revised, (WISC 3R), L.C. achieved a verbal score of 123 or the 94th percentile, and a nonverbal or performance score of 116. As a result, she has no significant weaknesses and she has an excellent general fund of information. She scored very high in all other achievement test and there is the indication that she has been very successful in her home schooling. She has an unusually high cognitive potential. Her verbal comprehension index is 124 which indicates that she has a higher order of thinking skills processes which is one of the goals of the core standards. She

possesses the ability to think abstractly and does well in general judgment and problem solving. These concepts are possessed by her as measured by the WISC 3R. He looked at her perceptual organization and there is no indication of any neurological or perceptual impairments. She writes a clear coherent paragraph and there is no sign of any emotional or social disorders. There is no abnormality, either emotional or social. He has talked to her about everything and she was very anxious about this situation. Her allergies were flaring up and she was experiencing rectal bleeding.

Dr. Trigani testified that in his professional opinion, L.C. was not properly assessed by the school district. A blue box of material was assessed, but L.C. was not. He indicated that the school district cannot prescribe unless they diagnose. They have a child that has exceeded all goals and objectives but no one ever assessed her. Five people were directed to examine the curriculum used by her but there was never any learning assessment of her abilities. This shocked him. Such an assessment should include talking to her, getting samples of her writing, finding out how she feels, finding out how she can fit in and doing an assessment of what she has learned in the past. Dr. Trigani indicated that the parents' letter of August 24, 1998 (P-11) requested a careful and objective evaluation of the achievement and skill levels of L.C., but this was not done. What is a student's best interests means to help children and it should be done in a professional manner. In L.C.'s case the minimum assessment should have been an assessment of standardized test scores, talking to L.C., and talking to the parents to find out what was done with their home schooling. He indicated that teachers do not place 16 year olds with 14 year olds. The retention decision can only be made after careful analysis. Placing L.C. in ninth grade significantly hurt her and it would work against her desire to want to come back to school. He indicated that when he spoke to Mrs. C. she told him that L.C. did biology labs and dissections. J.C. worked with L.C. on computers and she is very well versed in technology. In his opinion, L.C. could cognitively handle eleventh grade, but she should be with children her age and it is the best thing to do to keep her with children her age.

Dr. Trigani testified that he was told that there was on-going litigation and he has worked with attorney for petitioner before. There is no retainer and he has not been paid for his report or testimony, although he hopes to be paid. He has prepared reports for home schoolers in three to five previous cases. He has not worked for Freehold Regional High School although his son did

some work for the school district. He admitted that the statement in his report (C-9) that the school district's attitude of staunch opposition and an entangled mess of uncaring procedure is the parents' opinion. It is his opinion that it is shocking that the student to be assessed was not a participant in the assessment. He contacted the Monmouth County Superintendent's Office and tried to get that office to intervene. He feels that home instruction is acceptable if the circumstances are correct.

With respect to L.C.'s ability, Dr. Trigani feels that the parents are intellectually able, that they have the time to perform the home instruction, they have the financial resources and they are willing to subordinate their needs to those of their children. A home instructor must have some knowledge of the subject matter and he indicated that a certification requires subject matter expertise. He testified that Mrs. C. is a high school graduate and she is not certified and has no college credits.

Dr. Trigani stated that he is embarrassed that no one from respondent has talked to L.C. He is puzzled at the rough time the parents were being given by the school district. He feels that it is pathetic what happened. The whole assessment process was butchered. All schools make every effort to cover themselves. L.C. was doing well in elementary school but Mrs. C. took her out because of something being taught that the parents objected to involving moral values. He indicated that L.C. is a perfectionist and that she was undergoing stress and anxiety. Dr. Cencora recommended treatments involving stress reduction. He indicated that it was not inappropriate to evaluate only the curriculum materials, although this was one of the tools that was to be used.

M.C., mother of L.C., testified that L.C. is age 16. M.C. has three children including L.C. and two sons. They have resided in Manalapan for ten years as of August 1999. M.C. testified that L.C. wanted to re-enroll in the Colts Neck High School. She showed her parents articles on the new high school and the fact that it would be a new school with new students which was being underutilized. She has friends in Manalapan High School and it is dangerously overcrowded. Two of her friends from church go to Colts Neck High School. She made a good case and her parents agreed to her request. As a result they called the school district transportation office and were advised that they were not within the Colts Neck High School area. They were one mile west of the boundary line but were told that they could get a waiver and they

were given Dr. Emerman's telephone number. Mrs. C. called Dr. Emerman and she told Mrs. C. to write a letter. This was done on July 13, 1999 (P-6). Following the letter, Dr. Emerman called Mrs. C. at home on July 20 and Mrs. C. advised her that L.C. had been home schooled. Dr. Emerman said that L.C. must enter ninth grade. Any home schooler goes back to ninth grade and there is no avenue for evaluation and no way to evaluate her status. Mrs. C. told Dr. Emerman that she had report cards and standardized tests scores for L.C., but Dr. Emerman said that it does not matter. Mrs. C. Said "you're kidding me" and when they hung up from this conversation she told L.C.

As a result of this conversation, Mrs. C. contacted her Congressman on July 21, 1998. Following that she was contacted by Mr. Wasser, Superintendent of the school district who indicated that she must have misunderstood Dr. Emerman. He indicated that Dr. Emerman wanted L.C. to take district-wide finals and he told her to call Dr. Fruchtman. Mr. Wasser said that it was a guidance matter and that administration should not be involved. He told her bring in L.C.'s records and Dr. Fruchtman would evaluate her.

On August 3, 1998, M.C. called Dr. Fruchtman's office and Dr. Fruchtman said that district-wide finals are impossible but that she would look at L.C.'s ninth grade curriculum and eight and ninth grade records. After her review she would then give L.C. a basic skills type test. Dr. Fruchtman indicated that she knew some home schooling families and she was impressed. She indicated that there are procedures to assess individual children and then place them and that she thought Dr. Emerman's position was ridiculous. Dr. Fruchtman indicated that she was not concerned about academic standards, but concerned about the socialization aspect. Mrs. C. explained to Dr. Fruchtman that L.C. had been involved in many group activities. There was a group involved with a shark dissection and she participated in a medieval feast which was part of a social studies curriculum. She offered to give Dr. Fruchtman a list of field trips in which L.C. participated as part of a group.

Mrs. C. testified that on August 6, 1998, she brought to Dr. Fruchtman all of the requested documents and met with her briefly. Her secretary Ms. Williams accepted a blue box including all of L.C.'s class work for ninth grade.

Mrs. C. testified that between August 7 and 19, 1998, she was not able to get in touch with Dr. Fruchtman. During this time she called the State Education Office and spoke to Mr. Lally and he sent her a letter of August 13, 1998 (P-9). She was eventually able to reach Dr. Fruchtman on August 19, 1998, and Dr. Fruchtman advised her that Dr. Emerman had blocked the evaluation of L.C. Dr. Fruchtman apologized repeatedly and she indicated that she had suffered a concussion. She was very very sorry. She indicated that she was only authorized to follow her supervisor's instruction. She was subsequently contacted by Mr. Wasser who was furious with her for contacting her Congressman. However, Mr. Wasser indicated that if what Mrs. C. told him was true about Dr. Emerman preventing an evaluation of L.C. he had a problem with it and he would look into it.

Mrs. C. wrote a letter to Dr. Emerman on August 12, 1998 (P-24) and received a response from her on August 20, 1998 (P-10). As a result of this she responded on August 24, 1998 (P-11) and personally delivered the documents to Dr. Fruchtman for evaluation. Dr. Fruchtman promised to give her a letter that her daughter's evaluation had been blocked by Dr. Emerman.

Mrs. C. indicated that Mrs. Grey called her on August 25, 1998 and tried to convince her to register L.C. has a ninth grader in order to get her into the building. During this time L.C. asked Mrs. C. why the school district hates her. Mrs. Grey tried to convince her to bring the box back and that she was looking for some one to look at the curriculum and to test L.C. She brought the material back and included the entire ninth grade core curriculum including all testing. Homework was not included because this goes to the school of tomorrow. She gave the results of tests. She indicated that she did not know that there had been a curriculum review until September 28, 1998. She indicated that the school of tomorrow graduates are accepted by colleges (P-28). She also indicated that L.C. was given the Metropolitan Achievement Test (MAT) and that Dr. Emerman never asked for MAT scores for L.C.

As a result of the letter from Congressman Pappas to the County Superintendent of Schools, the County Superintendent assigned Maria Godoula, an educational specialist, to this matter. Ms. Godoula was to meet with Dr. Emerman and Mr. Wasser on August 31, 1998. Ms.

Godoula called Mrs. C. and told her to bring L.C. into the high school and because the school district was mandated to give an early warning test to her. On August 31, 1998, Mrs. C. and L.C. went to Manalapan High School but Principal Grey knew nothing about the early warning test. They then phoned Dr. Emerman and Dr. Emerman said that Mrs. Godoula had no right to do what she did. She indicated that Mrs. C. would have to register L.C. as a ninth grader, she will be assigned a ninth grade homeroom, and that she does not have to be tested for 30 days. Mrs. C. asked why a test was required now, and Dr. Emerman said that it never came up. She will be tested and then will be placed in a remedial reading class and a remedial math class and that they would teach her daughter to read correctly. Mr. Wasser was in the room with Dr. Emerman. L.C. was visibly upset as a result of this

Mrs. C. could not get anyone to take any action so she decided to go to Dr. Fruchtman because she had never received a written decision. She went to Dr. Fruchtman and asked for a decision in writing so on September 2, 1998, she registered L.C., went to Manalapan High School to get a schedule and met with Dr. Fruchtman who gave L.C. all ninth grade courses. Dr. Fruchtman assigned L.C. to ninth grade courses and a ninth grade homeroom (P-25). When asked about this, Dr. Fruchtman said "you'll have to take that up with the district". She then went home, called Ms. Godoula who indicated that she was very sorry but the school district has 30 days to test L.C. Ms. Godoula said that she found the school district's behavior professionally embarrassing. She suggested private schooling because she felt that L.C. would not be treated equitably by the school district. Eventually she informed the County Superintendent's Office that L.C. would be home schooled for tenth grade.

Mrs. C. testified that the parents decided to pay have L.C. evaluated after the emergency relief application. However, L.C. was too emotionally distraught to be evaluated. She was undergoing rectal bleeding, had terrible stomach aches and crying fits and was having a terrible time. She had never had these symptoms before. She was brought to a doctor who referred her to a specialist who sent her to a hospital for tests. The doctor recommended stress reduction and that she be shielded from this dispute. She was seen by Dr. Sincora, a Gastro-Intenstinal Specialist. She was sent to the hospital for tests. Dr. Sincora recommended stress reduction and the shielding of her from the stress related to these proceedings.

Mrs. C. disputed the testimony of those who evaluated L.C.'s ninth grade work. Mr. Robinson testified that he reviewed only nine math books. However, there were 12 math books in the blue box. Three books represented a couple of months of work. As a result, Mr. Robinson obtained a distorted view. He also testified that he reviewed three or four Biology books. However, there were 24 Biology books in the materials. Mr. Robinson also testified as to technology. L.C. has been taught technology. M.C. testified that her husband is the Internet Coordinator for all of an out-of-state utility firm. They have four computers in their home and they use their computers for educational and other research. Her husband taught eighth grade and also taught as an adjunct professor at City University of New York. The district never asked about how L.C. was taught technology.

M.C. also testified that L.C. was involved in dissections of a shark which was supervised by a certified science teacher. As a result, she disagrees with the testimony of Ms. Fox. M.C. disagreed with Mr. Welsh's review. He felt that the curriculum aligns with his but is not appropriate for high school. With respect to the driver's education, no freshman curriculum covers this subject and it is usually taught in a later grade. Family living is in the ninth grade curriculum for home schooling and L.C. was taught about sexuality and marriage. This may have been the booklet that was left out. The curriculum covers and gives instruction on awareness of drugs and awareness of symptoms of other common sexually transmitted diseases. Nutrition is in the curriculum and there is a section of the curriculum which applies and evaluates the students' own health habits.

M.C. testified that L.C. was taught ninth grade math. She then explained that the chapters that are taught are called "paces". A grade of 79 is failing and if that occurs the student must redo the pace and be retested. The test is then mailed to an advisor for grading. L.C. has an advisor from the Living School and her attendance record is called in to him. L.C. generally attends to her studies five days a week, Monday through Friday. It is the school which determines if she has mastered an area or subject. Book reports are done, six having been done in ninth grade and the six required reports were sent into the school. M.C. testified that she provided the school district with a grade history of L.C. and that this was given to Mr. Grey. She also gave the name and phone number of the advisor to Dr. Fruchtman, but she never called him.

On cross-examination M.C. admitted that there was a discussion of a possible settlement of this matter in September 1998. The proposed settlement which was discussed was an offer for L.C. to attend tenth grade at Colts Neck High School for summer school for all courses. She denied that it was her understanding that the settlement was that summer school would be required only for English 1 because it is a four year course, but summer school was required for all freshman courses. She indicated that it was her desire to have her daughter admitted without being punished because she was a home schooler. She believes that it is Dr. Emerman's fault that this matter had to proceed to a hearing because Dr. Emerman blocked the evaluation. She heard the testimony of the teachers who performed the evaluations that none of them had any direction or supervision from Dr. Emerman. She felt that Mr. Polakowski's evaluation was excellent but does not think that any of the teachers were able to do a full review. She has no way of knowing if anyone tried to influence them and she admitted that each of them has the ability to do proper evaluations.

M.C. testified that she has a high school diploma and attended one year of college in 1973 and 1974 and one year part-time in 1978 when she took courses in Accounting 1 and Financial Accounting. She has no education credits. L.C. attended kindergarten and first grade at ages five and six. She then attended second grade. From grades three to ten she was home schooled and this was from September 1991 to present. Her third grade curriculum was from the Calvert School in Baltimore, fourth to seventh grade the curriculum was put together from various manufacturers and eight grade was the School of Tomorrow curriculum. Tuition was paid for ninth grade to the School of Tomorrow in the approximate amount of $700. The School of Tomorrow was conditionally accredited at the time. She keeps an attendance record and academic activities occur five days per week. There is homework everyday and the school day starts at 9:00 am., and finishes somewhere around 2:00 p.m. The school of Tomorrow is a ten month program. For the 1998-99 school year, they were unable to start until December 1998 and she is scrambling to catch up,. At the present time L.C. is putting in more than five hours per day in her home schooling. She indicated that the Living Heritage Academy is the home schooling arm of the School of Tomorrow. The School of the Tomorrow is a physical building. She takes her children to the Maranatha Christian Academy for testing. She indicated that L.C. had a dissection exercise with a certified science teacher. She would have been satisfied if L.C. was

evaluated in accordance with State guidelines and it was properly determined where she belonged, and if Manalapan's overcrowding is alleviated, she would have no objection to L.C. attending Manalapan.

M.C. testified that she was referred to Dr. Trigani by her pediatrician, attorney and Brookdale teachers and the purpose of seeing him was to have L.C. tested without the punitive aspects.

Dr. Patricia Montgomery, who holds a Ph.D. degree in Educational Leadership, testified for petitioner. She has been employed in both public and parochial schools and she founded the Clonlara School in 1967. The Clonlara School home-based education program is an off-site program which services 7,500 students world-wide. Dr. Montgomery testified that she has lectured at Ohio University, the University of Massachusetts, University of Denver, University of Connecticut, and University of Pennsylvania. She indicated that Educational Leadership is a much broader degree than a degree in Educational Administration. Her doctoral thesis involved a survey of alternative schools from 1964 to 1974. She has served as an evaluator and an accreditor. The State of Michigan does not accredit schools but the National Association for the legal support of alternative schools has granted Clonlara accreditation. The Independent Schools Association (ISAS) is an accreditation agency and she has participated in ISAS as an evaluator. ISAS has reviewed the curriculum of Clonlara School. Clonlara is also a candidate for accreditation by the National Private School Association Group. She is aware that the School of Tomorrow of the Living Heritage Academy has been accredited by the National Private School Association Group.

Dr. Montgomery testified that she is the founder and director of the home-based education program at Clonlara. She has had students transfer to her school and presently services 60 children and families in 67 cities in New Jersey. She has had students transfer out of this to regular school programs, including one student who transferred to 12th grade and another student who transferred to 11th grade. Both transferred back to regular school without a problem. Clonlara regularly trains public school and non-public school staff. Transferring students are evaluated by reviewing their test scores, particularly standardized achievement tests, by interviewing the students, by reviewing a sample of the student's work and by looking at

extracurricular work. If the student is not interviewed then it must be assumed that the program was fully learned. It is usually the guidance counselor who does the interview of the student. A guidance counselor is able to size up a student relatively quickly based on the maturity of the student. Otherwise if there is no interview, the guidance counselor only has a piece of the pie and not the whole pie. It is also suggested that the parents be interviewed although this is not required.

Dr. Montgomery first met L.C. in her home. She reviewed her work samples and creative writing, science, computer and the whole range of subjects. She reviewed L.C.'s book reports. She reviewed a report which L.C. did on sonar in which she created a science exhibit. She indicated that L.C. has designed her own web page on the internet using the HTML format. She was shown L.C.'s standardized test scores and test materials. She asked how the testing material was corrected and evaluated. She is familiar with the Core Curriculum Content Standards of New Jersey and has worked with them. L.C. worked with groups and worked with a very large group in a social studies project. L.C. functions successfully in a group. She is aware that L.C. did dissections and saw proof of this in a portfolio format. She indicated that L.C. reviewed 500 pages of the congressional record. She did the work of a ninth grade student plus supplements. She is aware of Mrs. C.'s request for and evaluation of L.C., for her placement in tenth grade. She also indicated that in certain limited areas there was no coverage but with the pace system a student cannot move to the next step until the pace subject is successfully mastered. She reviewed the various achievement tests and as a result of her review of all this material she supports M.C. 's request for L.C.'s placement in tenth grade. She feels that placing a student in ninth grade when the student has completed all ninth grade course work would be punitive. L.C. is not seeking a high school diploma and the placement should be in accordance with her chronological age.

Dr. Montgomery indicated that she provided no written report and is not being paid and is not seeking payment. She did not speak to anyone at the Living Heritage Academy. She also did not try to speak to anyone at the Freehold Regional High School District. She has testified approximately 25 to 40 times before but has never before testified about the issue of transition from home schooling to a regular school. She indicated that it is not necessary to investigate the details and characteristics of a regular school being transferred into. She looked at the curriculum

at Freehold Regional High School. She is not aware that the CAT is not often used in New Jersey and is not aware that it shows too high a progress. She indicated that it sounds like a 30 day trial in ninth grade is a good idea. She admitted that she had L.C.'s materials for months in order to evaluate it. She felt that L.C. is being singled out simply because she is home schooled. She feels that L.C. is capable of being a tenth grade student at any high school. The school district's curriculum is irrelevant in evaluating grade placement.

Dr. Patricia Emerman was recalled as a witness by petitioner. She testified that Ms. Grey ordered the reviews and she did not instruct the reviewers or Ms. Grey concerning this. These evaluations were done the last week in August 1998. The supervisors worked that last week. She knew of the evaluations in august 1998, Dr. Grey having told her. She did not speak to the evaluators at that time. Dr. Emerman indicated that the review of the curriculum and the booklets dropped off by M.C. was done during the last week of August and that these reviews were followed up with written reports at a later date. Dr. Emerman was advised of this by Ms. Grey, the building principal. Dr. Emerman indicated she did not speak to any of the people who performed these reviews.

Dr. Emerman indicated that Board of Education policy number 5120 (P-30), indicates that students shall receive credits for courses and/or programs from other bona fide institutions which she interprets as meaning other accredited high schools. In her letter (P-10) she talks about a review of the student documentation from the student's previous academic history and that is where the school district would know what the student got from other accredited high school programs that the student attended. The policy (P-30) provides that no credit shall be given for correspondence courses unless specifically approved by the superintendent and the superintendent may award credit for correspondence courses if he so desires. Dr. Emerman indicated that there was a discussion whereby Mr. Wasser would have given L.C. credit for work done through her correspondence courses and this was discussed in September as a possible settlement at the emergent relief hearing.

At the conclusion of the testimony, the parties entered into certain stipulations which may be summarized as follows:

1. In November 1998, Dr. Cencora found that L.C. was suffering from stress and symptoms of irritable bowel syndrome.
2. The transcript from the School of Tomorrow indicating that L.C. had withdrawn in April 1998 is incorrect and was the result of a database error (P-32).
3. If J.C., the father of L.C. testified in this matter, he would have identified his resume (P-33) indicating that he is a teacher of high school and college classes. He was to testify that M.C., the mother of L.C., was the primary educator of L.C. and that his role is to enhance and focus on the math and sciences, do the computer work, do the web site work, assist L.C. with her study of sonar and its use in the finding of the Titanic, and to integrate school with technology. He also would have testified that L.C.'s book reports are required to be typed and that she used word processing for this. She uses the internet as part of her study of subject materials in biology, history and geography. She communicates through the internet with individuals in different countries as part of the curriculum utilized by the School of Tomorrow plus supplements. He would have testified that software is used that requires observation, note taking, deductive reasoning, and that involves problem solving in a group environment where a member is allowed to propose a solution, and that this group problem solving is done through the program and use of the internet.
4. J.C.'s testimony would have been that L.C. uses spreadsheets and other computer tools. As part of her volunteer work at the Raritan Bay Hospital, x-ray imaging was used, and this was used and studied by her at home as to how x-rays worked. U.S. News & World Report is utilized on a weekly basis through J.C. and M.C. and science and technology is brought into the curriculum. He would also have testified that L.C. belonged to various group activities as part of the home schooling experience including New Jersey State History and State Government Society. She has a Red Cross Child Care Certification which required that she take and pass certain courses. She takes an art appreciation class. She participates with other home schoolers in a sewing club. She participates with other home schoolers in a genealogy club, all being part of her experience of home schooling which is then included in the curriculum the parents are teaching. These latter were described by the attorney as supplemental to the curriculum.

5. It was stipulated that J.C. would have testified as to his credentials. He has a bachelor of science in physics and a minor in math with secondary education. He has a Certification from the State University of New York and he was a teacher in both public and private schools. He completed 28 credits of graduate work towards a masters degree in environmental science and engineering. His present work experience is that he is responsible to manage the portfolio of research and development projects in the area of nuclear energy, environment and ?. He is employed by an out of state public utility in research and development and advanced technology development. His work involves a broad spectrum of technology including advance computer systems, robotics, laser systems, photovoltaic and fuel cells, all of which are utilized with L.C. as supplements to the curriculum. He represents the public utility company on industry-related research committees and has presented research papers at various industry seminars and conferences.
6. It was stipulated that the foregoing would be testimony of J.C. and that it would not be contradicted by respondent.
7. It was stipulated that L.C.'s mother's additional testimony would have been to the effect that there were never any early warning tests offered to be administered to L.C. prior to her being at the emergent relief hearing on September 28, 1998.

LEGAL DISCUSSION AND ANALYSIS

The parents of L.C. assert that she has successfully completed home schooling course work to the ninth grade level. The parents contend that they utilized approved testing methods and curriculum provided by the Living Heritage Academy which has been provisionally accredited. They contend that when they attempted to enroll L.C. in the Freehold Regional High School District and sought her placement at the newly established Colts Neck High School they submitted voluminous documentation to respondent to support their request, and the parents assert that respondent was arbitrary in determining that L.C. should be placed in ninth grade at Manalapan High School rather than in tenth grade at Colts Neck High School. The parents take the position that the school district failed to objectively evaluate or administer standardized testing to L.C. as required by law and in violation of the district policies with regard to transfer students.

They are seeking an objective evaluation and the administering of standardized testing to determine L.C.'s proper placement. She is being home-schooled at the present time.

The parents also requested that respondent place L.C. at the newly established Colts Neck High School for the reason that L.C. has not attended formal classes since second grade, and her attendance at a newly established high school having fewer students who are also new to the school would aid in her transition from home-schooling to a formal educational setting. The parents applied for a waiver permitting L.C. to attend Colts Neck High School in July 1998 and this request for a waiver was never acted on by respondent. They argued that other waivers have been granted and the line delineating the areas served by the two high schools is approximately one mile from their home. They indicated their willingness to transport L.C. the one mile to the nearest bus stop for Colts Neck High School if that is necessary, although they would prefer to have bus service provided by the school district from their home to Colts Neck High School.

With respect to evaluations of L.C.'s ninth garde course work conducted by respondent, petitioners argue that due process requires that an objective evaluation should have been done and that respondent should have advised petitioner what was evaluated. Petitioner relies upon a letter sent to the parents by the Department of Education on August 13, 1998, setting forth guidelines to deal with this situation which were sent to public school districts in 1997 (Exhibit P-1). During home schooling, L.C. attended regular educational sessions from 9:00 a.m. to 3:00 p.m. All of this information was available but was never requested by respondent. The parents are seeking an objective educational evaluation of L.C.'s status and objective testing to determine her status. Finally, they are seeking her placement at Colts Neck High School.

Respondent's position is that it is responsible for students in the Regional High School District for grades 9 through 12, and that kindergarten through eighth grade students are educated in the local school districts. Because of this, respondent was not aware of L.C., nor was it responsible for L.C.'s education until she completed her eighth grade education, and it did not know of L.C.'s existence until July 1998. The school district takes the position that it is not contesting that L.C. has gotten an equivalent education and that it will welcome L.C. with open arms. However, it points out that the educators of the school district did evaluate the subject matter taught to L.C. at home (Exhibits R-1 through R-5) and that these evaluations were

objective and were made by professional educators who have no reason to discriminate or be anything less than objective when assessing L.C.'s educational status. The evaluations show that with respect to L.C.'s algebra 1 materials (R-1 and R-5), they were somewhat lacking, the evaluator did not know how the material was corrected and evaluated and he did not have any scores on any standardized test. Nevertheless, he recommended that L.C. be placed in an algebra 2 freshman class conditionally, and that her progress be monitored for the first six weeks of school, and that within that time frame both L.C. and her teachers would be able to determine whether she should remain in algebra 2 or moved to algebra 1. The health educator reviewed the health curriculum and found it to be lacking with many components non-existent (R-2). The Social Studies Department Supervisor reviewed the materials with respect to world studies and he concluded that there are no activities which require analysis, interpretation or evaluation and no requirement for the development of critical thinking skills and analysis of cultural dynamics and change, and that the text and activities materials are deficient with regard to these proficiencies (R-3). The Science Supervisor found that the biology materials utilized by L.C. were either lacking in depth of coverage or missing in approximately 11 areas and they appeared not to be supported by laboratory exercises which required as part of the course (R-4 and R-5).

The position of the respondent is that if L.C. is enrolled and assigned to ninth grade classes, during the initial phase of her placement L.C. would be evaluated to determine if she has significant knowledge and ability and well as course proficiency which would require that her placement be changed to tenth grade courses.

The position of respondent with respect to petitioner's request for placement at the Colts Neck High School is that she resides in Manalapan and the students living in her neighborhood will be attending Manalapan High School. Waivers are granted for extraordinary reasons or for medical reasons, but not because a student would feel more comfortable attending one school rather than another.

N.J.S.A. 18A:38-25 provides:

> Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction

> equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

N.J.S.A. 18A:38-31 contains the statutory provisions for enforcement of *N.J.S.A.* 18A:38-25 and provides:

> A parent, guardian or other person having charge and control of a child between the ages of 6 and 16 years, who shall fail to comply with any of the provisions of this article relating to his duties, shall be deemed to be a disorderly person and shall be subject to a fine of not more than $25.00 for a first offense and not more than $100.00 for each subsequent offense, in the discretion of the Court.

There have been two Court decisions dealing with and interpreting the foregoing statutory provisions. The first of these is *State v. Vaughn*, 44 *N.J.* 142 (1965). In that matter, defendants were parents who were convicted in municipal court as disorderly persons under *N.J.S.A.* 18:14-39 for failing to cause their child regularly to attend the public schools in violation of *N.J.S.A.* 18:14-14. The parents appealed this conviction to the county court which dismissed the appeal for failure to comply with certain procedural requirements. The matter was then appealed to the Appellate Division which reversed and, in so doing, directed the State to amend the complaint to reflect the statutory language, that is, to allege that the defendants failed to cause their child regularly to attend the public schools of the district or a day school or to receive equivalent instruction elsewhere than at school. The Supreme Court granted the State's petition for certification limited to the question whether the State must prove the latter two alternative provisions.

In ruling on this question, the Court observed that the primary requirement of the law is that the parent, guardian or other person with custody shall cause the child regularly to attend the public school. However, with respect to the optional alternatives of sending the child to a day school or causing the child to receive equivalent instruction elsewhere than at school, it is obvious that if the burden of proving a violation of either of the two alternatives rests upon the State, it would be saddled with a fairly impossible task, for it would be obligated to prove a negative proposition in circumstances in which the area of disproof is extremely wide. Accordingly, the Court indicated that as a matter of good sense it is both reasonable and necessary that these

alternatives be matters of exception or excuse to be raised by the defendant who seeks on one basis or the other to justify the failure to cause the child to attend public school. The language of the statute lends itself to the view that the Legislature intended to permit the parent, guardian or other person having charge and control of the child to elect to substitute one of the alternatives for the primary duty, *i.e.*, to cause the child to attend a public school. Accordingly, it is incumbent upon the defendant, if he should rely upon either of the exceptions, to introduce evidence in support of it, unless, of course, such evidence should appear in the State's case. More specifically, there must be introduced evidence from which it could be found that the child is receiving equivalent instruction elsewhere than at school.

The other case, *State v. Massa*, 95 *N.J. Super.* 382 (Morris County Ct. 1967), also dealt with a municipal court complaint in which the parents were charged with and convicted of failing to cause their daughter, age 12, regularly to attend the public schools of the district and further for failing to provide an equivalent education contrary to the provisions of *N.J.S.A.* 18:14-14. The municipal court conviction was appealed to the county court which indicated that the sole issue is one of equivalency, that is whether the parents provided their daughter with an education equivalent to that provided by the local school district. The court indicated that the question before it is what does the word "equivalent" mean in the context of *N.J.S.A.* 18:14-14? The Court referred to *Knox v. O'Brien*, 7 *N.J. Super.* 608 (1950), in which the county court interpreted "equivalent" to include not only academic equivalency but also the equivalency of social development. The Court observed that if *Knox* were to be followed it would not be possible to have children educated outside of the school. It observed that the Legislature must have contemplated that a child could be educated alone, provided the education was equivalent to that of the public schools. The Court agreed with decisions that the number of students does not determine a school, and further that a certain number of students need not be present to attain an equivalent education. It also observed and the prosecutor stipulated that a child may be taught at home and that a person teaching at home is not required to be certified as a teacher by the State for the purpose of teaching their children. Had the Legislature intended such a requirement it would have so provided.

The Court ultimately held that the language of the New Jersey statute providing for "equivalent education elsewhere than at school", requires only a showing of academic

equivalence. To hold that the statute requires equivalent social contact and development as well would emasculate this alternative and allow only group education, thereby eliminating private tutoring or home education.

The Court indicated that the only remaining question is whether the parents provided their daughter with an education equivalent to that available in the public schools. It observed that the majority of the testimony of the State's witnesses dealt with the lack of social development and that the other point pressed by the State was the mother's lack of teaching ability and techniques based upon her limited education and experience. However, the Court found this to be in opposite to the actual issue of equivalency under the New Jersey statute and the stipulation of the State. The Court was satisfied that the mother is self-educated and well-qualified to teach her daughter the basic subjects from grades one through eight. The remainder of the testimony of the State's witnesses dealt primarily with the child's deficiency in mathematics. The Court found that this alone, however, does not establish an educational program unequivalent to that in the public schools in the face of the evidence presented by the parents. It indicated that the parents presented a great deal of evidence to support their position, not the least of which was their daughter's test papers taken in the school district school after having been taught at home for two years. It observed that the results speak for themselves. As a result, the Court expressed an opinion that the daughter has received and is receiving an education equivalent to that available in the public schools and there is no indication of bad faith or improper motive on the part of the parents.

Based upon the foregoing court decisions, it is implicit in the language of *N.J.S.A.* 18A:38-35 that a home-schooled child is required to receive instruction equivalent to that provided by the school district. It may be argued that there should be a presumption that this is the case, since the failure of the parent or guardian to assure that the child has received equivalent instruction would be a violation of the law. Also implicit in this provision is that a home-schooled child who has received such equivalent instruction may transfer into the public schools of the State and be placed in classes appropriate to the level of instruction received by the child elsewhere than at school. To state this in another way, if the child has been receiving equivalent instruction at home in conformity with the statute, the placement decision should result in a grade placement equivalent to the level of instruction received by the child at home. If, on the other

hand, the child has not received equivalent instruction in home schooling, there has been a violation of this provision. However, it should not be assumed that a parent guardian or other person who provides for home schooling of a child has violated the law, and at least for the purpose of making the initial placement decision, it is to be assumed that the child received equivalent instruction in the home school. Thus, when a school district is called upon to assess whether a child has received an education equivalent to that available in the public schools, it must and should assume the academic equivalence of home school courses, at least for the purpose of making the initial placement decision.

This view of home schooling would be consistent with the views set forth by the Commissioner of Education in his Order of December 3, 1998. In that Order he stated that when a child enters or returns to a public school following a period of homeschooling, that child is to be treated as would any other new or returning student from a private school or public school outside the district. The district should review and assess the child's educational status, through whatever means the district has established by policy or practice for such purposes, in order to determine the appropriate grade level placement for the child. There are no specific requirements as to precisely how this is to be done; no special privileges or burdens attach to the child's having been previously educated at home rather that at a private or other public school. The school district must simply make a reasonable discretionary judgment as to appropriate placement based on the information available to it, consistent with the district's own programs, policies and procedures. The term "evaluate" as found in the Department of Education publication *Homeschooling in New Jersey* at page 7, is used in the ordinary sense of the word, not in the highly prescriptive sense specifically ascribed to it in particular statutory or regulatory contexts such as the laws governing provision of special education.

The procedure which is followed by respondent when a student transfers from another school district, whether it is from within the State of New Jersey or from an out-of-state or foreign school district, was described by Dr. Fruchtman and Dr. Emerman. Dr. Fruchtman indicated that the Guidance office procedure, which is in the guidance books, is to review materials, the student's cumulative record, the student's grade history, attendance history and the student's standardized test results. Dr. Fruchtman indicated the either she or the guidance counselor interviews the student and parents, reviews the student's transcript of courses and

grades from the student's former school, and assesses both from this interview and from a review of the student's transcript the academic equivalence of the student's past schooling. The guidance counselor also has the option of contacting the sending district for more information. The general procedure is to test and evaluate transfer students within 30 days of their enrollment. The focus is on where the student is in his or her grade level. Where they are would depend on what they took before. The student is then given credit for academically equivalent courses and the placement decision is made based upon the interview and the transcript of courses.

Where a home-schooled student is involved, the procedure should be the same. If it is presumed that the courses taken by the home-schooled student are academically equivalent to the courses offered by the school district, the student should be given credit for the passage of those courses for the limited purpose of *initially* determining the appropriate placement of the student. It is to be noted and acknowledged that this credit is to be given for purposes of the initial placement of the student only. During the student's initial placement the general procedure of testing and evaluating transfer students within 30 days of their enrollment would be implemented in order to determine where the student is in his or her grade level. The student is then given credit for the academically equivalent courses and the final placement decision is made based upon the interview, the transcript of courses and the testing and evaluation of the student during the initial placement period.

This procedure was supported by the testimony of one of petitioner's expert witnesses, Dr. Benedict J. Trigani, who indicated that there should have been a careful and objective evaluation of the achievement and skill levels of L.C., but this was not done. Such an assessment should include talking to L.C, getting samples of her writing, finding out how she feels, finding out how she can fit in and doing an assessment of what she has learned in the past. In L.C.'s case the minimum assessment should have been an assessment of standardized test scores, talking to L.C., and talking to the parents to find out what was done with their home schooling. He also indicated that the decision to retain a student can only be made after careful analysis. In his opinion, L.C. could cognitively handle eleventh grade, but she should be with children her age and this would be best. This procedure was also supported by the testimony of another of petitioner's expert witnesses, Dr. Patricia Montgomery, who indicated that transferring students are evaluated by reviewing their test scores, particularly standardized achievement tests, by interviewing the

student, by reviewing a sample of the student's work and by looking at extracurricular work. If the student is not interviewed then it must be assumed that the program was fully learned. It is usually the guidance counselor who does the interview of the student. A guidance counselor is able to size up a student relatively quickly based on the maturity of the student. Otherwise if there is no interview, the guidance counselor only has a piece of the pie and not the whole pie. It is also suggested that the parents be interviewed although this is not required.

In the present matter, the parents of L.C. attempted to enroll her in the school district. They provided to Dr. Fruchtman as the Guidance Director, copies of all of the course work that was available to them with respect to L.C.'s home schooling. Admittedly, they only provided a copy of her grade transcript through April of her ninth grade school year, and it was not disputed that a transcript of her grades for her entire ninth grade school year was not submitted to the school district at that time. Dr. Fruchtman was also provided with copies of L.C.'s eighth and ninth grade CAT scores. In fact, as a result of her review of the CAT scores, Dr. Fruchtman concluded that L.C. did not need testing in basic skills and she did not need to attend a basic skills class. Dr. Fruchtman indicated that since there were no credits, clock hours and no dates, she concluded based upon her background in child psychology, that it would be in L.C.'s best interests, socially and emotionally, to be placed in ninth grade.

Subsequently, Dr. Fruchtman was directed by Mr. Wasser to evaluate L.C.'s course materials which had been previously provided by L.C.'s parents. She attempted to review these materials but indicated that she is a generalist and could not evaluate the specialized material provided by the parents. L.C.'s parents continued to insist that L.C. be placed in tenth grade and, as a result, Dr. Fruchtman asked Theresa Gray, the Principal of Manalapan High School, to help her reach a decision. Ms. Grey reviewed the materials provided by the parents, including the home school partial transcript, test data including CAT scores for eighth and ninth grade and a letter regarding the provisional accreditation of L.C.'s home school. She then arranged for the evaluations of the materials by department supervisors. This resulted in somewhat mixed evaluations by these department supervisors. In one case, the supervisor recommended that L.C. be placed in an Algebra 2 Freshman class, and that her progress be monitored for the first six weeks of school in order to determine if she should remain in Algebra 2 or be moved to Algebra 1. Another supervisor agreed with the first evaluation with respect to L.C.'s placement in

Algebra 2. The balance of the evaluations indicated that the materials provided were deficient in many respects. However, in certain cases, the deficiencies related to areas which were either not covered by a ninth grade curriculum, such as driver education, and in other cases it was unclear what was being evaluated and whether a portion or all of the entire course of study was being reviewed. As a result of these reviews and evaluations of the course materials, L.C. was given a ninth grade schedule which was rejected by the parents

Based on the foregoing, it is clear in hindsight that the actions taken by respondent were not sufficient. While respondent undertook a review of certain of L.C.'s course materials, there was no attempt to review or even to obtain L.C.'s up-to-date cumulative record, no attempt to review L.C.'s grade history, no review of her attendance history and insufficient consideration of her standardized test scores. While Dr. Fruchtman interviewed the student and parents, she did not indicate that she properly considered the student's transcript of courses and grades from the student's former home school, and did not assess both from this interview and from a review of the student's transcript the academic equivalence of the student's past schooling. It was not presumed for purposes of L.C.'s initial placement that the courses taken by her as a home-schooled student were academically equivalent to the courses offered by the school district, and she was not given credit for those courses for the limited purpose of determining her appropriate initial placement. Respondent's Guidance office made no attempt to contact the home school for more information. Respondent refused to give L.C. credit for academically equivalent courses and refused to make an initial placement decision based upon the interview and the transcript of courses.

Based on the foregoing, I **FIND** that L.C. has not been treated as would any other new or returning student from a private school or public school outside the district. I **FIND** that the district has failed to properly review and assessed L.C.'s educational status, through whatever means the district has established by policy or practice for such purposes, in order to determine the appropriate grade level placement for L.C. I **FIND** that the school district has failed to make a reasonably discretionary judgment as to the appropriate placement of L.C. based on the information available to it consistent with its own programs, policies and procedures. Therefore, I **CONCLUDE** that the respondent school district did not appropriately assess and place L.C.

I make the following findings and reach the following conclusion with respect to the parents request that respondent place L.C. at the newly established Colts Neck High School. They reason that because L.C. has not attended formal classes since second grade, her attendance at a newly established high school having fewer students who are also new to the school would aid in her transition from home-schooling to a formal educational setting. However, I **FIND** that this is an insufficient basis for changing the placement of L.C. The parents also applied for a waiver permitting L.C. to attend Colts Neck High School in July 1988 which was never acted on by respondent. They indicated their willingness to transport L.C. the one mile to the nearest bus stop for Colts Neck High School if that is necessary, although they would prefer to have bus service provided by the school district from their home to Colts Neck High School. However, L.C. resides in the Manalapan High School area and the students living in her neighborhood will be attending Manalapan High School. The line delineating the areas served by the two high schools is approximately one mile from their home. I agree that waivers should be granted for extraordinary reasons or for medical reasons, but not because a student would feel more comfortable attending one school rather than another, and I so **FIND**. Therefore, I **CONCLUDE** that the actions of the school district in denying L.C.'s placement at Colts Neck High School is correct and should be **AFFIRMED**.

DECISION AND ORDER

Based upon the foregoing discussion, it is **ORDERED** that respondent shall treat L.C. as it would any other new or returning transfer student from a private school or public school outside of the respondent's school district. It is **ORDERED** that the district shall properly review and assess L.C.'s educational status through whatever means the district has established by policy or practice for such purposes applicable to a transfer student in order to determine the appropriate grade level placement for L.C. It is **ORDERED** that respondent shall make a reasonably discretionary judgment as to the appropriate placement of L.C. based on the information available to it consistent with its own programs, policies and procedures. For the purpose of L.C.'s initial placement, it is to presume that the courses taken by L.C. as a home-schooled student are

academically equivalent to the courses offered by the school district and she shall be given credit for those courses for the limited purpose of determining her appropriate initial placement.

It is further **ORDERED** that respondent's denial of petitioner's request that L.C. be placed at the Colts Neck High School and that a waiver be granted for busing L.C. to Colts Neck High School is hereby **AFFIRMED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 29, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

11/3/99
DATE

Debbie Antanaitis /lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 4 1999
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/lam

LIST OF WITNESSES

For petitioner:

Edward Polakowski

Joseph J. Robinson

Kim M. Fox

Charles W. Welsh

Joanne Zayanskosky-Whitaker

Patricia Emerman

Susan Fruchtman

M.R.

Anette V. Williams

Warren Douglas Crown

Theresa Grey

Benedict J. Trigani

M.C.

Patricia Montgomery

For respondent:

None

LIST OF EXHIBITS

ALJ Exhibits:

C-1 Psychology report of L.C. by Benedict J. Trigani, Ph.D., dated October 5, 1998

For petitioner:

P-1 Evaluation of L.C. by Ed Polakowski, dated August 30, 1998

P-2 Evaluation by Jay Robinson, dated September 165, 1998

P-3 Evaluation of L.C. home instruction materials by Kim M. Fox, dated September 1,1998

P-4 Report of L.C. home schooling materials by C. Welsh, dated September 1, 1998

P-5 Review of home schooling materials in health by Jo Anne Zayanskosky-Whitaker, dated September 1,1998

P-6 J.C. and M.C. letter dated July 13, 1998

P-7 June 3, 1998 letter of Private Schools Association Group

P-8 Excerpt from respondent guidance manual

P-9 Letter of John Lally, Education Program Development Specialist of Department of Education, dated August 13, 1998

P-10 Dr. Patricia Emerman letter to M.C., dated August 20, 1998

P-11 M.C. letter of august 24, 1998

P-12 Legal notice to parent or guardian from attendance officer, dated September 11, 1998

P-13 Excerpt from respondent guidance manual regarding home schooling

P-14 Living Heritage Academy progress report for M.C., dated August 10, 1998

P-15 California Achievement Test report, June 1997

P-16 California Achievement Test report, June 1998

P-17 Freehold Regional High School District student schedule for C.R.

P-18 C.R. grade materials

P-19 Curriculum Vitae of Warren D. Crown, Ph.D.

P-20 Manalapan High School, Department of Health and Physical Education course requirements

P-22 L.C. Biology test score October 28, 1998, NABT/NSTA High School Biology Examination

P-23 Letter of M.C., dated July 28, 1998

P-24 M.C. letter of August 12, 1998

P-25 September 2,1998 course schedule for L.C.

P-26 M.C. letter of September 1, 1998 to Board of Education president

P-27 Dr. Patricia Emerman letter of August 31, 1998

P-28 Listing of colleges and universities which have accepted School of Tomorrow graduates

P-29 Curriculum vitae of Dr. Patricia Montgomery

P-30 Rules and Regulations and School District Policy Number 5130

P-31 School of Tomorrow curriculum introduction

P-32 School of Tomorrow corrected transcript indicated L.C. completion of ninth grade

P-33 Resume of J.C.

For respondent:

R-1 New Jersey Association of School Administrators Administrative Guide regarding home schooling

R-2 J.C. and M.C. application for waiver for change of schools, dated July 17, 1998

R-5 Letter of Patricia Emerman, dated October 5,1998

R-6 M.C. letter of October 12, 1998

OAL DKT. NO. EDU 8229-98
AGENCY DKT. NO. 420-9/98

M.C., on behalf of minor child, L.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein. [1]

Petitioner's exceptions are limited to, and essentially reiterate the arguments advanced below in support of, her contention that L.C. be permitted to attend Colts Neck High School via the waiver process. In its reply exceptions, the Board contends that petitioner and the Board have reached a voluntary agreement that L.C. will attend Freehold Boro High School and that petitioner's exceptions are therefore moot.

[1] Along with her exceptions, petitioner submitted a Pyschology Report from Benedict J. Trigani, Ph.D., dated November 15, 1999, and a letter from Michael J. Tirpak, Ph.D., dated November 16, 1999. Attached to the Board's reply exceptions were two letters, both dated November 17, 1999 and designated as "Exhibits A & B." These additional documents submitted by petitioner and the Board were not before the ALJ and not previously made a part of the record. In accordance with *N.J.A.C.* 1:1-18.4(c), these additional submissions were therefore not considered by the Commissioner in rendering his decision. Further, *N.J.A.C.* 1:1-18.4 does not provide for submissions other than exceptions and replies. Accordingly, petitioner's submission, filed on December 9, 1999, and the Board's submission, filed on December 13, 1999, were not considered.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision, with clarification. Initially, the Commissioner concurs with the Administrative Law Judge (ALJ) that it is implicit in the language of *N.J.S.A.* 18A:38-25 that a home-schooled child is required to receive instruction equivalent to that provided by the public schools. (Initial Decision at 34) The Commissioner also concurs that, when a child has been lawfully home schooled, a district should place the child for initial purposes at the level represented by the parents as being the level of instruction received by the child at home. (*Id.*)

In his analysis, the ALJ found the District's actions insufficient in that "there was no attempt to review or even obtain L.C.'s up-to-date cumulative record, no attempt to review L.C.'s grade history, no review of her attendance history and insufficient consideration of her standardized test scores." (*Id.* at 38) The Commissioner agrees with the ALJ's finding that the actions taken by the District were deficient, but for different reasons. The Commissioner finds the actions taken by the District were insufficient because the District did not, upon L.C.'s parents' representation that L.C. had been provided with a ninth-grade curriculum at home, place L.C. in accordance with that level and determine thereafter, based on L.C.'s demonstrated level of academic achievement with respect to the *District's* specific course proficiencies, if the initial placement was, in fact, appropriate. [2] Instead, prior to placing L.C., the District conducted an in-depth review of L.C.'s course materials in an effort to determine whether her home-school *curriculum* was equivalent to the District's *curriculum.* Put another way, the District's assessment should not have occurred prior to L.C.'s initial placement, and should not have

[2] Such determination could be accomplished by the administering of "final exams" in the appropriate courses, or by other means determined by a district through its policies and procedures.

focused on the equivalency of L.C.'s home-school instruction to the specific curriculum taught by the district; rather, such assessment should have occurred *after* preliminary review of, and initial placement in accordance with the representation of L.C.'s parents as to the grade level of her instruction, and focused on L.C.'s *level of proficiency* within the context of the District's instructional program so that an adjustment could then be made if necessary.[3]

Accordingly, the District is directed, should L.C. wish to return to Manalapan High School rather than continue at Freehold Boro High School as previously agreed to by the parties, to place L.C. in the eleventh (11^{th}) grade and expeditiously assess her course proficiencies through the mechanisms established by the District for such assessments.

Like the ALJ, the Commissioner finds that the Board's denial of petitioner's request that L.C. be placed at Colts Neck High School was within its lawful authority and was not arbitrary, unreasonable or taken in bad faith.

Accordingly, the Initial Decision of the ALJ is adopted as the final decision in this matter for the reasons expressed therein, as clarified above.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] The Commissioner stresses that initial placement is not to be solely based upon a student's age, as an age-appropriate initial placement may not be warranted based upon the grade level of instruction provided at home.

[4]This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

February 2, 2000

Date of Mailing, February 2, 2000

SB/47-00

HDY #7817-99 and EDE #9001-00 (consolidated)
SBE #526-06/99-219
SB #47-00

IN THE MATTER OF THE REVOCATION OF	:	STATE BOARD OF EDUCATION
THE TEACHING CERTIFICATES OF M.S.	:	DECISION
BY THE STATE BOARD OF EXAMINERS.	:	

Decided by the State Board of Examiners, June 15, 2000

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Petitioner-Respondent, Peter D. Alvino, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On June 15, 2000, the State Board of Examiners revoked the teaching certificates of M.S. (hereinafter "respondent"), a tenured teaching staff member, for unbecoming conduct. The Board of Examiners adopted the findings and conclusions of the Administrative Law Judge, agreeing that the charge of improper sexual conduct had been proven by a preponderance of the credible evidence and that the respondent's conduct was so egregious as to warrant revocation of her certificates.

After a thorough review of the record, we affirm the decision of the State Board of Examiners substantially for the reasons expressed therein. In so doing, we have carefully reviewed the audio tape made by A.E., a former student in the district, exhibit P-1, in evidence, rather than simply relying on the transcript of that tape. Moreover, we agree that the testimony clearly establishes that the voice on the tape is that of the respondent. Both the Superintendent of Schools and the Director of Special Services,

DEC. 6, 2000

who directly supervised the respondent, identified the respondent's voice on the tape. Tr. 10/6/99, at 92, 94. Although it is difficult to establish on the basis of that tape whether the respondent, as alleged by A.E., grabbed his genitals and displayed her breasts to him during the course of their conversation, we conclude that the sexual nature of the exchange–in which the respondent was an active and willing participant–in addition to the ample evidence in the record, fully support the Board of Examiners' determination that the charges of improper sexual conduct had been proven and that the appropriate sanction under the circumstances is the revocation of the respondent's teaching certificates. We agree that the respondent's conduct was so egregious as to warrant precluding her from serving as a teacher in any school district in this state.

Consequently, we affirm the decision of the State Board of Examiners substantially for the reasons expressed therein.

December 6, 2000

Date of mailing DEC 08 2000

47-00

BOARD OF EDUCATION O F MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board challenged the determination of the Department that it was legally responsible for educating K.O., a child placed in an out-of-state facility by a State agency, for the 1997-98 school year.

The ALJ concluded that The Board had presented credible testimony to overcome the presumption that the address provided to the Department by DYFS for D.O., the mother of K.O., was correct, and concluded that the Board was not the responsible district for K.O.

The Commissioner affirmed the decision of the ALJ, holding that the presumption that information provided the Department by other State agencies for purposes of determining the district of residence of students is correct may be rebutted by credible evidence or testimony. The Commissioner agreed with the ALJ that the presumption of validity of the DYFS records in this case had been rebutted by the Board.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3200-98
AGENCY DKT. NO. 491-12/97

MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,
Respondent.

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

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 17, 1999 Decided: December 22, 2000

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

Statement of the Case

This is an appeal by a regional high-school district from the assessment of tuition costs for placement of a child in an out-of-state facility for the 1997-98 academic year. Under the State Facilities Planning Act of 1979, *N.J.S.A.* 18A:7B-1 to –13, the "district of residence" is responsible for the education of a child placed in an out-of-state facility by a state agency. New Jersey Department of Education ("Department") contends that

the Morris Hills Regional School District ("Morris Hills") is obligated for tuition costs as "the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or his most recent placement by a State agency." *N.J.S.A.* 18A:7B-12(b). Morris Hills, however, maintains that the parent did not reside within its constituent municipalities on the date that the Division of Youth & Family Services ("DYFS") placed the child in an out-of-state facility. The dispositive issue is whether the mother was residing in the Borough of Wharton on August 12, 1997.

Procedural History

By letter dated September 8, 1997, the Department's Office of School Finance notified petitioner of its determination that Morris Hills is responsible for the educational costs of a child who was placed by DYFS at Kidspeace in Orefield, Pennsylvania on August 12, 1997. Further, the letter determined that the mother "was a resident at 86 Ford Avenue, Wharton, New Jersey as of the date of placement." On September 22, 1997, Morris Hills sought intermediate review by an Assistant Commissioner. Thereafter, on October 1, 1997, the Assistant Commissioner upheld the original determination, but modified the findings to reflect that the mother's correct address at time of placement "was 107 East Central Avenue, Wharton, New Jersey." Morris Hills filed an appeal to the Commissioner of Education ("Commissioner") on December 24, 1997.

Subsequently, on March 16, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on September 21, 1999. Witnesses and exhibits are listed in the appendix. Both parties filed post-hearing briefs on November 17, 1999.

Findings of Fact

Many of the background facts are uncontested. K.O was sixteen years old when DYFS placed him at a facility operated by Kidspeace in Orefield, Pennsylvania on August 12, 1997. While details are sketchy, K.O. had a chaotic and unstable upbringing. According to DYFS worker David Johnson, K.O.'s mother D.O. "was in and out of the picture" and "three or four caseworkers had dealt with him." Johnson took over management of K.O.'s case in April 1997, when the prior worker retired. He was the worker at the time of K.O.'s placement at Kidspeace. At one point, D.O. confided to Johnson that "she wanted to wash her hands of her son" and that "she wishes he [were] eighteen." Darlene Thrower, K.O.'s maternal aunt, commented that her sister "doesn't care about anything but herself" and felt sorry for her nephew. K.O. left New Jersey soon after turning eighteen in June 1999 and is no longer under the care of DYFS.

Both parties agree that D.O. had previously lived in the Town of Dover, New Jersey. A 1996 federal income tax return and assorted rent receipts covering the period January 1996 to April 1997 show her address as 133 West Clinton Street in Dover. Her sister Darlene Thrower confirmed that during the first half of 1997 D.O. lived in Dover, first with a friend at 1 Bowlby Street and later with her adult daughter in an apartment at 133 West Clinton Street. Likewise, DYFS records indicate that D.O. had lived in Dover in early 1997. Johnson advised the Department that "the natural mother resided in Dover, New Jersey until the end of June 1997" when "the home in which she rented an apartment was sold to an individual family." Reportedly, in September 1997, D.O. told David Young, an attendance officer employed by the Wharton public school system, that, "she has not had a permanent residence since she moved from 1 Bowlby Street in Dover."

Morris Hills is a regional high-school district comprised of the municipalities of Wharton, Denville, Rockaway Borough and Rockaway Township. For purposes of school funding, therefore, it is necessary to ascertain whether D.O. lived in Wharton, or any of the other constituent municipalities, on the date of her son's placement at

Kidspeace. Proof that D.O. resided in Wharton on August 12, 1997 consists largely of unsubstantiated hearsay-on-hearsay. Johnson testified that, in July 1997, he spoke to DYFS worker named Dara Sugarman, who had supposedly heard from K.O. that his mother was then living with his aunt in Wharton. Clearly this information was based third-hand knowledge of what one DYFS worker said another DYFS worker said the child had said. There is no evidence that K.O. himself ever lived in Wharton or had personal knowledge of his mother's living arrangements at the time.

Similarly, Johnson had a telephone conversation on August 4, 1997 with D.O., who claimed to be living with her sister at 107 East Central Avenue in Wharton. Again, this information is rank hearsay, which does not fall under any recognized exception to the hearsay rule.[1] Moreover, the source of this information is notoriously untrustworthy, since surrounding evidence strongly suggests that D.O. was trying to hide her true whereabouts from the authorities. Johnson himself appears to have disbelieved her claim. Usually, when Johnson needed to get in touch with D.O., he would telephone Delores Thrower, who had her sister's pager number and would relay the message. On August 18, 1997, he wrote to the Department that DYFS "is funding tuition for KIDSPEACE for thirty days, since a residence determination could not be made at the time the child was admitted to the placement." That letter, of course, is dated after Johnson's telephone conversation with D.O. Nothing has substantially changed since that letter was written.

[1] No suitable hearsay exception has been invoked. The contents of this statement cannot come in as a statement against interest under *N.J.R.E.* 803(c)(25), since it is not against the declarant's pecuniary, proprietary or social interest to live in Wharton. Nor is it admissible as an admission by a party-opponent under *N.J.R.E.* 802(b), since the mother is not a party to this litigation between a school district and the State.

Only two weak pieces of evidence tend to support the theory that D.O. resided in Wharton. First, D.O. happened to be at her sister's house on August 4, 1997, when Johnson was able to reach her there by telephone. Naturally, it is not unusual that D.O. might be visiting her sister, especially since at that time D.O. was working at a nearby diner. Second, the attendance officer from Wharton interviewed D.O. at the sister's house on September 14, 1997. Nevertheless, the attendance officer accepted D.O.'s explanation that she uses her sister's address as a mail drop for important documents relating to her son, but "was staying with her friend in Dover" and expected to be "moving soon." He wrote in his report to the Wharton School District that, "it seems that [D.O.] is seldom available for immediate consultation due to the fact that she is not living at a permanent location."

Competent credible evidence indicates that D.O. did not reside in Wharton in August 1997. Darlene Thrower testified under oath that she and her husband occupy the house at 107 East Central Avenue in Wharton and that her sister does not, and did not, live there. Occasionally D.O. would stay overnight when she worked late at the diner or baby-sat the Throwers' children, but this only occurred "an average of one night per month. Unwilling to assume responsibility as K.O.'s legal guardian, Thrower consented to act as go-between with her sister for the benefit of her nephew. Summing up the extent of her involvement, Thrower explained that she agreed to help because her sister "could never be found" and she "felt bad for the kid."

When D.O. was living in Dover in 1997, she "often gave out [Thrower's] address in Wharton because she didn't want anyone to know where she was." Although D.O. stored some papers and two winter coats at the Thrower residence, she kept her day-to-day belongings elsewhere. When Johnson paid a visit to her home on August 5, 1997, Thrower invited him in and offered to let him search "from room to room." Inexplicably, however, Johnson declined the opportunity to look for evidence that D.O. lived there. Consequently, he is unable to contradict Thrower's testimony that D.O.'s property was not on the premises.

Accounts differ on whether Thrower was aware that D.O. had made an appointment to meet Johnson at her house. Thrower insisted that Johnson's visit was "unannounced" and she "had no clue he was coming." Johnson had the impression that Thrower had been expecting his visit and was not surprised when he came. They both agree, however, that D.O. never showed up for the meeting. Significantly, Johnson acknowledged that he never encountered D.O. at the Thrower home.

Statements by Thrower and her sister during their interview with the Wharton attendance officer on September 14, 1997 are fully consistent with Thrower's version at the hearing. Thrower signed a written statement attesting that her sister "is not living at my address 107 E. Central Ave. in Wharton," but rather "stays in Dover and in Parsippany with friends and has no permanent address." D.O. corroborated that she has "no permanent address at this time" and "lives with a friend in Dover," spending only "a few nights" at Thrower's home to baby-sit her sister's children. Thrower continued to insist that D.O. was not living with her in response to additional inquiries by the local police chief and a Morris Hills security guard. Insofar as Thrower knows, D.O. went to live with her boyfriend in Parsippany in June 1997, moved to Florida for an indeterminate time, and later returned to Parsippany.

No apparent motive exists for Thrower to be untruthful. She receives no known gain if Morris Hills wins this appeal and suffers no known loss if Morris Hills loses. While the Deputy Attorney General urges that Thrower was tired of constantly being asked questions about her sister, such minor annoyance is hardly a reason to lie under oath. Cognizant of being under intense scrutiny by state authorities, school officials and the police, Thrower is unlikely to risk making demonstrably false statements.

In contrast, the DYFS records are plainly inconclusive. Originally, DYFS notified the Department that D.O. lived with her sister at 86 Ford Avenue, although it now concedes that in August 1997 Thrower had not lived at that address for at least six years. A typewritten entry in a residency form, approved by DYFS supervisor John Moore, recites that D.O. has "no permanent address" and is "staying with friends." Insertions made by someone with the initials "K.G." excised that entry and substituted

the handwritten address of 86 Ford Avenue in Wharton.[2] Then that second address was also crossed out by K.G. and replaced by the handwritten address of 107 East Central Avenue. Johnson played no part in the preparation of this particular document, even though he was the worker assigned to the case.

I FIND that D.O. did not reside in Wharton on August 12, 1997. Sworn testimony by Darlene Thrower convincingly establishes that D.O. was not living with her. DYFS records are inaccurate and poorly supported by competent evidence. Most of DYFS's conclusions regarding residency depend on hearsay. Unsubstantiated statements attributed to D.O. are not entitled to much weight, in light of her history of unreliable and irresponsible behavior.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Morris Hills Regional School District is not the "district of residence" within the meaning of *N.J.S.A.* 18A:7B-12.

N.J.S.A. 18A:7B-12 prescribes the method for determining "district of residence" for school funding purposes of certain children who are not residing with their parent or guardian. Subsection (a) provides that the district of residence for children in foster homes "shall be the district in which the foster parents reside." Subsection (b), applicable here, specifies that the district of residence for children who have been placed by a state agency in group homes, private schools or out-of-state facilities "shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." Subsection (c) adds that the district of residence for children whose parent or guardian temporarily moves from one school district to another as a result of

[2] In his testimony, Johnson ventured that K.G. is Karen Gagne, a school social worker at the Department. Gagne was never called to testify regarding these alterations of the DYFS records.

becoming homeless "shall be the district in which the parent or guardian last resided prior to becoming homeless." Lastly, subsection (d) creates a catch-all category where the district of residence cannot be determined according to the foregoing criteria, in which case "the State shall assume fiscal responsibility for the tuition of the child."

Regulations adopted by the Department clarify the method of determining district of residence. In particular, *N.J.A.C.* 6:20-5.3(b) directs the Commissioner to determine residency "based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education." The Deputy argues that the Commissioner must accept the address given in the DYFS records unless Morris Hills can prove that it is arbitrary, capricious and unreasonable to do so. As support for this proposition, the Deputy cites *State Operated Sch. Dist. of Newark v. State Dep't of Educ.,* EDU 1370-98, Initial Decision (Jan 29, 1999), *adopted,* Comm'r (March 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html. Commenting that petitioner had produced no documentary or testimonial evidence in support of its claim, the Commissioner considered it reasonable under those circumstances for the Department to rely on the address contained in the DYFS records. Morris Hills, however, objects that an arbitrary, capricious and unreasonable standard is overly rigid and would bestow a presumption of absolute validity on any information obtained from DYFS.

Certainly it is appropriate for the Department to confer an initial presumption of validity on information set forth in the official records of other New Jersey agencies. It does not follow, however, that such information is binding on the Department, even when, as in our case, that other state agency acted totally in good faith. Where a school district is able to demonstrate that such information is derived from unreliable sources, a mechanism must be created for correction of false data. Generally in administrative proceedings, findings of fact cannot be based on hearsay alone. Some legally competent evidence must exist to support each ultimate finding of fact. *N.J.A.C.* 1:1-15.5(b). *Weston v. State*, 60 *N.J.* 36 (1972). Any presumption in favor of the regularity of official state records is rebuttable and can be overcome by the production

of countervailing evidence. *Div. of Motor Vehicles v. Granziel*, 236 *N.J. Super.* 191, 205 (App. Div. 1989).

Unlike the *Newark* case, Morris Hills introduced strong evidence sufficient to destroy the probative force of any presumption. From the proofs presented at the hearing, Morris Hills has carried its burden of showing that D.O. did not reside in Wharton at the relevant time.

Order

It is **ORDERED** that the Morris Hills Regional School District is not financially liable for the education cost relating to the placement of K.O. at Greenpeace for the 1997-1998 academic year.

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

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

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

Dec. 22, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1-5-01
DATE

Deborah A. Gramiccioni
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Darlene Thrower, aunt of K.O.
2. David Johnston, resource development specialist, Division of Youth and Family Services
3. Manuel E. Deus, business administrator/board secretary, Morris Hills Regional School District

List of Exhibits

No.	Description
P-1	Copy of U.S. individual income tax declaration for electronics filing, dated March 4, 1997
P-2	Copy of rent checks for the period January 21, 1996 to April 15, 1997
P-3	Copy of letter to Rocco Collucci from David S. Young, dated September 29, 1997
P-4	Copy of letter addressed To Whom it May Concern from D.O., undated
P-5	Copy of letter addressed To Whom it May Concern from Darlene Thrower, dated September 14, 1997
P-6	Copy of letter to James J. McNasby from Melvin L. Wins, dated September 8, 1997

P-7	Copy of field log of D. Duncan, dated September 17, 1997, with attachments
P-8	Copy of letter to Michael Azzara from James J. McNasby, dated September 22, 1997
P-9	Copy of letter to Dr. James J. McNasby from Mike Azzara, dated October 1, 1997
P-10	Copy of log book of J. Truesdale, with attachments
R-1	Copy of DYFS contact sheet for the period July 23, 1997 to August 12, 1997
R-2	Copy of DYFS district of residence determination, dated August 18, 1997, with attached cover letter
R-3	Copy of DYFS district of residence determination, dated August 8, 1997

OAL DKT. NO. EDU 3200-98
AGENCY DKT. NO. 491-12/97

BOARD OF EDUCATION O F MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent Department of Education's (Department) exceptions and petitioner's (Board) reply exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The Department urges that the Initial Decision should be set aside by the Commissioner because there was a reasonable basis for the Department's decision that the Board is the district responsible for K.O.'s tuition. With respect to this, the Department cites *State-operated School District of Newark, supra,* at 12 and restates its argument that the standard of review in district of residence cases is whether the Department's determination was "arbitrary and capricious, or without reasonable basis." The Department further urges that in the present case, its decision that the Board is the responsible district for K.O. had a reasonable basis and was not arbitrary and capricious, and that the Administrative Law Judge (ALJ) erred when finding to the contrary.

The Department next argues that the DYFS records in this case indicated that K.O.'s mother, D.O., resided in the District on the date of the child's placement in Kidspeace, which it avers is dispositive, given the provisions of *N.J.A.C.* 6:20–5.3(b) which DYFS followed when it submitted, on August 18, 1997, the Department's "District of Residence Determination for a Child Placed in a Group Home, Private School, or an Out-of State Facility" form and listed D.O.'s present address as 107 E. Central Avenue in Wharton, one of the Board's constituent districts. (Department's Exceptions at 3, citing R-2 in evidence) The Department further argues that there was additional evidence which supports its decision because it demonstrates that D.O. lived with her sister at or around the time of her son's placement in Kidspeace; *e.g.*, D.O.'s receipt of phone calls and mail at her sister's home, storage of personal property there and physical presence at the address when she was contacted by phone by the DYFS social worker on August 4, 1997 and when interviewed by the District's attendance officer on September 14, 1997. (*Id.* at 4)

Furthermore, the Department asserts that the ALJ's conclusion that D.O. did not live with her sister was based principally on the testimony of that sister, Darlene Thrower. As to this, the Department initially avers that it is unclear that the ALJ needed to even reach to Thrower's testimony, given that DYFS had complied with *N.J.A.C.* 6:20–5.3(b). (*Ibid.*) The Department further avers the ALJ's analysis of Thrower's credibility is questionable, in particular the ALJ's conclusion that, "[n]o apparent motive exists for Thrower to be untruthful. She receives no known gain if Morris Hills wins this appeal and suffers no known loss if Morris Hills loses." (Initial Decision at 6) The Department argues that Thrower can hardly be characterized as an impartial witness in this case, given her testimony at the hearing that she was employed by the District. (Department's Exceptions at 5)

Initially, the Board avers that the mere existence of documents, as envisioned by *N.J.A.C.* 6:20-5.3(b), does not create an irrebuttable presumption that those documents are, in fact, correct and without question and it urges that, if this were true, there would be no need for an appeal mechanism. As to the actual documents in the instant matter, the Board argues that the Department "ignores the unequivocal fact that there were two different documents in K.O.'s file (Exhibits R-2 and R-3) which reflect differing addresses for D.O." (Board's Reply Exceptions at 2) Moreover, the Board maintains that the evidence in the matter established that the information contained in R-2 was apparently derived through several layers of hearsay before reaching the printed page and David Johnson, the DYFS worker, testified that while document R-3 was a DYFS record, he did not know where it came from; nor did he know the circumstances under which R-3 had been created or changed. (*Ibid.*) The Board further argues that:

> The mere existence of documents is not enough. Their contents must be verified, or disputed. The Board has clearly disputed, and disproven, the contents of the DYFS records.
>
> In establishing the residence of D.O., the Board presented the most concrete evidence that could be offered: the testimony of Darlene Thrower, the sister with whom D.O. allegedly lived. No one was in a better position to testify as to the residents of her home than Ms. Thrower. Ms. Thrower's testimony was straightforward and sincere.***
>
> On pages four and five of the State's Exceptions, the State characterized [the ALJ]'s analysis of Ms. Thrower's credibility as "questionable." In support of that assertion, the State proclaims that "Thrower testified at the hearing that she was employed by the District." This representation is incorrect. During the hearing, Ms. Thrower testified that she started working with the Wharton Board of Education in October 1998. The Wharton Board of Education serves the elementary school students of Wharton. The Township of Wharton is a constituent district of the Morris Hills Regional School District Board of Education, which serves high school students. The Wharton Board of Education is not the same

> as the Petitioner Board. [The ALJ] correctly determined that Ms. Thrower had no reason to be untruthful. (Board's Reply Exceptions at 2-3)

Upon review of the record in this matter, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ that Morris Hills Regional School District was not, within the meaning of *N.J.S.A.* 18A:7B-12, the district of residence for K.O. for the 1997-98 school year. A review of the record convinces that Commissioner that the ALJ is correct in concluding that:

> [I]t is appropriate for the Department to confer an initial presumption of validity on information set forth in the official records of other New Jersey agencies. It does not follow, however, that such information is binding on the Department, even when, as in our case, that other state agency acted totally in good faith. Where a school district is able to demonstrate that such information is derived from unreliable sources, a mechanism must be created for correction of false data. ***Any presumption in favor of the regularity of official state records is rebuttable and can be overcome by the production of countervailing evidence.***
>
> Unlike the [*State-operated School District of Newark*] case, Morris Hills introduced strong evidence sufficient to destroy the probative force of any presumption. From the proofs presented at the hearing, Morris Hills has carried its burden of showing that D.O. did not reside in Wharton at the relevant time. (Initial Decision at 8-9).

See also Board of Education of Lower Camden County Regional School District No.1 v. State of New Jersey, Department of Education, Division of School Finance, decided by the Commissioner, August 13, 1999, wherein the ALJ concludes, at page 15 of the Initial Decision, that while the information provided to the Department by other state agencies pursuant to *N.J.A.C.* 6:2-5.3(b) carries a presumption of correctness, that presumption is rebuttable. This means that the party challenging the presumption must produce enough evidence to support a

finding of its nonexistence; *i.e.*, once evidence tending to rebut the presumption is introduced, the presumption of correctness loses its force.

The ALJ in the instant matter has correctly concluded that the Morris Hills Regional Board has borne its burden of rebuttal by showing the lack of accuracy/sufficiency of the information provided by DYFS upon which the Department relied to make its district of residence determination, specifically that the DYFS records in this case have been proven to be inaccurate and not supported by competent evidence. Moreover, the Commissioner finds meritless the Department's exceptions impugning the ALJ's credibility determination with respect to Ms. Thrower.

Accordingly, for the reasons set forth in the Initial Decision, it is found and determined that the Board of Education of the Morris Hills Regional School District has born its burden of proof in this matter. Therefore, it is ordered that the Morris Hills Regional Board is not financially responsible for the education costs relating to the placement of K.O. for the 1997-98 school year.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/8/01

Date of Mailing: 2/8/01

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

48-00

PATRICIA DESMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning vice principal alleged the Board improperly dismissed her.

The ALJ found that when petitioner applied for positions of vice principal in respondent's District, and throughout her employment there, she did not possess a valid principal certificate and her submission of an application and resume stating that she held a "Supervisor/Principal" certificate constituted a knowing, material misrepresentation of fact to the Board. Citing *N.J.S.A.* 18A:26-2 and *N.J.S.A.* 18A:27-2, the ALJ determined that petitioner's employment contract was void *ab initio* and, accordingly, tenure rights never attached. The ALJ found nothing in the record to support petitioner's contention that she was dismissed in retaliation for her cooperation with a Monmouth County Prosecutor's Office investigation or that the Board had a policy, created by past practice, of permitting various employees to obtain certifications while holding jobs that required those particular certifications. The petition was dismissed.

The Commissioner affirmed the Initial Decision for the reasons expressed therein and ordered that any employment relationship between petitioner and the Board be dissolved effective April 27, 1998, the date upon which the Board received notification from the County Office that petitioner had been assigned to the position of vice principal without the appropriate principal certification.

February 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10959-98

AGENCY DKT. NO. 514-11/98

PATRICIA DESMOND,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,

Respondent.

Edward Testino, Esq., for petitioner

Kathleen Smallwood Johnson, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: November 4, 1999 Decided: December 17, 1999

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transferred to the Commissioner of Education by the Superior Court, Chancery Division, Monmouth County, *N.J.S.A.* 18A:6-9, by order dated September 28, 1998, in which Counts 5 and 6 of a verified complaint were severed because deemed to arise under the school laws.

The matter being joined, the Commissioner transmitted it to the Office of Administrative Law for disposition. *N.J.S.A.* 52:14F-1 through -13.

The petitioner alleges she was terminated in retaliation for her cooperation with the Monmouth County Prosecutor's Office and the Grand Jury. She also alleges that no one in the District's administration mentioned her receipt, or not, of principal certification until she cooperated with the Monmouth County Prosecutor. Further, the District has a policy, created by past practice, of "allowing various employees to obtain their certification." Amended complaint, ¶12.

The petitioner demands reinstatement with back pay and all emoluments, and various damages.

The Board generally denies the allegations, says the petitioner no longer has either a contract or tenure by operation of law, asserts a qualified immunity because it took certain actions at the direction of the Monmouth County Superintendent of Schools, and says the petitioner has not stated a cause of action.

PAROL AND DOCUMENTARY EVIDENCE

Hearing commenced on June 3, 1999. The petitioner suffered a sudden illness and was excused. Counsel were able to put certain stipulations into the record:

1. On June 28, 1993, Patricia Desmond made application for the position of vice principal, as indicated in documents R-1, R-2, R-3 and P-17.

2. The resume is submitted for Patricia Desmond, as appended to her application letter, which is document R-2.

3. On July 19, 1993, Patricia Desmond was interviewed for the vice principal position. Present at the interview were Ms. Desmond, Dr. Mundy, Superintendent of Schools; Judy Smith, District Supervisor; Mr. Roettinger, Vice Principal; Mr. Enoch Peters, Principal; Dr. Antonio Lewis, Principal; and Dr. Robert Mann, Assistant Superintendent.

4. On July 23, 1993, there is a letter from Dr. Mundy confirming acceptance for the position of vice principal of

the Middle School. It is signed by Patricia Desmond and dated July 24, 1993.

5. The starting salary and the appointment to the position are stipulated in items R-6 and R-7.

6. At no time prior to her application for the position or to the present, has Ms. Desmond had her principal certification.

7. Ms. Desmond did present to the District her certificates and also presented to the County Superintendent her certificates, which included supervisor of instruction, reading specialist, teacher of reading and teacher of English, as noted in document P-18.

8. Patricia Desmond served as vice principal for the Middle School from August, 1993 through July, 1994, as in documents R-8 and R-9 and has received numerous performance appraisals.

9. Patricia Desmond served as vice principal for the High School from on or about July, 1994 to the current present time, as indicated in documents P-24, which includes eight appraisals in this position.

10. Patricia Desmond's salary history with the District includes the following:
From 1993 to 1994, $62,726.00
From 1994 to 1995, $70,677.00
From 1995 to 1996, $72,222.00
From 1996 to 1997, $75,097.00
From 1997 to 1998, $77,977.00

Testimony began on the second day of hearing, July 14, 1999.

Patricia A. Desmond

The petitioner testified that she became aware of administrative positions in Asbury Park in or about June 1993. She responded to advertisements for a vice principal at the middle school and a vice principal at the high school. She sent her resume for each.

Desmond identified two job postings (R-1, R-3). She sent a cover letter and the resume she was then using for each position. The cover letter is exhibit R-2.

The witness interviewed for both positions. She appeared before an interview committee in July 1993. The posting for the high school vice principal asked for an administrator or supervisor certificate. The witness believed she had no certificate problem.

The level 1 interview committee was made up of approximately five persons. The second level interview was conducted by Dr. James Mundy, Superintendent. The interviews centered on her experience. Certificates were not reviewed. Desmond did not yet have a doctorate and did not yet have a principal certificate. During her discussions with the superintendent, Desmond stated she was still in school and still working toward a principal certificate. The superintendent did not tell her that she had to have principal certification. The superintendent did say that she had done so well in the interview he was offering her choice of the high school position or the middle school position. She chose the middle school position.

Desmond had to complete the application and eventually did (R-5). She received a letter offer from the superintendent (R-4) and endorsed it on July 24, 1993. She completed exhibit R-5 after returning R-4.

The application for administrative position that Desmond filled out asked on the first page for the exact title of New Jersey certificates held. The witness wrote in the appropriate space, "K-12 Reading Teacher; Supervisor/Principal; Reading Specialist; English Teacher."

On the second page of R-5, Desmond states she has completed seventy-two credits toward her Ed.D. at Columbia University. On the last page of the application, Desmond indicated the seventy-two hours she had earned beyond her last degree and stated that she was transferring to Seton Hall University in the spring of 1994 and that she was enrolled in the Administration and Supervision curriculum. The last questions are, "If you are not fully certified, are you enrolled in an approved program?" and "Where?" The witness answered yes to the first question and Seton Hall University – spring '94 to the second question.

Desmond stated she told the superintendent what certificates she held and what her educational status was. She was hired as vice principal for curriculum and instruction at the middle school. Exhibit R-6 is an excerpt from Board minutes approving the appointment and Exhibit R-7 is correspondence from the superintendent to Desmond informing her that the appointment had been made.

Desmond stated she saw a copy of the job description for the first time on or about August 7, 1993 (P-25). The witness stated she performed other duties as well, including Middle States Accreditation service, college interviews and mid-year assessment tests. Approximately half of her duties were curriculum and instruction related and half involved supervising teachers. She was evaluated by Antonio Lewis (R-8, R-9). She spent one year at the middle school and there was no mention of certificates made to her. She filed the certificates she held with the County Superintendent.

Exhibits 18a, b, c and d are Desmond's certificates: Teacher of English, Teacher of Reading, Reading Specialist and Supervisor. Desmond stated she never held a principal certificate. At the time of hearing, she was still working toward her doctorate and stated she still had to earn eighteen credits.

As a result of Principal Lewis's May 31, 1994 evaluation (R-9), Desmond went to see the superintendent. She stated she "clashed" with Lewis and asked for a transfer to the high school. Desmond stated that she was moved to a vacancy at the high school, there was no posting for the job and there were no further certificate discussions. Desmond met with Superintendent Mundy and Principal Murphy during the summer. They discussed job requirements. There were two vice principals at the high school, one for curriculum and instruction and one who dealt with discipline and attendance. The witness filled the curriculum and instruction position. Approximately half her time was involved in teacher supervision. She also performed other tasks, including arrangement and scheduling of assembly programs.

Desmond provided references and reference letters. Reference checks were done by the District. Exhibits R-1 through R-5 were in Desmond's file and she stated she "eventually" saw them. Desmond assumes that former superiors knew her certifications. She was never

disciplined and her evaluations generally were good. Desmond stated her present problems began on October 27, 1997.

Desmond introduced testimony and documents surrounding her requests to attend classes at Seton Hall University. She also stated she received a letter dated May 10, 1996 from the superintendent (P-16) advising that the Board would be discussing her tenure appointment on Monday, May 13 and that she had the right to be present, she had the right to have the matter discussed in public and she had the opportunity to address the Board. Desmond stated she discussed the letter, but could not recall with whom. The certificates had not changed. Shortly after May 13, Mundy advised her that the Board voted to give her tenure. Desmond stated she sent her graduate transcripts to the County Superintendent, but could not recall when. Prior to 1997, no administrator had discussed with her certifications, the State report of certifications or the need to get certifications. An assistant superintendent for curriculum and instruction and the assistant superintendent's secretary would be in charge of certification matters. Robert Mann, then assistant superintendent with those responsibilities, said nothing to the witness prior to November 1997. No administrator ever told Desmond to complete her certification work before November 1997.

Desmond stated she was aware of persons in the District who did not hold appropriate certificates: the athletic director, the Department supervisor for special education and "a couple of other people." Desmond testified that arrangements were made for them. They were allowed to go back to school and complete the work they needed. An administrative assistant, Milton Parker, functioned as a vice principal in an elementary school but did not hold a certification as a principal. The District creating acting supervisor positions, including one for special education.

In November 1997, the District came under the close scrutiny of the State Department of Education. According to Desmond, she was assigned to work with a city public relations person to develop a performing arts curriculum. The public relations person, Charles Rouse, Jr., took her work and passed it off as his own. He received $8,000 for the work. Desmond stated she reported this to authorities. Then, the assistant superintendent stated that she could not hold her position because she did not have a principal certificate. This, Desmond says, is clear retaliation.

Desmond identified a memorandum she wrote to the superintendent on November 26, 1997. The subject was "artists in residence" program/nonresponse of Mr. Chico Rouse (P-28). Exhibit 29 is a follow-up memorandum she wrote on the same subject to the Board and administration. Exhibit P-30 is an affidavit of a Monmouth County Assistant Prosecutor concerning January 1998 complaints issued for the arrest of Charles A. Rouse, Jr. (Chico Rouse). The affidavit also states that Rouse was arrested as a result of an ongoing investigation, that the Grand Jury heard testimony on November 24, 1997 and January 5, 12 and 26, 1998 concerning Rouse, that detectives from the Prosecutor's Office interviewed Desmond concerning Rouse on December 23, 1997, that Desmond was subpoenaed to the Grand Jury to give testimony, that Superintendent Mann was also summoned, that on January 26, Mann and Desmond both appeared and that the investigation and presentation could be not be completed before the Grand Jury finished its term. The affidavit also states that the subject matter is being presented to a different Grand Jury. The affidavit was sworn and subscribed on April 30, 1998.

Desmond testified that her memorandums were leaked to the *Asbury Park Press*. At or about the same time she testified before the Grand Jury, Mann called her and stated that there was a problem and that she was not properly certified to hold a vice principal position. Sometime after April 24, 1998, Desmond received a copy of a letter from County Superintendent Maddaluna to the superintendent (R-10). The gist of the letter was that the County Superintendent had become aware that Desmond was assigned to a vice principal position but did not hold an appropriate certificate. He cited *N.J.S.A.* 18A:26-2 and directed the Board, within twenty days, to cease employing Desmond or to assign her appropriately. Maddaluna emphasized that no person may be employed and/or assigned to any position for which he/she is not appropriately licensed. Verification of the certificate should precede the hiring and/or the assignment. Desmond stated that an employment action was then begun against her.

Desmond completed her course work and applied for a principal certificate in June 1999 (P-31). Desmond believes this was her second application. Desmond stated she believes she has completed requirements for the principal certificate other than taking a test. Exhibit P-32 is a memorandum from Superintendent Mann to Desmond dated July 7, 1999 concerning a letter of expedition. The memorandum covers five points:

1. Have you completed all the required coursework for the Principal's Certification?

2. Have you submitted the transcripts from the appropriate universities indicating your coursework, particularly the courses required for the Principal's Certification?

3. Have you taken the Administrator's Exam for the Principal's Certification?

4. Have you provided to the county all required documentation for a proper evaluation of your credentials for the Principal's Certification?

5. Please be advised that in my discussion with Dr. Gagliardi, he has no recollection of encouraging you to request a letter of expedition from my office to Mr. Maddaluna.

Nonetheless, please find enclosed my letter of request to Mr. Maddaluna.

Desmond also introduced several evaluations of her work. The first evaluations showed her performance to be above average, the more recent tend to be negative. Since this litigation began, Desmond has been given no work; all responsibilities have been transferred to others.

Desmond submitted a preliminary report dated December 1998 in which members of the Commissioner's staff reported on the Status of the Asbury Park School District Special Assistance Project. Desmond states that this document shows the failure of the organization to guarantee accountability. The District knew what her certificates were, but kept her in position.

In May 1998, Desmond applied for the position of Science Department Supervisor. Her job application form (R-12a) has a resume attached to it which, at page 4, lists certifications held as supervisor of instruction, K-12; reading specialist, K-12; teacher of reading, K-12 and teacher of English K-12. It also states "eligible for certification as: school administrator, principal, K12." The witness testified she had not completed all necessary course work required for these certificates and in the spring 1998 term was not taking courses. This application was sent to the County Superintendent. In March 1998, the witness made requests for college transcripts. In April 1998 she made application and submitted the appropriate fee and transcripts, for the

principal and school administrator certificates. In July 1998 she made an additional college transcript request (R-22). Desmond's resume (R-12) submitted on May 6, 1998 does state that she was eligible for those certificates.

Desmond testified that the interview committee never mentioned certificates to her. She stated she "might have said" she would have all work done and certificates issued by a certain time. When she spoke with Superintendent Mundy, and was given the choice of the high school or the middle school, she probably said she would complete her coursework soon. On her application of July 30, 1993 (R-5), she stated she had completed seventy-two credits at Teachers College, Columbia. She did not.

Desmond stated she had no personal knowledge of New Jersey emergency certificates. Mr. Katz received an emergency certificate in special education and Mr. Hill received an emergency certificate in special education. Another employee, Greenwood, had held supervisor and principal certification since 1986. Desmond stated that Greenwood was working outside of certifications in the period 1993-1995, that Katz so worked from 1996 to the present and that another employee, Kessler, she believes was given ten years to complete his degree. Desmond has not seen certificates for Hill, Parker, Kessler, Katz or others.

In April 1998, Desmond requested that her personnel matter be discussed at a public session of the Board. The first session following her request was a work session, and the Board could not appropriately act. The next day, Desmond says, a restraining order issued. To this day, Desmond does not hold a principal certificate.

When Desmond applied, she did place "supervisor/principal" on her resume because she was completing her coursework and expected to receive the certificates shortly. She had no intent to deceive the District. No one ever told her the certificates she held were insufficient to meet job requirements. Desmond conceded that she listed seventy-two credits at Teachers College, Columbia, but that the total included credits earned while she took a master's degree at Seton Hall University. Desmond also stated that no one asked her to apply for emergency certification. She could recall no discussion of certification requirements in New Jersey for principal. When she put that information on her application and resume, she was enrolled in a

doctoral program and this meant to her that she was working towards certification. Desmond was sure that, at the time, she knew the requirements for the principal certificate. At this point the judge put counsel on notice that he might take official notice of certain facts in the certification area.

Antonio N. Lewis

Lewis testified about his middle school principalship experience. He was involved in interviews for the middle school vice principal vacancy. He did not help create the posting, but knew the specifics at the time. He identified the postings (R-1, R-3). The candidates sat with a committee composed of the witness, Frank Roettinger, Robert Mann, James Mundy, and three other persons, one of whom was Enoch Peters.

The witness reviewed Desmond's resume. He saw no certifications, only information about certifications on Desmond's resume. During the interview he asked if she had certificates with her and she replied that she did not.

The witness saw Desmond's letter of June 28, 1993 to the superintendent applying for the vice principal positions. The last page of her attachment to the letter states that she holds a "supervisor of instruction/principal, K-12" certificate. This is a misrepresentation.

Lewis disagreed with Desmond's selection. The superintendent took the matter out of his hands. The witness repeated that the resume, not the application, was before committee members. There was nothing in the certificate section that caught his eye. Superintendent Mundy did not discuss Desmond's certifications with the witness.

Lewis stated that after Desmond was hired, she had a principal certificate on the wall of her office with the name whited out. She told Lewis it was whited out because it originally bore her married name. Lewis evaluated Desmond at least twice. He recommended to the superintendent, in writing, that Desmond not be continued in position. The witness identified evaluations of December 6, 1993 and May 31, 1994 made by him (R-8, R-9). The witness also testified about certain problems having to do with textbooks and mid-year examinations. Among

other things, textbook orders for which Desmond was responsible were late and Lewis had to complete them. Lewis also stated that Desmond was always absent when a special project or test was to be submitted or performed.

Frank Roettinger

Frank Roettinger was vice principal for discipline and attendance at the Asbury Park Middle School beginning in 1971. He was involved in Desmond's selection. Before interviews were conducted, he went to the Board office to get copies of Desmond's documents. He had documents for all other interviewees, but could not locate Desmond's.

Roettinger recalled that Desmond made a good appearance at the interview. He did not ask questions about her certifications and cannot recall if others did. He recalled no one raising the question of what "supervisor/principal" meant. He recalls that the superintendent made the decision. Desmond was not the witness' first choice.

Roettinger recalled when the high school vice principal vacancy in curriculum and instruction opened. He recalled receiving a "bundle" from the central office although he had requested only Desmond's resume. Roettinger believes he worked with Desmond in the 1993-94 and 1994-95 school years. Desmond would occasionally come to him and complain about Antonio Lewis. Lewis was, indeed, occasionally demanding. Lewis does not discuss problems with other persons.

Judy Smith

Judy Smith, District Supervisor of Instruction, testified. She has been in position since December 1984. She was involved in the selection of the middle school and high school vice principal. Committees would review applications and, after consultation, some applicants were selected for interview. The positions were both posted and advertised. She believes having only one round of applications creates too small a pool. Smith recalls reviewing all submissions but probably only resumes after the applications. Smith identified the postings (R-1, R-3).

Concerning Desmond's resume (R-2), the witness did not at that time look at her certifications or other credentials. The witness could not explain why one posting required certification as an administrator or supervisor.

Smith discussed some of Desmond's resume with Desmond and members of the Committee. She could recall no discussion of Desmond's advanced schooling. Last year, in approximately of April of 1998, she first heard of the County Superintendent's assertion that Desmond did not hold the necessary certificate. She then looked at Desmond's application for the first time. Her recollection is that during the 1993 interviews, she had Desmond's resume, but not Desmond's application. The witness was unaware of who, in 1993, would have checked on credentials. Smith identified exhibit R-5, Desmond's application for administrative positions.

The witness met with High School Principal Murphy when he was considering in 1994 whether to take Desmond as high school vice principal. She recommended against the selection based on her interactions with and observations of Desmond.

In March or April 1998, Smith attended a meeting with Mann and others at the County Office concerning State requirements. The County Superintendent raised questions about certifications held by some staff members. All files of all persons whose names were raised were reviewed. There was no principal certificate in Desmond's file. Superintendent Mann then called Desmond. The assumption was that the principal certificate was missing. However, Desmond stated she did not have a principal certificate. Concerning other names the County Superintendent mentioned, Smith stated that the appropriate certificates were in the appropriate files, although sometimes a certificate would be in a maiden name. Smith knew of no "acting" supervisors or persons serving in any capacity without appropriate certification. As to Marstiner Hayes, her college made an error. As to Richard Katz, an employee named Hill and an employee named Greenwood, the witness did not know when they received their particular certificates. She assumes each held the appropriate certificate when beginning employment. Smith knows of no district practice of allowing persons to complete work to qualify for a certification. The instance involving Mr. Parker was covered by an administrative internship. He was not then and was never designated an acting administrator.

The witness identified exhibit P-33, the report on the status of the district created by two State Department of Education administrators. Smith stated that State Department of Education monitors were helping the District develop a new table of organization.

Smith did not supervise Desmond. She knows generally what Desmond's duties were and they included teacher evaluation, curriculum coordination and articulation, State and standardized testing responsibilities and staff development.

Smith was clear that in March or April of 1998 it was the County Superintendent who initiated discussion of certificates. Smith was with the superintendent when he called Desmond. He informed Desmond that he was at the County Superintendent's office, had reviewed Desmond's file and could not find a principal certificate. Smith testified that the superintendent stated, "So, you do not have your principal certificate?" He then stated, "You want us to work something out? We can't do that."

So far as Smith could recall, the County Superintendent mentioned nothing about the prior five years. Smith is certain that the District would not have interviewed Desmond if she did not have principal certification. Smith is also sure that the posting is in error. One cannot be a vice principal without a principal certificate.

Enoch N. Peters

Enoch N. Peters was principal of an elementary school for eight years. In 1993 he served on an interview committee for the middle school vice principal position. He asked questions of candidates. He reviewed resumes of the applicants selected for interview. He had seen the posting for the position. He saw Desmond's resume and had no question at the time. Peters did not participate in the interview of high school candidates. He recalls that questions were general. He had no reason to and did not question any of these certificates Desmond asserted she held. He now knows Desmond does not have a principal certificate.

Concerning Desmond's letter and resume (R-2), the witness stated he has seen them and that it is not unusual for principal and supervisor endorsements to be on the same certificate.

Michael Maddaluna, III

Michael Maddaluna, Monmouth County Superintendent of Schools, testified. The Asbury Park District is in "Level II," meaning that it is not certified at this time. The District has particular problems in the area of test scores and dropouts.

Maddaluna saw the report made by Special Assistant to the Commissioner Vito A. Gagliardi, Sr. This alerted him to certain hiring and certification problems. In or about April 1998, he became aware of the Desmond situation. He ran a check of all certificates of all staff in Asbury Park. Fifteen or sixteen names were returned to him and, for each of these, further inquiry was made. He met with the District Superintendent and staff. There was really only one problem and that problem was Desmond. For the others, name changes or incorrect social security numbers explained the discrepancies. Based upon what he learned, Maddaluna issued a letter under date of April 24, 1998 directing that, within twenty days, the District cease employing Desmond or assign her appropriately. It was the District Superintendent's responsibility to reply.

The witness required no investigation of or about Desmond. He never received a principal certificate from Desmond. He knows Desmond has a supervisor certificate. Maddaluna checked fall reports from 1993 through 1997. All showed job codes for Desmond of elementary vice principal, high school vice principal and (once) supervisor. Fall reports are submitted directly to the Department in Trenton. Information is later sent back to County Offices. The County Offices do not have the staff to check all anomalies. However, when a district is being monitored, as is Asbury Park, certificates are checked carefully. When Asbury Park was monitored, all certificates were checked. This occurred in fall or winter of 1995.

Maddaluna discussed the 1997-98 staff coding manual. The elementary assistant principal code is 232, the high school assistant principal code is 0202 and the supervisor code is 0307. He identified printouts of the reports. As to Desmond, he determined that proof of a certification was needed and he wrote the letter (R-10) referred to earlier. As to Ms. Hayes, the superintendent informed him that Hayes was acting as a supervisor. Maddaluna advised the

District Superintendent that she could not so serve and the superintendent stated that she would be moved immediately. Maddaluna also testified that the District received reports in three consecutive years showing "code error" for Desmond, but failed to contact the County Office. Maddaluna could recall no other certificate or job title reported for Desmond. Of all the persons looked at, all but two were explained by name changes or social security number errors. Only Hayes and Desmond stuck out. Maddaluna could not say how long Hayes worked outside the scope of her certification. He did not follow up on Hayes because the District Superintendent stated Hayes would be moved.

Desmond has applied for a principal certificate (R-24). This is handled in the Bureau of Licensing and Credentials in Trenton. The document shows all items still outstanding. The applicant puts together all information and submits, with a fee, to the Bureau. In this case, the examiner identified six deficiencies. The witness could find no request by Desmond for review in 1993, 1994, 1995, 1996, or 1997. There was a conversation between county staff and Desmond in 1997, but the office received no submission or request from Desmond. Until July 1998, the County Office heard nothing from Desmond.

Arlene Jannarone

Arlene Jannarone, a secretary in the District Superintendent's office for nineteen years, testified. She handles certification checks for the District. She performed these duties when Mundy was superintendent. Among her duties was the responsibility to send teaching staff members' certificates to the County Office for recording. The witness received some certificates from Desmond and sent those for recording.

The witness also prepared fall reports. She prepared the 1994 fall report. Exhibit P-41 identifies an error code. Jannarone stated that if this was brought to the District's attention, the District would follow-up. She had no recall of seeing this particular error code. She is sure that Superintendent Mundy did not mention it to her.

If the County Office or the State Department had a question concerning certification, it would usually go through her. Jannarone recalls Hayes, but not the specific problem. She recalls that Hayes' college may have failed to submit something.

Richard Katz

Richard Katz testified that he was Director of Special Education and Physical Education at the high school. The physical education department's supervisor is not the athletic director. He has been special education supervisor since 1989 and became physical education supervisor two or three years ago. He holds teacher of the handicapped and supervisor certificates. He has a certificate of eligibility for principal certification. He briefly served as acting athletic director under his supervisor certificate.

Daniel F. Murphy

Murphy served as high school principal for six or seven years. He met Desmond about five years ago. Desmond became a high school vice principal in 1994. She oversaw all curriculum matters, did teacher evaluations, prepared professional improvement plans and worked on scheduling. Desmond served with him for four years.

Before Desmond's transfer to the high school, he met with her and held discussions. While at the high school, Murphy evaluated Desmond's performance. He identified exhibit P-24 as evaluations he had performed and he could recall no problems. The evaluations in the exhibit are not complete. Some, not in this lot, are not as good as those in the exhibit.

Murphy stated he noticed a change in Desmond in or about September 1997. This was prior to her certification problems being uncovered. He personally never checked her certification record. He did not know she held no principal certificate until the matter became public.

The witness identified exhibit P-28, Desmond's November 26, 1997 memo to Superintendent Mann concerning Rouse. He then learned that Desmond was cooperating with the County Prosecutor.

Hayes acted as supervisor of science, industrial arts and fine arts. She was appointed about four months before a charter school started, probably in 1997. The witness interviewed Hayes and others. In-house candidates did not present certificates.

Murphy recommended transfer of Desmond to his school. Superintendent Mundy suggested Desmond would function better at the high school.

Murphy recalls hearing the term "administrative intern." The person did not serve in his building, however. Another employee, Greenwood, was an administrative intern for a while.

After Hayes was appointed, she was not removed. About one and one-half years ago, a question arose concerning her graduate school work. This was, perhaps, in May 1998. Hayes was ordered to cease performing teacher observations and evaluations.

Dawn Benson was hired as a substitute teacher. She was interviewed for a science teacher job. The first two interviewees who were offered the position refused. Benson was brought in. She had taken her certification test, but certification had not yet issued. She functioned as a substitute until she passed her certification test and received her certificate. In the following February, this happened.

The witness also had a problem securing a Latin teacher. He did get a teacher from a neighboring school district to teach it after regular hours. That arrangement lasted for one year. Now, Asbury Park High School offers no Latin. Murphy was aware of no other certification problems.

Murphy was not on the Desmond interview committee when she came into the District. When she moved to the high school, he looked only at middle school evaluations. He did not recognize exhibit P-20, an employee data collection sheet concerning Desmond.

After Murphy learned of the certification issue, he sent a memorandum to Desmond directing that she perform no observations or evaluations and prepare no professional improvement programs until the matter was cleared up. Her other duties were unaffected. The Board reposted positions of science supervisor and guidance supervisor. Desmond applied for at least one of these. The witness could not recall Desmond stating that she had a principal certificate.

In or about September 1997, Murphy observed a change in Desmond's work. She seemed distant from him and he inquired about it. She declined to talk. Her performance was different. In the summer of 1998, Desmond was absent most of the time. In the 1998-99 school year, she had fewer duties as outlined above. According to Murphy, Desmond was less proactive, and less visible. He lost confidence that jobs would be done. Desmond was absent on many days. She worked as a vice principal, not as a supervisor, although he had taken away the observation and evaluation duties that would properly be performed only by a person holding an administrative certificate. He could not recall any Board of Education member problem involving Desmond.

Robert H. Mann

Robert H. Mann has been superintendent of the Asbury Park Public Schools for approximately two and one-half years. He was appointed October 1, 1997. Previously, he was assistant superintendent. He has been in the District since 1970 and in central administration since 1993. He was a high school principal for seventeen years.

Mann met Desmond in the summer of 1993. He was present at her hiring interview. He was assistant superintendent at the time. He reviewed the committee process. His recommendation for the vice principal opening was Desmond. The witness recalled that this was his first year as assistant superintendent and also Mundy's first year as superintendent. It was his responsibility to check for certifications and do background checks.

The witness stated that Desmond went through the interview process. She had a number of certificates. Her application said she had a principal certificate, but he neglected to check. Formerly, the superintendent did certification checks. The witness knew that Mundy had called some applicants about needed data. Mann looked at Desmond's application (R-5), saw the principal notation, believed it and did not check farther. The witness conceded that the posting (R-3) was less than clear. Mann was not present at meetings between Mundy and Desmond in 1993.

Mann stated it was general knowledge in the administration that Desmond was working on a doctorate. He reviewed her resume before the interview. She filled out an application after the interview. He does not recall reviewing that application. Mann and Mundy both were involved in checking applicants' references. He had no reason to doubt Desmond's application (R-5) dated July 30. The witness was unaware if Mundy had checked any of the particulars in the application.

In 1993, the superintendent handled all licensing questions. The superintendent was responsible to review the fall report. Mann could recall no discussions of the fall report between Mundy and him. He does recall sitting down with Mrs. Jannarone at one point. The District had been criticized as top-heavy with administrators. The District hired former Superintendent Jannarone as a consultant. The Department of Education was penalizing the District. The District had documents showing administrators were doing supervision also. He believes that Desmond was shown under a supervisor code. Some persons at elementary schools were likewise coded.

State monitoring began in the mid-1980's. The District originally was at Level III, mainly because of test scores and facilities. Test score rose, but property disputes delayed new school building. The District remained at Level III.

When the State Department of Education penalized the District for being administration-heavy, he assigned some supervisor of instruction responsibility to Desmond.

No one that he is aware of while he was employed was allowed to complete certification requirements for a certificate the position required. Hayes did not timely produce a certificate from her college. The college dean called him and stated it was the college's error, not Hayes'. The college told Hayes she was eligible for certification when she was not, but would work with her to remedy the matter quickly. Hayes worked for approximately one year without certification. When the witness learned of this, he removed certain duties so that she was functioning within the scope of certificates held. The witness now requires a certificate in his hand before he makes any recommendation to the Board.

Mann identified exhibit P-33, the report to the Commissioner of Education of December 1998. This is referred to as the Gagliardi report. The administrator intern title came into being to allow persons who wanted to be administrators to gain experience. Desmond gained tenure "without fanfare" upon award of her fourth contract. There was no certification problem known to the District at that time.

James Famularo, former member and Board president, was removed by the Superior Court. The removal was reversed by the Appellate Division. Charles Rouse, known as Chico Rouse, was involved in writing a performing arts curriculum for the high school. This led to a Prosecutor's Office investigation. This was a dispute before Desmond's memorandums. The investigation of certificates was not a result of her memorandums. The investigation of certificates was initiated by the Department and County Office.

In 1997-98, when he became superintendent, Mann assumed certificate report responsibility. He recalls that he filed the first fall reports, but did not review them.

Mann stated he saw Desmond in the lobby on the day both were scheduled to testify before the Grand Jury. He cannot say what the date was. However, it is not relevant because he did not speak to Desmond about certification until the County Superintendent brought the matter to his attention.

When Maddaluna raised the question with the witness, he called Desmond to his office and asked if she had a principal certificate. She replied that she did not and asked if Mann could

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help her. He said that he was not in a position to help and that the credibility of his office was at stake. Desmond replied that she was working on certification.

Mann made no effort to reassign Desmond. At the next Board meeting, he recommended that she be terminated. He believed the Board and administration had been lied to by Desmond, based on her resume. He did not go back and check fall reports. Mann says he did not treat Hayes differently. It was a different situation. Hayes' college had made an error, not she. The Famularo-Hayes relationship is irrelevant.

Concerning one employee, Stewart Tave, Mann stated the employee has a guidance counselor certificate, he has seen the actual certificate, and Tave was not ever placed on an acting status. When Katz was appointed, supervisor certification was not required. When the State Board of Education required supervisor certification, persons serving as supervisors were "grand-fathered." Nevertheless, the administration told Katz to get his certificate anyway and gave him "a couple of years" to complete work toward the certificate. Hill held an emergency special education certificate, got a regular certificate and then taught special education. As stated earlier, Smith was a substitute until she had her certificate in hand. Another employee, Benson, had a substitute certificate, had a master's in the field and was used as a substitute until certified. Benson then was hired as a regular teacher.

Concerning the Desmond hire, Mann stated that reference checks went well and that written references came in. There were some telephone contacts. References were never a problem with Desmond. When Desmond was working as a vice principal, the only problem he knew of was at the middle school. Desmond's transfer to the high school was approved.

Following release of the Gagliardi report, Mann prepared a corrective action plan. Since he became superintendent, he has made no hiring recommendation to the Board unless a copy of the applicant's certificate is in his hand. In addition, job postings are more clear. When the State penalized the District for being top-heavy in administration, he looked at all administrators, not only Desmond. He made a good faith estimate of the time on instruction-related activities that each spent. Mann was not aware of any attempt by Mundy to place Desmond in another title as suggested by the County Superintendent. The witness identified several documents including

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recommendations written on Desmond's behalf, memorandums, Desmond's letter of application, her certificates and various job descriptions. Mann believes that Desmond applied for the supervisor of science position. To the best of Mann's recollection, he dealt with certification issues only after meeting with Gagliardi. He did receive a request from Desmond to expedite his reply (A-36). When the Desmond question reached the Board, he reported that Desmond was in the District without appropriate certification for a number of years. This was his main concern. He recalls no other particulars. A board member may have asked if Desmond could be moved to another position.

Since April 1998, the Guidance Supervisor position opened. In addition, a new position, Supervisor of Early Childhood/Special Education opened and Hayes was appointed. This position requires a supervisor certificate. There have been other "shifts and shuffles." Gagliardi advised Mann that all such positions should be designated acting pending adoption of a reorganization.

Mann stated his recollection that Mundy apparently had resumes attached to papers he gave to Board members in connection with proposed hirers. The Board did not see full personnel folders. When Mann was assistant superintendent, Mundy called no certification problems to his attention.

Returning to the Hayes matter, the witness stated he spoke to the Dean at Monmouth University. The Dean said it had misadvised Hayes as to the courses she needed for her supervisor certificate. This was in May 1997. Hayes had her certificate or was eligible for it by the end of that summer. Concerning Desmond and the Grand Jury, Mann stated he had never been called to the Grand Jury, he had never been told he was a target of the Grand Jury investigation and there is no connection between the certification issue and the Grand Jury. The Board and he were shocked to learn that Desmond holds no principal certificate. Desmond made several requests for time to work on her doctorate, but never mentioned completing certification requirements for the principal license. Desmond gave no indication she needed to complete courses to get her principal certificate. She made no formal request for time to complete coursework for the certificate. Now, because of the Chancery Division order, the Board cannot terminate or transfer Desmond.

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Mann did not see fall reports while Mundy was superintendent. When he assumed the superintendency, Mrs. Jannarone pulled copies of fall reports from the file to show him. The last report from the State to the District was dated January 1993. If he had seen information after that date, he would have recalled it. Mann had the authority to change job-code titles. He met with the consultant and decided the proportions of time that could be allocated to other than administrative duties for each administrator. In Desmond's case, he emphasized instruction-related duties. He cannot now recall the exact allocation of time to various duties.

Mann stated that when Hayes applied for a supervisory position, she submitted her resume. He believes the resume stated that she had a supervisor certificate. He relied on that information. Upon follow up, Hayes did not have certification. Hayes told him that her college had advised her she was eligible. Mann believes that Hayes indeed timely applied for her certificate. She had not received it because the college had not processed some necessary information that had to be submitted. The witness called the high school principal and instructed him not to allow Hayes to do any duties requiring a supervisor certificate. The conversation with the Dean at the University followed. Hayes was not removed from position. Hayes had all other necessary paperwork including a criminal background check. The only question was certification and, as stated above, that was quickly rectified. There were duties that Desmond could have performed with only a supervisor certificate, but they would have been far from all that was required of the vice principal position. The witness identified exhibit 46, an excerpt from Board Minutes of July 1, 1999 recommending appointment of Marstiner Hayes to the position of Acting District Supervisor of Instruction, Special Education and Early Childhood. At the same time, a vice principal was assigned to oversee an early childhood education center. Thus, Hayes required no principal certificate.

Mann had no correspondence from any school that Desmond attended to the effect that Desmond was in any way misadvised. There was no documentation that Desmond was certified as a principal and there was no indication that she was certifiable. Mann helped complete fall reports. He has not received any back from the State since 1993. He has not seen what the County Superintendent testified from. He began as assistant superintendent in 1993 at about the same time Mundy began as superintendent. When Mundy and he arrived, they walked into "a

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number of hot issues." There were many personnel changes. The administrative staff and business administrator were new. There was a new Board of Education, which was proactive. The District was in Cycle III monitoring and had been given a Level II designation. There was litigation surrounding construction. The New Jersey Supreme Court *Abbott* decision focused attention on early childhood education. A new personnel selection procedure was put into place. Now, no recommendation for hire is made by the superintendent to the Board until the superintendent has in hand all certificates the applicant claims to hold. The District's table of organization still is not approved by the State. Nearly all appointments are acting appointments. The District also suffers from revenue shortfall.

Bernice H. Willis

Bernice H. Willis, Dean of the School of Education at Monmouth University, testified. She knows Marstiner Hayes and recalls a controversy about Hayes' supervisor certificate. A faculty member had misadvised Hayes. The matter was rectified as soon as possible. The Dean discovered the error in October 1997. She received a note from a faculty member asking how to process Hayes' certification materials. The next day she received a note from a faculty member concerning Hayes' transfer credit. In May, the Dean had written communication with Hayes and advised what action was needed to be taken. She sent copies to Superintendent Mann and the Provost of the University. A faculty member had simply "dropped the ball." Hayes completed the last course she needed, "Education of Gifted and Talented Children," over the summer. This course, for six credits, gave Hayes all she needed for complete certification credentials.

The Dean was disturbed by the fact that Hayes had been misadvised. Hayes had done what Hayes believed she had to do. Fortunately, by independently completing a portfolio showing administrative and supervisory activities, Hayes was able to complete the requirements for certification.

Marstiner E. Hayes

Marstiner Hayes testified she has been employed by the Asbury Park Board of Education for eight years. She is now Acting District Supervisor for Special Education and Early

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Childhood Education. She has also served as Acting Supervisor of Science, Fine Arts and Industrial Arts. She began as an acting supervisor. She had applied for supervisor certification and had advised both Board and administration that she did not yet have certification. This was a true representation of the circumstances. She began in September 1997 as an acting supervisor and still believed herself to be eligible for the certificate. The witness had correspondence and other contacts with Monmouth University and learned that two courses she had taken, both upon recommendation of faculty, might not be appropriate to her goal of certification. She immediately informed her superiors of the situation and, fortunately, was able to work out a plan with the University so that she could complete her requirements and reapply for supervisory certification before the end of the summer. The Dean provided a letter to the administration supporting what Hayes reported.

Superintendent Mann did not terminate her upon learning that she had no supervisor certificate. Rather, he communicated with Monmouth University and ascertained the situation. There was no formal notice of action against Hayes' job and there was no agreement as to the period in which she was to complete requirements for the certificate. Fortunately, the matter was resolved very quickly.

This concluded presentation of Desmond's case in chief.

Judith Granick

Judith Granick is Executive Assistant to the Superintendent of the Jersey City public schools and responsible for the area of human resources. She has been in Jersey City since 1989 and in position since 1992. Effective July 1990, Desmond was Executive Director for Program, Planning and Design. This appointment was made a few months after the State assumed administration of the District. Program, Planning and Design is a new department. Executive Director is a new title. The executive director is responsible for the supervision and implementation of programs. The certification required was principal or school administrator. The witness identified exhibit R-16, a resume submitted by Desmond to Jersey City at or about that time. It states that from 1989 to present (1990) she held a school administrator/assistant superintendent curriculum and instruction certificate. It states that from 1978 to present (1990)

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she held the supervisor of instruction/principal, K-12; reading specialist, K-12; teacher of English, K-12 and teacher of reading, K-12. It also states she holds a Massachusetts teacher of English, K-12 certificate.

The witness identified exhibit R-19, a memorandum to Desmond from Robert Y. Schaefer, Executive Director of Human Resources, dated February 13, 1991. The memorandum refers to employment procedure requirements and states:

> Since you started on August 27, 1990, we have not been able to complete the employment process for you. Several attempts have been made to have the process completed with little success. The required Pension forms were late in coming but did arrive, however, the following have not been submitted and we are technically in violation.
>
> 1. fingerprints have not been submitted for the required criminal background check.
>
> 2. Jersey City Application has not been submitted. We do have the resume, but an application is required.
>
> 3. Certifications have not been received for submission to the County office for registration as required.
>
> The time has long passed to attend to these details.

The witness stated that Desmond left Jersey City effective June 30, 1991. She knew Desmond while Desmond was employed in Jersey City, but did not interview her or do any follow up concerning certifications. So far as the witness knows, Desmond resigned.

Exhibit R-17 is the posting for the program planning and design position. The second qualification listed is New Jersey supervisor and/or school administrative certification. Despite this, the witness stated the job title required a principal or school administrator certificate. A small committee interviewed Desmond. The interview committee had the posting (R-17). Desmond was hired (R-23, Item 12) and reported directly to Assistant Superintendent Foster.

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The Board presented evaluation material concerning Desmond prepared by her superordinate in the Jersey City position (R-23, Item 20).

Vito A. Gagliardi, Sr.

Following the New Jersey Supreme Court *Abbott* decision in May 1997, the Commissioner of Education asked Vito A. Gagliardi, Sr., to come out of retirement and to oversee twenty-three urban districts as to spending and other concerns. This assignment, which Gagliardi took, included inquiries and oversight in Asbury Park. Gagliardi did some initial interviews of personnel, certifications and background before approving new hires. He asked the County Superintendent to assure that all persons employed by the District were properly certified and had passed criminal background checks. The County Superintendent sent Gagliardi a printout on which more than ten names appeared with notations that indicated that there was question as to their certification status. The County Superintendent stated that all appeared to be simple errors except for the case of Patricia Desmond.

Gagliardi compared Desmond's certifications with her job description. The County Superintendent issued the twenty-day letter (R-10) mentioned above. Desmond was acting as an assistant principal and needed principal certification. Desmond did not supply it. In most cases, when a twenty-day letter is issued, the person appears with a certificate or an explanation. If not, the person is disqualified from holding the subject position.

In his December 23, 1998 report to the Commissioner and to the Asbury Park Board of Education (P-33), Gagliardi found fault with the manner in which positions were posted and with job descriptions particularly as they related to certifications. The District has improved since December 1998.

Gagliardi never advised Desmond as to "expedited transcript review" or any other aspect of certification. Approximately one week before his testimony, Gagliardi saw the checklist returned by the Office of Licensing and Credentials to Desmond indicating six major areas in which she had failed to supply appropriate or sufficient information. In Gagliardi's opinion, Desmond is qualified in none of these six areas (R-24). As of the date of his testimony,

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Gagliardi expressed the opinion that Desmond is not certifiable as a principal. From the issuance of the twenty-day letter until this hearing, the time elapsed is unheard of. In normal cases, failure to produce proper certification is sufficient cause for dismissal.

Gagliardi was sent to Asbury Park in 1988-99 because of internal problems. Regardless of who made errors or mistakes, job postings must be clear as to certificates required. If a person applies, but lacks the appropriate certificate, two errors are involved. The first is misrepresentation by the applicant and the second is error by the administrator who tells the Board that the person is qualified for the vacancy.

In the Hayes case, the computer printout shows that Hayes was certified in July 1998. She still holds an acting title because of the directive to the Asbury Park Board to hold many administrators and supervisors in acting titles.

Looking at the postings (R-3), the job description (R-21) and Desmond's resume (R-16), it is very clear that vice principal is the title. The posting certainly could have been more clear as to certificate required. The job description, however, is very clear. And Desmond's resume says she holds a "supervisor of instruction/principal" certificate. The witness also stated there are no emergency certificates for administrators and working without the proper certificate is inappropriate.

James H. Mundy

James H. Mundy was Asbury Park Superintendent for the school years 1992-93 through 1996-97. He served as Somerset County Superintendent of Schools and is now employed in Virginia. He recalls that Desmond was hired during his first summer as superintendent in Asbury Park. He was interviewing her with an eye toward the high school vice principalship. Assistant Superintendent Mann convinced Mundy that there was greater need for a vice principal at the middle school.

Mundy was on the interview team. He could recall no discussion of certificates. He identified exhibit R-2, Desmond's resume attached to her application. Desmond applied for the

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high school VP position. On a page of her resume she states she has a "supervisor of instruction/principal" certificate. Mundy and others check references. He has no recall of any discussions with Desmond concerning certification. He recalls Desmond had been taking courses more or less consistently. He was not aware of what particular courses Desmond was taking at Seton Hall University.

Desmond had some difficulty in her first year with Dr. Lewis at the middle school. Following that year, he moved her to the high school. It was never his practice to allow persons to work before they were fully certified. He needed all staff to be certified.

Mr. Parker was an administrative intern when Mundy arrived in the District. He can recall no conversation with the County Superintendent concerning the administrative intern position. Mundy did not recall Desmond's name appearing as an exception on the fall reports.

Exhibit R-1, the June 17, 1993 posting for the middle school vice principalship is not, in the witness' opinion, misleading. He believed Desmond had the proper certificate. Mundy had no recall of the twenty-day letter from the County Superintendent (R-10). He never moved to create an administrative intern position for Desmond and Desmond never told him she was "a course or two" away from principal certification.

Concerning the interview process, Mundy stated that Desmond was first considered for the high school vice principalship. The posting (R-3) does require certification as an administrator or a supervisor. Anyone meeting those qualifications could apply. The witness sat in as a member of the interview committee. He cannot remember how many interviews were conducted and he cannot recall who offered the job to Desmond. Reference checks, he believes, were divided among three persons. He expressed the opinion that Desmond was the best candidate based on the interview and background.

His handwriting appears on five reference checks (P-1 through P-5). He did not discuss certificates with any of the references. This was a character reference check only. All candidates were presumed to hold correct certificates. Exhibit R-4 is a letter over his signature to Desmond offering her the position. She countersigned it. Mundy was not sure if he had seen Desmond's

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submitted resume (R-2). If he had seen it, he would assume she had principal certification. Exhibit R-5, the actual application for the position, was submitted after the fact.

Mundy stated a staff member should have checked certifications. He does not know how this was missed. He had a practice of having copies of certificates attached to applications. He did not go through Desmond's certificates (P-18) carefully. He assumed she had a principal certificate. He assumed all applicants had proper certification. Mundy also stated he had no recall of fall reports showing any problem, no recall of a conversation with Maddaluna about Desmond's certificate and no recall of a conversation with Maddaluna concerning the administrative intern position. He identified a letter of recommendation from the assistant dean for academic affairs at Hudson County College and he recognized a letter from Desmond dated August 6, 1993 thanking him for the interview and offer of position and enclosing copies of letters of reference. He could not recall whether the conversation in which he offered Desmond the position was in-person or by telephone. He could not say that he gave a choice of position, as to the high school or the middle school, to Desmond. However, he would have met with Desmond at some point.

Mundy stated that there was a shared responsibility for compiling fall reports. If a problem on a fall report had been raised by the State, it would have been brought to his attention. If he were aware of a problem, he would try to address it, either himself or through delegated responsibility. He signed fall reports to the State after briefly looking them over. He had no recall of any response from the State that a vice principal was not properly certificated.

If there was correspondence from the State concerning the 1993 fall report, it would have come to him. The witness identified exhibit P-41, a final listing of 1996-97 certificated staff from the New Jersey Department of Education. In the entry for Desmond, Patricia, the last column shows a possible license error. Mundy stated he had no recall of any licensing problem returning Desmond brought to his attention. He cannot at this time recall who was responsible for report compilation and review of the report upon return from the Department. Certificates are relatively easy to check. Because the District was being monitored, Mundy believed that "all certificates were okay." He had no recall of seeing any other final listing of certificated staff.

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Mundy did not recall Gagliardi coming into the District in 1996, but it is possible that he did. He recalls no change made in Desmond's code on any report. In 1996, Desmond was up for tenure. There was probably a Rice notice to her before a personnel matter was discussed. The witness identified exhibit P-16, a notice to Desmond dated May 10, 1996 that she would be discussed at the May 13, 1996 meeting of the Board. Mundy signed the notice.

Mundy recalled administrative penalties from the State because the District was top-heavy with administrators. He recalls the Jannarone consultancy. He believes the Board suggested that Jannarone be hired to deal with "some" new legislation and/or requirements. Assistant Superintendent Mann could not have and should not have changed any allocation of Desmond's time to supervisory duties without Mundy's consent. The witness was not familiar with Desmond's employee data collection sheet (A-20). He recalls knowing Desmond was working toward a doctoral degree. He did not know this before he offered her the position, however. Selection was based on her interview performance. He identified exhibits P-25 and P-26, the vice principal job descriptions. These were likely sent to candidates or selectees. It is probable they were given by the immediate supervisor to the successful candidate. Desmond was a vice principal so it is likely the principal, Dr. Lewis, gave the job description to her.

Mundy testified about Katz, Hill, Tave and Parker. He believes Hill was transferred from physical education to special education and Hill satisfied the requirements for special education supervision. He believes Tave had a guidance counselor certificate when Mundy arrived in the District. Parker was an administrative intern when Mundy arrived. Mundy did not review the administrative intern position, either for qualifications or possible elimination. Mundy had no recall of assigning some of Desmond's time to instruction. What the principal delegated to her would have determined her duties and, hence, how her time was allocated.

Concerning the external review team, Mundy was not sure of the timing. He was aware that Board members were going into schools. There were two construction projects going on. He recognized the January 1997 external report (P-45) and has recall of some portions. He recalls an action plan was developed to address concerns raised by the report. He had another year to go on his contract at that time and was not asked to leave. The Monmouth County

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Prosecutor's Office looked into the Asbury Park Superintendent's Office at some point. Mundy believes that inquiry has been concluded.

Mundy had no problems with Desmond. He knows who Chico Rouse is. Mundy was trying to get programs going and an artist in-residence program was discussed. He believes this was never finalized.

James Famularo was Board president when Mundy left. He is not sure Marstiner Hayes' name came up in certification discussions, but he does recall that she was transferred. He has no recall of Famularo asking that Hayes be put in an administrative position or any other position. He believes that all other transfers were made within the scope of appropriate certifications. He recalls no time off for Desmond to take courses. He did not discuss Desmond with Board members and was aware of no one working with improper certification.

DETERMINATION AND ORDER

Desmond alleges she was terminated in retaliation for cooperation with the Monmouth County Prosecutor's Office and the Grand Jury. Nothing in the record supports the allegation. The most that can be said is that the Rouse matter was coming to a head at approximately the same time. The State Department, through its County Office, raised questions about certificates held by various Asbury Park employees.

Her second allegation is that no one in the school district mentioned her receipt, or not, of principal certification until she cooperated with the prosecutor. Again, there is no support in the record for this proposition. The two matters, the matter involving Rouse and the Performing Arts curriculum and the matter involving Desmond's principal certificate coincided. Nothing has been shown to establish that they are related.

Desmond's allegation that the District has a policy, created by past practice, of allowing employees time in which to obtain certifications required by their jobs, also is unsupported.

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The three bases of Desmond's appeal are without merit. Upon examination of the entire record, I **FIND**:

1. In late June 1993, Patricia Desmond applied for positions of vice principal in the Asbury Park School District;

2. She submitted a resume stating that she held a "supervisor/principal" certificate;

3. Desmond stated at hearing that she included the word principal because she was close to eligibility for the certificate and expected soon to attain it;

4. When Desmond applied for a principal certificate in July 1999, the Office of Licensing and Credentials found she lacked graduate study in three areas, a passing score on the test "Educational Leadership: Administration and Supervision," an offer of employment in a position requiring the principal endorsement and satisfactory completion of the principal residency program under professional certification;

5. Desmond knew or should have known that placing the principal notation in her resume constituted a misrepresentation;

6. Desmond made a similar misrepresentation to the State Operated Jersey City School District in 1991;

7. Throughout her employment in Asbury Park, Desmond held a valid supervisor certificate;

8. At no time during her employment in Asbury Park did Desmond possess a valid principal certificate;

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9. No one in the Asbury Park public school administration pursued the matter of Desmond's certificate until the matter was brought to the administration's attention by the County Superintendent;

10. There is nothing in the record to establish a connection between any cooperation Desmond might have extended to the Monmouth County Prosecutor's Office and the matter of her nonpossession of a principal certificate;

11. There is nothing in the record to support Desmond's contention that the District had a policy, created by past practice, of allowing various employees to obtain certifications while holding jobs that required those particular certifications;

12. Marstiner Hayes reasonably believed she was eligible for a supervisor certificate based on what faculty at Monmouth University told her;

13. Hayes had been misadvised by persons at Monmouth University and, upon learning this (1) advised administration immediately, (2) was relieved of duties that required possession of a supervisor certificate and (3) completed her remaining requirement for the certificate in a very short time;

14. Other persons about whom certification questions were raised satisfactorily showed that only name or social security number errors existed in their respective cases.

I **CONCLUDE** that the certificates of Hayes and Desmond were the only two cases in which there was more than a clerical error. The difference, of course, is that Hayes acted in good faith. She reasonably relied on the advice of persons at her university. To the credit of the University and Hayes, as soon as the problem was detected, steps were taken to correct it. The District properly removed duties from Hayes that would require holding a supervisor certificate. Before the next academic year began, Hayes had completed all requirements for the certificate and, indeed, it issued.

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The circumstances surrounding Desmond's nonpossession of a principal certificate are different. Desmond served for nearly a year in the Jersey City State Operated School District and never produced the certificates she claimed to hold. She accomplished the same feat in Asbury Park from 1993 until 1998. Any assertion that the District knew what certificates Desmond held is only coincidentally true. Desmond submitted to the District the certificates she did, indeed, possess. These were, in turn, recorded by the County Superintendent's Office. These were certificates to serve as Teacher of English, Teacher of Reading, Reading Specialist and Supervisor. The District, however, believed that Desmond also held a valid principal certificate.

It is clear that the District failed to carry through its obligation to check the certificates Desmond held. Negligence or even nonfeasance on the District's part cannot excuse dishonesty on Desmond's part. Whatever subsidiary issues may exist, this conclusion is of the utmost importance. Resume inflation is, unfortunately, commonplace in today's society. However, at some point, inflation becomes misrepresentation and that cannot be tolerated.

As the Commissioner of Education has observed, teaching staff members are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. *Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321. The professional responsibility imposed on teaching staff members, that is, all persons required to hold certificates issued by the New Jersey State Board of Examiners, extends to every aspect of professional life. This requires candor in dealing with colleagues, subordinates and superordinates.

The posting for middle school vice principal (R-1) merely calls for "A valid State certificate." Inasmuch as the position is a position that requires the occupant to hold a principal certificate, the valid State certificate is the principal certificate. *N.J.S.A.* 18A:26-2 provides:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer,

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> direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

N.J.S.A. 18A:27-2 provides:

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

In light of the findings and conclusions, above, there is no leeway here. Desmond's contract was void *ab initio*. Thus, tenure rights never attached. The Board has wrongfully paid monies to Desmond. This tribunal has no jurisdiction over that aspect of the case. The Board of Education of the City of Asbury Park may seek its remedies in the Superior Court of New Jersey.

In summary, I **FIND** and **CONCLUDE** that none of Desmond's allegations can be supported because she made a knowing and material misrepresentation of fact to the Board in each of her two applications for employment in July 1993. The governing statutes, *N.J.S.A.* 18A:26-2 and *N.J.S.A.* 18A:27-2, are clear and unambiguous. Under the provisions of *N.J.S.A.* 18A:27-2, Desmond's employment, if it ever existed, ceased when the County Office advised the District that Desmond does not hold a principal certificate.

Accordingly, it is **ORDERED** that any employment relationship between Patricia Desmond and the Asbury Park Board of Education is dissolved effective April 27, 1998, the date upon which the Board received the County Office notification that Desmond had been assigned without the appropriate license to the position of vice principal. It is further **ORDERED** that so much of Desmond's appeal as is properly before the Commissioner of Education is hereby **DISMISSED**.

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

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

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

17 DECEMBER 1999
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12-21-99
DATE

Debbi Antanaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 22 1999
DATE

Barbara A Hermal
OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

Patricia Desmond
Antonio N. Lewis
Frank Roettinger
Judy Smith
Enoch N. Peters
Michael Maddaluna, III
Arlene Jannarone
Richard Katz
Daniel F. Murphy
Robert H. Mann
Larry E. Hill
Bernice H. Willis
Marstiner E. Hayes

For respondent:

Judith Granick
Vito A. Gagliardi, Sr.
James M. Mundy

EXHIBITS

For petitioner:

P-1 July 20, 1993 Reference Check – Loretta Polkill, Montclair

P-2 July 20, 1993 Reference Check – Dr. Jefferson, Asst. Supt., East Orange BOE

P-3 July 19, 1993 Reference Check – Ms. Sandra Reynolds Supv. Funded Programs, East Orange

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P-4 July 20, 1993 Reference Check – Diana Hartman – Jersey City

P-5 July 22, 1993 Reference Check – Dr. Vallen, Asst. Dean, Hudson County College

P-6 July 26, 1993 Letter of Recommendation from Michael Vollen, Hudson County College

P-7 July 21, 1993 Memorandum from Patricia Desmond to Mike Vollen, Asst. Dean, Academic Affairs

P-8 April 18, 1991 Letter of Recommendation from Dr. John Howard, Jr., Associate Superintendent Cluster II, Jersey City Public Schools

P-9 April 9, 1991 Letter of Recommendation from Constance L. Fraizier, Associate Superintendent, Jersey City Public Schools

P-10 April 15, 1991 Letter of Recommendation from Elena J. Scambio, State District Superintendent, Jersey City Public Schools

P-11 September 1991 – An Educational Philosophy

P-12 Employee Absence Summary

P-13 August 8, 1993 Letter to Dr. James Mundy from Patricia Desmond

P-14 March 14, 1994 Status Report from Patricia Desmond to Dr. James Mundy

P-15 January 28, 1994 Memo to Dr. Antonio Lewis and Dr. James Mundy from Patricia Desmond

P-16 May 10, 1996 Letter to Patricia Desmond to James H. Mundy

P-17 June 28, 1993 Letter to Superintendent of Schools from Patricia Desmond

P-18 Certificates: Teacher of English, Teacher of Reading, Reading Specialist and Supervisor

P-19 1997-98 Salary Information

P-20 Contractual Employee Data Collection Sheet

P-21 State of New Jersey Records of the Department of Education re: Asbury Park staff, 1992-97

P-21-1 1997-98 Certificated Staff Status Coding Manual

P-21-2 1997-98 Certified Staff

P-21-3 District's Teachers List

P-21-4 Final Listing of 1996-97 Certificated Staff, dated March 22, 1996

P-21-5 Final Listing of 1997-98 Certified Staff, dated October 12, 1997

P-21-6 Final Listing of 1992-93 Certified Staff, dated October 12, 1992

P-22 July 11, 1994 Letter from Enoch N. Peters, II, Principal at Asbury Park Middle School to Patricia Desmond

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P-23 June 5, 1996 Letter of Commendation from Daniel Murphy to Patricia Desmond

P-24 Evaluations

P-24-1 September 1, 1994 – November 30, 1994

P-24-2 December 1, 1994 - February 28, 1995

P-24-3 March 1, 1995 – April 12, 1995

P-24-4 March 1, 1996 – June 30, 1996

P-24-5 September 1, 1995 – November 30, 1995

P-24-6 September 1, 1996 – February 28, 1997

P-24-7 March 1997 – June 1997

P-24-8 July 1, 1997 – February 1, 1998

P-25 Vice Principal roles and responsibilities, Middle School

P-26 Vice Principal role and responsibilities, High School

P-27 December 8, 1997 Memo to BOE Members, Dr. Robert Mann, Mrs. Dora Mylchreest and Kim A. Fellenz, Esq., from Patricia Desmond

P-28 November 26, 1997 Memo to Dr. Robert Mann, Superintendent of Schools from Patricia Desmond

P-28a September 1, 1997 Memo to Dr. James Mundy from Charles A. Rouse, Jr.

P-28b November 17, 1997 DONET District Transmittal Form

P-30 Affidavit of Paul J. Feldman, Monmouth County Asst. Prosecutor

P-30a January 14, 1998 Complaint – State of New Jersey vs. Charles Angelo Rouse, Jr.

P-31 State of New Jersey Office of Licensing and Academic Credentials

A-32 July 7, 1999 Letter and attachment to Patricia Desmond from Dr. Robert Mann

P-33 December 1998 Preliminary Report – Status of the Asbury Park School District Special Assistance Project

P-34 May 24, 1999 Memo to Dr. Vito Gagliardi, Special Asst. to the Commissioner from Dr. Robert Mann re: Corrective Action Plan with 27 attachments

P-35 Complaint, Superior Court of New Jersey, State v. Charles Angelo Rouse, Jr., January 15, 1998

P-36 1997-98 Certificated Staff Status Coding Manual

P-37 Certified Staff, 1997-98, Asbury Park Public Schools

P-38 September 1, 1997 Letter from Rouse to Mundy

P-39 Diskette transmittal form prepared by Arlene Jannarone, November 27, 1997

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P-40 Printout of staff, undated

P-41 Final Listing of 1996-97 Certificated Staff

P-42 Final Listing of 1997-98 Certificated Staff

P-43 Final Listing of 1992-93 Certificated Staff

P-44 Summary of Revised Budget, June 1999

P-45 Level II External Review Team Report Addendum, January 1997

P-46 Superintendent Appointment Recommendations, July 1, 1999

P-48 Graduate Student Advisement Log excerpt, September 14, 1987 – August 7, 1997

P-49 August 8, 1997 Letter from Hayes to Scherer, notarized August 12, 1997

P-50 Position Announcement, District Supervisor of Instruction for Special Education

P-51 Transcript, Deposition under Oral Examination, James Famularo, June 3, 1998

For respondent:

R-1 June 17, 1993 Asbury Park Board of Education Position Announcement – Middle School Vice Principal Position

R-2 June 28, 1993 Correspondence from Pat Desmond to Asbury Park Board of Education re: Letter of Application for the position of Vice President with an enclosed resume

R-3 July 6, 1993 Asbury Park Board of Education Position Announcement – High School Vice Principal for Curriculum and Instruction

R-4 July 23, 1993 Correspondence from Dr. James Mundy to Ms. Patricia Desmond re: The position of Middle School Vice Principal

R-5 July 30, 1993 Application for Administrative position as completed by Patricia Desmond

R-6 August 10, 1993 Board Minutes approving the appointment of Ms. Patricia Desmond to the position of Vice Principal at the Middle School

R-7 August 11, 1993 Correspondence from Dr. James Mundy to Patricia Desmond re: The appointment to the Vice Principal at Asbury Park Middle School

R-8 Performance Appraisal, dated December 6, 1993, for Patricia Desmond by Antonio Lewis

R-9 Performance Appraisal, dated May 31, 1994, for Patricia Desmond by Antonio Lewis

R-10 April 24, 1998 Correspondence from Michael Madduluna, County Superintendent of Schools to Dr. Robert Mann re: Pat Desmond serving without the appropriate license for the position of Vice Principal

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OAL DKT. NO. EDU 10959-98

R-11 April 24, 1998 "Rice Notice" to Ms. Desmond and her request for public session

R-12 May 6, 1998 Patricia Desmond Resume

R-13 April 27, 1998 Department of Education, Office of the County Superintendent, Certification Department, requests for application, certified check and official college transcript

R-14 July 16, 1998 Department of Education, Office of the County Superintendent, Certification Department, request for Official college transcripts

R-15 March 25, 1999 Department of Education, Office of the County Superintendent, Certification Department, request for Official college transcripts

R-16 Resume Patricia Ann Desmond, 1324 North Avenue, Elizabeth, New Jersey

R-17 Position Announcement: Jersey City Public Schools – Executive Director

R-18 Job Description: Executive Director

R-19 Memo to Patricia Desmond from Robert Schaefer re: Employment Procedures Requirements

R-20 Jersey City Public Schools Application, August 27, 1990

R-21 April 22, 1991 Letter from Elena J. Scambio to Patricia Desmond

R-23 Personnel file of Patricia Desmond, Jersey City Public Schools, 41 items

R-24 Correspondence re: requirements for principal and school administrator Desmond had not satisfied from Office of Licensing and Credentials, July 1999

R-25 Excerpts from Board minutes, August 10, 1993; May 19, 1994; August 18, 1994; May 18, 1995 and administrative salaries for 1995-96, 1996-97, 1997-98

OAL DKT. NO. EDU 10959-98
AGENCY DKT. NO.514-11/98

PATRICIA DESMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter including the transcripts and the Initial Decision of the Office of Administrative Law have been reviewed.[1]

Upon his independent review, the Commissioner determines to affirm the well-supported conclusion of the Administrative Law Judge (ALJ) finding that petitioner made a knowing and material misrepresentation of the facts when she listed her certificates held as "Supervisor of Instruction/Principal, K-12," and "Supervisor/Principal" on her resume and employment application, respectively. (Respondent's Exhibits 2 & 5) Although the District failed to fulfill its obligation to verify petitioner's certificates, the District's negligence cannot excuse petitioner's actions.

Since petitioner has never held a principal certification, the Commissioner agrees with the ALJ that, under *N.J.S.A.* 18A:26-2 and *N.J.S.A.* 18A:27-2, petitioner's employment, if it

[1] Petitioner's exceptions, filed on January 7, 2000, were untimely and, therefore, not considered.

ever existed, ceased when the County Office advised the District that petitioner did not hold a principal certificate. The Commissioner further agrees that, because petitioner's contract was void *ab initio*, tenure rights never attached. (Initial Decision at 36)

Additionally, there is nothing in the record to support petitioner's claims of retaliation. Nor is there any evidence to support her contention that the District has a past practice of "allowing various employees to obtain their certificates." (Amended Complaint at 12)

Accordingly, the Initial Decision in this matter is adopted for the reasons expressed therein. Any employment relationship between petitioner and the Asbury Park Board of Education is dissolved effective April 27, 1998, the date upon which the Board received the notification from the County Office that petitioner had been assigned to the position of vice principal without the appropriate principal certification.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2-2-00

Date of Mailing: 2-2-00

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

49-00

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

PETITIONER,

V.

E.F. AND G.F.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

SYNOPSIS

Petitioning Board sought a declaration that respondents were not domiciled within its District during the 1997-98 school year. Petitioner subsequently filed an amended petition seeking the same determination for the 1998-99 school year.

At the OAL the ALJ granted petitioner's motion for partial summary decision as to the 1997-98 school year, finding that respondents offered nothing by way of responding affidavits or certifications demonstrating disagreement to require submission to a factfinder whether respondents were domiciled in petitioner's District for that year. The ALJ concluded that the doctrine of judicial estoppel precluded respondents from asserting that they were domiciliaries of petitioner's District in Hunterdon County when they maintained in prior litigation concerning the same school year that they were domiciled in another district in Somerset County. The ALJ denied without prejudice those portions of petitioner's motion seeking a declaration that respondents intentionally misrepresented their place of domicile to petitioner at the start of the 1997-98 school year so as to obtain a free education for their children and that respondents' defense to petitioner's 1997-98 tuition claim was frivolous, thereby permitting petitioner to pursue a claim for attorney's fees.

The Commissioner affirmed the recommended Order of the ALJ, concurring that respondents are estopped from asserting the inconsistent positions that they were domiciled in Branchburg and Flemington in the 1997-98 school year and finding that since respondents were not legally domiciled in petitioner's District during the 1997-98 school year, petitioner is entitled to recover $22,878 representing costs to educate respondents' two children during that year. The Commissioner further affirmed the ALJ's ruling on the intentional misrepresentation and frivolous defense claims and ordered the matter to continue at OAL for proceedings on the Amended Petition of Appeal, which seeks reimbursement of tuition costs for the 1998-99 school year.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING PETITIONER'S MOTION FOR

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 6247-98

AGENCY DKT. NO. 194-6/98

BOARD OF EDUCATION OF THE HUNTERDON REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

Petitioner,

v.

E.F. AND G.F.,

Respondents.

James P. Granello, Esq., for petitioner

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a regional school district board of education, filed a petition of appeal on June 11, 1998, requested a declaration that respondents were not legally domiciled within Hunterdon Central Regional School District during the 1997-1998 school year and entitling petitioner to recover from respondents tuition expenses plus legal interest and such other relief as may be

appropriate. The matter was transmitted to the Office of Administrative Law (OAL) on July 14, 1998, for hearing as a contested case.

By application dated June 10, 1998, attorney for petitioner requested entry upon the land or properties of respondents for inspection or other purposes, pursuant to *N.J.A.C.* 1:1-10.2(a)3 and sought an order to this effect. A letter order was entered on August 21, 1998, denying this request.

The matter was then scheduled for a telephone conference on August 18, 1998, and was scheduled for hearing on November 12, 1998. On August 25, 1998, attorney for petitioner requested an adjournment of the scheduled hearing because of the unavailability of witnesses, and the matter was adjourned and rescheduled to January 6 and 7, 1999.

On October 19, 1998, attorney for respondents sought a stay of this matter because the respondents had filed a voluntary petition in bankruptcy in May 1998. By letter order dated January 13, 1999, it was ordered that proceedings in this matter be stayed until such time as relief from the automatic stay provision of the Bankruptcy Act is granted or the bankruptcy case is closed, dismissed or discharged. In the meantime, an order of inactivity was entered for a period of six months commencing on January 13, 1999.

In the meantime, petitioner filed an amended petition of appeal seeking a determination that respondents were not legally domiciled within Hunterdon Central Regional School District and entitling petitioner to recover from respondents tuition expenses plus legal interest and such other relief as may be appropriate with respect to the 1998-99 school year and seeking the payment of tuition cost, interest and other relief. This amended petition of appeal was forwarded to the OAL on December 2, 1998.

An Order was entered in the United States Bankruptcy Court on April 28, 1999, granting relief from the automatic stay and petitioners were permitted to proceed against respondent through judgment only, but may not seek to collect on said judgment without further leave of the Bankruptcy Court. By letter order dated May 27, 1999, the matter was scheduled for a telephone prehearing conference on June 23, 1999. At that prehearing conference it was agreed that

respondents were to file an answer to the amended petition no later than July 7, 1999, each party was required to respond to any outstanding discovery not later than July 23, 1999, and petitioner had until July 23, 1999, to file a motion for summary judgment with regard to the 1997-98 school year. In addition, the matter was scheduled for hearing on January 3, 5, 6 and 7, 2000.

Attorney for petitioner filed the within notice of motion on July 23, 1999, and attorney for respondent responded thereto on August 4, 1999. Attorney for petitioner filed a reply letter on August 5, 1999, whereupon the record closed with respect to the motion.

DISCUSSION OF THE MOTION

1. Summary Decision Standard

The first issue before me is whether this matter may be decided by way of motion for summary decision. With respect to a motion for summary decision, *N.J.A.C.* 1:12-5(b) states:

> The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

This administrative code provision is based on New Jersey Court Rule 4:46-2, which permits a party to move for summary judgment. Summary judgment, or summary decision in the administrative context, is a device for expeditiously reviewing the merits of a case to determine if the moving party is entitled to a favorable decision without the necessity of hearing. *See, Judson v. People Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 73-75 (1954). It may be granted if the papers and discovery which have been filed, together with the affidavits, if any, clearly show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b); *Templeton v. Boro. of Glen Rock,* 11 *Super.* 1, 4 (App. Div. 1950). As the Supreme Court recently stated:

> . . .[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether there competent evidential materials

> presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [of herself] to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Brill v. Guardian Life Ins. Co. of America, 142 *N.J.* 520, 540 (1995) citing *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 249 (1986). It was indicated by the Court in *Brill* at 529 "[b]y its plain language, Rule 4:46-2 dictates that a Court should deny a summary judgment *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.' A nonmoving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." *Id.* At 529.

Where the party opposing a summary judgment motion points only to disputed issues that are "insubstantial" in nature, the proper disposition is summary judgment. *Id.* A motion judge must engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict." Whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533; *Anderson v. Liberty Lobby Inc.*, 477 *U.S.* 242 (1986).

The thrust of the *Brill* decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves. *Brill, supra.* at 541.

I will now discuss petitioner's motion for summary decision in light of the foregoing standards.

2. Discussion of the Motion

Petitioner's first argument is that in prior litigation against the Branchburg Township Board of Education commencing in 1996 and concluded in April 1998, it was maintained that respondent E.F. and his family were long term residents of Branchburg Township and were legally entitled to have the Branchburg Township Board of Education pay for the tuition for R.F. to attend Hunterdon Central Regional High School for both the 1996-97 school year as well as

the 1997-1998 school year. Petitioner asserts that under the doctrine of judicial estoppel a party is precluded from assuming a position in a legal proceeding inconsistent with one previously asserted. Petitioner argues that virtually all courts have recognized that the doctrine of judicial estoppel is fundamental in protecting the integrity of the judicial process. This doctrine precludes a party from taking inconsistent positions, and applies as well to representations made by a party's attorney in a brief. Petitioner argues that the attorney for E.F. in the prior litigation filed a post-hearing brief on January 8, 1998, wherein it was stated that E.F. and his family reside in Branchburg Township.

In response, attorney for respondent takes the position that in the previous matter, respondents were indeed domiciled in Branchburg but that before the commencement of the instant litigation they became domiciliaries in Flemington. He points out that on August 6, 1998, their bankruptcy attorney filed a letter with the Bankruptcy Court correcting respondent's address from Somerville to Flemington. In addition, he relies upon the affidavit of Michael T. Barrett, Esq., the attorney for E.F. in the Branchburg case, dated July 9, 1999, asserting that prior to the Administrative Law Judge on September 18, 1997, the respondents had advised him that they had relocated from Branchburg to Flemington. Therefore, attorney for respondent argues that the cases relied on by petitioner do not apply because the respondents' situation clearly changed. He further argues that one of the cases decided by the Third Circuit called judicial estoppel, "a draconian sanction, one that should be evoked only with reluctance." *Kline v. Stahl J.M.B.H. and Co.,* 1999 W.L. 498053 (3rd Cir. Pa.) and that it must, at a minimum, pass the two-part threshold inquiry set out by *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F. 3d. 355, 360 (3rd Cir. 1996): (1). Is the party's present position inconsistent with the position formerly asserted? (2). If so, did the party assert either or both of the inconsistent positions in bad faith – *i.e.,* with intent to play fast and loose with the court? Further, any finding of bad faith must be based on more than inconsistency in factual positions." *McNamer v. Disney Store, Inc.,* 91 *F.* 3d. 610, 617 (3rd Cir. 1996).

In *E.F. on behalf of R.F. v. Board of Education of the Township of Branchburg, Somerset County,* E.F., who is one of the respondent's herein, sought an order requiring that the Branchburg Township Board of Education pay tuition for R.F.'s attendance at Hunterdon Central Regional High School for the 1996-97 and 1997-98 school years. The record in that matter

closed on January 26, 1998. Implicit in the claim for E.F. is that he is a resident and domiciliary of Branchburg Township and sought to have the Branchburg Township Board of Education pay tuition for his child's attendance at Hunterdon Central Regional High School. The ALJ decided that E.F. had no legally cognizable right nor legitimate legal expectation of tuition reimbursement for either school year 1996-97 or 1997-98 and no right to expect tuition to be paid by Branchburg for R.F.'s attendance at Hunterdon Central Regional High School in future years. This decision was affirmed by the Commissioner of the Department of Education on April 27, 1998.

I agree with the argument of attorney for petitioner with regard to this matter. Under the doctrine of judicial estoppel a party is precluded from assuming a position in a legal proceeding inconsistent with one previously asserted. *Cummings v. Bahr*, 295 *N.J. Super.* 374-385 (App. Div. 1995). Virtually all courts have recognized that the doctrine of judicial estoppel is fundamental in protecting the integrity of the judicial process. *Levin v. Robinson, Wayne and LaSala,* 246 *N.J. Super.* 167, 179 (Law Div. 1990). This doctrine precludes a party from taking inconsistent positions, and applies as well to representations made by a party's attorney in a brief. *Id.* at page 180. The attorney for E.F. in the prior litigation filed a post-hearing brief on January 8, 1998, wherein it was stated that E.F. and his family reside in Branchburg Township.

Under these circumstances, I **FIND** that the doctrine of judicial estoppel precludes respondents herein from assuming a position in the present matter that is inconsistent with the position taken in the prior legal proceeding involving E.F. and his claim against the Branchburg Township Board of Education for the 1997-1998 school year. Because of the determination I have made with respect to the issue of domicile, I **FIND** that it is unnecessary to determine the extent of this preclusion.

Petitioner additionally argues that the motion papers together with the admissions and discovery responded to by respondents herein supports the finding that they have established a permanent residence or domicile in Branchburg Township and did not abandon that permanent residence or domicile prior to or during the 1997-1998 school year. Petitioner points to the admission by respondents that they have owned and lived with their family in a four-bedroom home in Somerville, Branchburg Township for 26 years and have indicted that since September

1997 they have rented a one-bedroom apartment which they claim has become their permanent residence or domicile for themselves and their two unemancipated teenaged children. They continue to own the Somerville residence and they continue to pay the significant expenses for maintenance, taxes and most of the utilitites as well as homeowner's insurance. In May 1998, respondents filed for voluntary bankruptcy giving the Branchburg Township address as their place of residence. They filed a changed of address with the Bankruptcy Court on August 12, 1998.

Attorney for respondents argues that respondents herein maintain that they are indeed domiciled in Flemington and there is evidence in the record to support the contention including their verified petition, the lease for the apartment, the affidavit of their attorney Mr. Barret, and utility bills. In response, petitioner argues that the lease is illegal since it does not permit occupancy by a family of four, and the utility bills and other expenses for the home exceed those for the apartment.

Pursuant to *N.J.S.A.*18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. In general, domicile is the place of a person's abode where he or she has the present intent of remaining and to which, if absent, he or she intends to return. *Mercadante v. City Paterson*, 111 *N.J.Super.*35, 39 (Ch.Div. 1970). Courts have recognized that a person may have multiple residences, but only one domicile, *State v. Benny*, 20 *N.J.* 238, 251 (1955); *In re Jaffe*, 74 *N.J.* 86, 90-91 (1977); *Lea v. Lea,* 18 *N.J.* 1, (1955). In the *Mercadante* case, the court stated that the following factors are important in determining the domicile of a person:

> . . . the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return.
> [111 *N.J. Super.* At 39-40]

In *In the Matter of Unanue*, 255 *N.J. Super.* 362, 376 (Law Div. 1991), the court stated that "a choice of domicile by a person, irrespective of his motive, will be honored by the court,

provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In general, the courts have recognized that intent is the decisive factor in establishing domicile. *Benny, supra*, 20 *N.J.* 238, *Unanue, supra,* 255 *N.J. Super.* 362; *Collins v. Yancey*, 55 *N.J. Super.* 514 (Law Div. 1959). The Commissioner has recognized that the determining factor in deciding a family domicile is a matter of intent. *Fort Lee Board of Education v. Kintos*, 92 *N.J.A.R. 2d* (EDU) 96, 103.

Students between the ages of five and under twenty living in Branchburg Township are entitled to attend the public schools in the Branchburg Township school district at the elementary level and Somerville High School at the secondary level on a tuition-free basis. Pursuant to petitioner's Policy 5118, children of nonresident employees of the petitioner may enroll their children in the school district's high school with the payment of tuition. Respondent E.F. has been employed as a teacher of mathematics by the Board of Education for the past twenty-five (25) years.

Beginning in the 1996-97 school year, respondents, as nonresidents of the Hunterdon County Central school district, enrolled their son R.F. in the ninth grade and paid the full cost of tuition for his attendance at school. During this year and for the previous 25 years, respondents resided at 219 County Line Road, Somerville (Branchburg Township) Somerset County, New Jersey.

Prior to the start of the 1996-97 school year, respondent E.F. filed a petition of appeal to the Commissioner of Education challenging the denial by the Branchburg Township Board of Education to pay the tuition for R.F. to attend Hunterdon Central High School. (P-1) *E.F. on behalf of minor child R.F. v. Board of Education of the Township of Branchburg, Somerset County,* OAL Dkt. No. EDU 6593-96, Agency Dkt. No. 234-6/96, decided April 27, 1998. Hunterdon Central Regional High School Board of Education was not a party to this litigation and apparently found out about it through a review of recent Commissioner of Education decisions. See also, respondents' letter to Commissioner of Education dated June 26, 1996 (P-11). The petition in that matter sought tuition payments for the school years 1996-1997 and 1997-1998. In that matter, respondent E.F. maintained throughout that he and his family were residents of Branchburg Township. See the post hearing letter memorandum on behalf of

petitioner E.F. dated January 8, 1998 submitted by Bergman & Barrett, Esqs., attorneys for petitioner. The record of that case was closed on January 26, 1998, the initial decision was issued on March 11, 1998, and the Commissioner of Education's decision was issued on April 27, 1998.

Respondents E.F. and G.F. filed a voluntary petition of bankruptcy on May 4, 1998, before the U.S. Bankruptcy Court, District of New Jersey, in which they declared that they resided at 219 County Line Road, Somerville, New Jersey. (P-2) *See, In re Emeral J. Foster and Glenn A. Foster*, U.S. Bankruptcy Court, District of New Jersey, Docket No. 98-35604, filed May 4, 1998. According to attorney for petitioner, the Hunterdon Central Regional High School Board of Education was not named as a creditor in the petition but subsequently discovered its existence in August 1998 made a claim shortly thereafter. On August 12, 1998, respondents notified the Bankruptcy Court to change their mailing address to the Flemington apartment. None of the other schedules in the bankruptcy petition were changed. In the schedules which were submitted to the bankruptcy court, respondents claimed a homestead exemption of $30,000 on their residence at 219 County Line Road, Somerville, New Jersey as well as on household furnishings, supplies and equipment and an exemption on personal property in the amount of $8,000 located at the same address. There was no reference to the lease agreement for the one bedroom apartment at Hunter Hills, Flemington, New Jersey on Schedule G with regard to unexpired leases.

At the beginning of the 1997-1998 school year, respondents presented to the petitioner a copy of a one year lease on a one bedroom apartment at Hunter Hills, Flemington, New Jersey and claimed that they and two of their children were domiciled at that address as of September 1, 1997. (P-3) The lease agreement is dated July 12, 1997, commencing September 1, 1997 ending on August 31, 1998 on Apartment E8 (one bedroom). The petitioner accepted this representation an allowed the respondents' two children R.F. and C.F. to attend Hunterdon Central High School tuition-free until May 15, 1998, when the petitioner determined that the respondents continued to own and or periods of time occupy the Branchburg residence and only used the Flemington apartment as a residence of convenience in order to claim entitlement to tuition-free education for their two children who were attending Hunterdon Central High School as of September 1997.

Petitioner demanded tuition reimbursement on May 5, 1998, which was refused by the respondents. See Respondents' answer dated July 1, 1998. Also, see respondents' answer number 8(b) to petitioner's initial set of interrogatories. Thereafter, on June 11, 1998, the petitioner filed a petitioner of appeal with the Commissioner of Education seeking tuition reimbursement. Respondents answered the petition denying continued domicile in Branchburg Township and claiming domicile in Flemington, New Jersey in September 1997.

The statements set forth in the following paragraphs were admitted by the respondent (P-5).

Prior to August 30, 1997, respondents and their two unemancipated teenage children R.F. and C.F. resided at 219 County Line Road, Somerville, Branchburg Township, Somerset County, New Jersey. They considered the Branchburg residence their primary residence until August 30, 1997. Respondents have been the owners of record of the Branchburg residence from 1971 to present. The Branchburg residence is a single family house with four bedrooms and two and one-half baths. (P-10). Since August 30, 1997 to present, respondents have not contracted for sale, leased, or otherwise given up their right of ownership and/or right of possession to the Branchburg residence. Since August 30, 1997 to present, respondents have been responsible for the payment of the property taxes charged to the Branchburg residence. Since August 30, 1997 to present, respondents have been responsible or the payment of all electric and gas bills charged to the Branchburg resident. Also, they have paid the telephone bills for the Branchburg residence at least during the months of March, April and May 1998. (P-6).

On January 27, 1998, respondent renewed their homeowners policy on the Branchburg residence for the period January 1998 to January 1999 for an annual premium payment of $498.60. This insurance coverage included limits of liability for dwelling of $200,000, personal property of $120.00, and loss of use of $40,000 among other coverage. (P-7). Respondents were requested in discovery to produce a true copy of any renter's insurance policy on their Flemington apartment, including contents, but failed to produce same.

Respondents admitted that they and their two unemancipated children have stayed overnight at the Branchburg residence during the 1997-1998 school year, including September 2 and 3, 1997, September 30, 1997, December 24-28, 1997, two nights over the Spring/Easter school break, and several Saturday nights since May 1998. Respondents admitted that they spent Christmas 1997 at the Branchburg residence.

Both respondents registered to vote on May 26, 1998, giving the Flemington apartment as their address. (P-8). This registration occurred after respondent E.F. was placed on notice on May 15, 1998 that the petitioner was disputing domicile. Since that time neither respondent has voted using their Flemington address. Respondents are still listed as having active voter registration status at the Branchburg residence. (P-6).

A motor vehicle registration for one of the respondents' motor vehicles was submitted in discovery having been issued in March 1998 with the Flemington address (P-6).

Electric bills for the Flemington apartment where two adults and two teenage children are allege to reside were submitted in discovery and included seven monthly bills from September 1997 to May 1998 ranging from $12.24 to $18.36 per month, and from May to July 1998, after respondent's were placed on notice of the dispute, ranging from $33.82 and $76.54

Electric bills for the Branchburg residence submitted in discovery included three bills from November 1997 to June 1998 ranging from $55.65 to $68.80. The respondents assert that one person, an older daughter, was living at the Branchburg residence at that time.

Gas heating bills for the Branchburg residence submitted in discovery included bills ranging from $113.97 to $131.96 from December 1997 to February 1998 (P-6)

The telephone bills for the Flemington apartment submitted in discovery included three bills for November and December 1997 and May 1998 ranging from $15.83 to $24.92 (P-6).

Telephone bills for the Branchburg resident submitted during discovery included bills for February and March 1997 and May 1998 ranging from $48.20 to $82.14. Telephone payments for March, 1998 was $124.36 and for April and May 1998 were $188.89 each (P-6).

Also included were payments made to Bell Atlantic in 1996 while respondents admitted they were living in Branchburg on December 1, 1996 in the amount of $70.34 and on December 29, 1996 in the amount of $71.08.

The lease agreement entered into beginning in September 1997 states that it is a one year lease ending August 31, 1998 (P-3). The lease is for a one bedroom apartment with rent at $765.00 per month. Paragraph 10 states: "If the premises demised hereunder is a one-bedroom apartment, it is agreed that no more than two people may occupy same, the Tenant and one other." Paragraph 4 of the lease also provides that the Tenant shall conform to all rules and regulations printed on the lease. Respondents maintain that they and their two unemancipated children occupy the apartment. Grounds for eviction under New Jersey law include substantial violations or breach of any of the covenants or agreements contained in lease. *N.J.S.A.* 2A:18-61.1(e). Apparently, the landlord has not objected to the manner in which the respondents occupy the apartment.

Respondents continued to use a personal checking account with a Branchburg address during the 1997-1998 school year. See Check Nos. 2285 and 2385. (P-9)

Witness Jennifer Spieker, a school vice-principal, observed respondents during the 1997-1998 school year arriving at school in the morning from the direction of Branchburg and leaving in the afternoon heading toward Branchburg, which is in the opposite direction of Flemington (P-9). Ginger McCabe, a school guidance counselor, observed the respondents' cars parked at the Branchburg residence on several days during March 1998. Another witness, Scott O'Brien, the building manager at the Hunter Hills apartment complex in Flemington, saw the respondents mostly on weekends. He did not observe them staying overnight at the apartment too often. Inside the apartment he observed only a make-shift table, beds, a couch, and some toothbrushes-bare basics. A private detective hired by the petitioner, James Marino, observed the respondents on July 18, 1998, coming out of the Flemington apartment and driving directly to the Branchburg

address, opening the garage door and going inside carrying a garbage bag. On the following day they were observed leaving Flemington and heading toward Branchburg. He never observed the F. children at any time.

As was previously indicated, a court or administrative tribunal should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.' A nonmoving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." *Brill* at 529. Where the party opposing a summary judgment motion points only to disputed issues that are "insubstantial" in nature, the proper disposition is summary judgment. *Id.* A motion judge must engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict." Whether the evidence presents a sufficient disagreement to require submission to a fact-finder or whether it is so one-sided that one party must prevail as a matter of law."

I agree with the assertions of attorney for petitioner in his reply letter of August 4, 1999 (P-13), that respondents have offered nothing by way of responding affidavits or certifications which shows that there is a genuine issue of fact which can only be determined by an evidentiary hearing. The reliance on respondents' attorney's letter of June 30, 1999, is insufficient in view of the undisputed factual assertion that none of the bankruptcy petitions schedules were amended to reflect a change in the homestead exemption or personal property exemption for respondents' residence in Branchburg Township. I agree, in addition, that the affidavit filed by attorney Michael T. Barrett, Esq., also fails to raise a genuine issue of fact. Respondents have failed to come forward with any affidavits or certifications which would dispute these discovery responses and admissions or to point out factual information upon which to base a finding that there is a genuine issue of any material fact challenged. In view of the admissions made by respondent's in discovery, in light of the situation with regard to the bankruptcy petition, in view of my finding and conclusion with respect to the issue of judicial estoppel, and in light of all of the facts and circumstances discussed hereinabove, I **FIND** that the evidence does not present a sufficient disagreement to require submission to a factfinder whether respondents herein were domiciled within Flemington, New Jersey during the 1997-1998 school year so as to claim this as their domicile. Accordingly, I **CONCLUDE** that respondents were not legally domiciled within the Hunterdon Central Regional School District during the 1997-98 school year. Therefore, I **FIND**

that petitioner is entitled to recover from respondent tuition expenses for the 1997-98 school year.

In its brief, attorney for petitioner seeks a finding that respondents intentionally misrepresented their place of domicile to the school district at the beginning of and during the 1997-98 school year in order to obtain a free public education for their children at the expense of petitioner. However, I **FIND** that it is virtually impossible for me to determine, based on the motion papers submitted, that respondents made an intentional misrepresentation in this regard. Petitioner must show that respondents knew at the time that they made these misrepresentations that they were false and misleading. Under these circumstances I **DENY** this portion of petitioner's motion without prejudice.

In addition, attorney for petitioner seeks a finding that respondents' defense to petitioner's claim was frivolous. In order to establish this it is necessary that I find that respondents could not hold a good faith belief that their defense would prevail once all the facts were brought to light before this tribunal. Likewise, I **FIND** that something more than the documents supplied in support of the motion is necessary in order to determine that respondent's position in this matter is frivolous. Accordingly I **DENY** petitioner's request with respect to this issue without prejudice.

Since petitioner's motion dealt with the 1997-98 school year, and since petitioner herein filed an amended petition of appeal with respect to the 1998-99 school year, this decision does not resolve all issues in controversy in this matter. Accordingly, I have entered an Order granting partial summary decision with respect to the 1997-98 school year only rather than an initial decision which would have the effect of deciding all issues in controversy.

DECISION AND ORDER

Based upon the foregoing discussion it is hereby **DETERMINED** that respondents were not legally domiciled within Hunterdon Central Regional School District during the 1997-98 school year, and it is hereby **ORDERED** that petitioner's motion for summary decision with respect to this issue is hereby **GRANTED**. It is further **ORDERED** that petitioner is entitled to

recover from respondents tuition expenses and such other relief as may be appropriate with respect to the 1997-98 school year. It is further **ORDERED** that all other relief requested by petitioner in its motion is hereby **DENIED** without prejudice.

This order granting partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **Commissioner of the Department of Education** who by law is authorized to make the final decision in this matter. If **Commissioner of Education** does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 21, 1999
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12-22-99
DATE

Debbie Antanaitis /jsp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF EXHIBITS

For petitioner:

P-1 Commissioner of Education decision *E.F. on behalf of minor child R.F. v. Board of Education of the Township of Branchburg, Somerset County,* OAL Dkt. No. EDU 6593-96, Agency Dkt. No. 234-6/96, decided April 27, 1998

P-2 Excerpt from bankruptcy petition filed on May 4, 1998 *In re Emeral J. Foster and Glenn A. Foster*, U.S. Bankruptcy Court, District of New Jersey, Dkt. No. 98-35604

P-3 True copy of lease agreement dated July 12, 1997 between Biltmore Realty, Tenants, to commence September 1, 1997 ending August 31, 1998

P-4 Post hearing letter memorandum dated January 8, 1998 filed on behalf of petitioner E.F. by his attorney in the "Branchburg" case

P-5 Petitioner Hunterdon Central Reginald's request for admissions and response given by respondents submitted on September 22, 1998

P-6 Respondents certified answers to initial set of interrogatories and demand for production of documents submitted on or about August 8, 1998

P-7 Respondents certified answers to supplemental request for production of documents and written interrogatories dated August 4, 1998

P-8 Voter registration information dated September 6, 1998

P-9 Statements by witnesses identified in answers to interrogatories filed by the Hunterdon Central Regional High School Board of Education

P-10 Respondents answers to second supplemental interrogatories and for production of documents

P-11 Copy of letter from E.F. and G.F. to State Commissioner of Education dated June 26, 1996

P-12 Attorney for petitioner Brief in Support of Motion

P-13 Attorney for petitioner letter dated August 4, 1999

For respondent:

R-1 Attorney for respondent letter brief dated August 2, 1999

OAL DKT. NO. EDU 6247-98
AGENCY DKT. NO. 194-6/98

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON MOTION
V.	:	
E.F. AND G.F.,	:	
RESPONDENTS.	:	

The record of this matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed. Both the Board and respondents filed exception arguments, and the Board filed a reply, in accordance with *N.J.A.C.* 1:1-18.4.

The Board asserts in its exceptions that (1) there is sufficient material evidence to find that respondents made intentional misrepresentations as to their domicile at the beginning of, and during, the 1997-1998 school year; (2) there is sufficient material evidence to find that respondents' defense to the Board's claim was frivolous; (3) the Administrative Law Judge (ALJ) failed to address the Board's motion for sanctions against respondents pursuant to *N.J.A.C.* 1:1-14.14 for failure to complete discovery in accordance with *N.J.A.C.* 1:1-10.1 *et seq.*; and (4) the ALJ failed to address the Board's request for pre- and post-judgment interest, pursuant to *N.J.A.C.* 6:24-1.16.

Respondents contend in their exceptions that the doctrine of judicial estoppel does not apply, since they are *not* now asserting an inconsistent legal theory or position. Rather, they aver that "[i]n the previous matter, [they] were domiciled in Branchburg. Presently, and before

the commencement of the instant litigation, [they] relocated and became domiciled in Flemington." (Respondent's Exceptions at 2) Respondents reason that they are simply asserting a "change in a factual situation." (*Id.*) Additionally, respondents argue there is a genuine issue of material fact as to whether they were domiciled in Flemington during the 1997-1998 school year, sufficient to warrant submission of this matter to a factfinder. Thus, they maintain that the ALJ's Order granting partial summary decision to the Board should be rejected. (*Id.* at 4)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the recommended Order of the ALJ. Initially, the Commissioner concurs that the doctrine of judicial estoppel precludes respondents from asserting in the present matter that they were domiciliaries of Flemington during the 1997-1998 school year, when they maintained in prior litigation before the Commissioner that they were living in Branchburg during the same school year. In this connection, the Commissioner observes that, notwithstanding respondents' contention, as noted above, that "[i]n the previous matter, [they] were domiciled in Branchburg [, but p]resently, and before the commencement of the instant litigation [in June of 1998] respondents relocated and became domiciled in Flemington" (Respondent's Exceptions at 2), they *also* argued before the ALJ that they "established their domicile in Flemington *before the start of the 1997-1998 school year,* as evidenced by Mr. Barrett's affidavit, respondent's lease, and respondent's verified petition." (Respondents' Brief in Opposition to Board's Motion for Summary Decision at 5-6) (emphasis added)

The Hunterdon Central Regional Board has maintained that, "[a]t the beginning of the 1997-1998 school year, respondents presented to [it] a copy of a one (1) year lease on a one (1) bedroom apartment at Hunter Hills, Flemington, New Jersey and claimed that they and two of their children were domiciled at that address as of September 1, 1997." (Brief in Support of

Petitioner's Motion for Summary Decision at 4) Based on their representations, respondents' two children were permitted to attend the Hunterdon Central Regional High School, free of charge, from September 1997 until May 1998, when the Hunterdon Board determined that respondents continued to own their Branchburg residence and, consequently, the Board challenged respondents' claim of domicile in its District. (*Id.* at 4)

Yet, as the ALJ noted, during the 1997-1998 school year, respondents' prior litigation was still in progress. Hearings were conducted in the matter of *E.F., on behalf of minor child, R.F. v. Board of Education of the Township of Branchburg, Somerset County,* on February 25 and 28, 1997 and September 18, 1997 at the Office of Administrative Law. (*E.F.*, slip. op. at 2) (*See also* P-1 at 2) The Initial Decision was issued on March 11, 1998, and the Commissioner's decision was issued on April 27, 1998. Throughout this litigation with the Branchburg Board of Education, and notwithstanding respondents' claim addressed to the Hunterdon Central Regional Board that they changed their domicile prior to the start of the 1997-1998 school year, E.F. and G.F. maintained they were residents of Branchburg during the 1996-1997 *and* 1997-1998 school years for the purpose of prosecuting their suit against Branchburg. (Brief in Support of Petitioner's Motion for Summary Decision at 3) "'The doctrine of judicial estoppel is an equitable doctrine whose primary purposes are to promote the truth and to prevent parties from deliberately shifting positions to suit the exigencies of the moment.'" *Levin v. Robinson, Wayne & La Sala*, 246 *N.J.Super.* 167, 195 (Law Div. 1990), *quoting Department of Transp. v. Coe*, 112 *Ill. App.*3d 506, 510, 68 *Ill.Dec.* 58, 60, 445 *N.E.*2d 506, 508 (1983).

Moreover, respondents' affirmation in the prior proceeding that they were domiciliaries of Branchburg was "successful," in that it helped to form the basis of the ALJ's and the Commissioner's determination in that matter. *See Cummings v. Bahr*, 295 *N.J. Super.* 374,

387 (App. Div. 1996).[1] "If a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position." (*Id.* at 387-388) The Commissioner additionally notes that the doctrine has been applied in quasi-judicial proceedings to preclude a casino employee from introducing evidence at his license-revocation hearing before the Casino Control Commission which was inconsistent with his prior plea of guilty to the offenses of conspiracy to possess and distribute marijuana and possession of marijuana with intent to distribute in a school zone. *State, Dept. of Law v. Gonzalez*, 142 *N.J.* 618, 632, 633 (1995).

Further, respondents' claim, as raised in their exceptions before the Commissioner, that they were relying upon "the advice of counsel" when they failed to duly inform the ALJ of the change in their domicile in the course of the *E.F. v. Branchburg* proceedings, is disingenuous. Although respondents' counsel in the prior matter, Michael T. Barrett, Esq., indeed, admits that he withheld from the ALJ his knowledge, *obtained prior to the September 1997 hearing date in that case,* that respondents advised him that "they had relocated to Flemington," (Barrett Affidavit at 2), respondents cannot now insulate themselves from having taken such a position, where, as the Board herein recognizes, they "could have limited the issue [in the prior lawsuit] to only the [recovery of tuition for] the 1996-1997 school year but chose not to do so, apparently accepting the faulty reasoning offered by Mr. Barrett." [2] (Reply Brief in Support of Petitioner's Motion for Summary Decision at 2) (*See*

[1] Therein, both the ALJ and the Commissioner agreed that petitioner failed to demonstrate that his son, *as a resident of Branchburg*, had a legal entitlement to attend the Hunterdon County Regional High School District, and the Board of Education of the Township of Branchburg, therefore, was under no obligation to pay R.F.'s tuition for attendance at Hunterdon Central Regional High School. (*E.F., supra,* slip. op. at 11, 14)

[2] Mr. Barrett attests that he withheld such information from the ALJ because he believed the respondents' move "did not impact upon the ultimate issue of the case, i.e., whether Branchburg has an obligation to pay tuition costs of one of its residents matriculating to Hunterdon Central, in light of the District's past practice." (Barrett Affidavit at 3) Additionally, Barrett was concerned that "the change in dynamic might affect the Judge's consideration of the

also, *Levin v. Robinson, Wayne & La Sala*, 246 *N.J. Super.* at 178, where the Court rejected plaintiff's argument that judicial estoppel was not applicable since the position he asserted in his prior matrimonial action was offered "in good faith and upon advice of counsel." Instead, the Court adopted the view that there can be no "good faith exception" with respect to either mistakes of law or fact, since such assertions could emasculate the doctrine of judicial estoppel. (*Id.* at 185) The Court further dismissed the plaintiff's assertion that his contradictory position in a prior proceeding was taken without an intent to deceive the Court. (*Id.* at 186)

Having determined that respondents are precluded from asserting the inconsistent positions that they were domiciled in Branchburg during the 1997-1998 school year (*E.F., supra*) *and* in Flemington during the 1997-1998 school year, (Respondents' Brief in Opposition to Board's Motion for Summary Decision at 5-6), and noting his concurrence with the ALJ that the record herein is ripe for summary decision with respect to the question of respondents' domicile during the 1997-1998 school year, the Commissioner further affirms the ALJ's finding that respondents were not legally domiciled within the Hunterdon School District during the 1997-1998 school year, and the Board, consequently, is entitled to recover $22,878 representing costs to educate respondents' two children during that year. (Board's Exceptions at 3)

However, like the ALJ, the Commissioner declines to find on the basis of the record before him that respondents intentionally misrepresented their place of domicile to the school district at the start of the 1997-1998 school year so as to obtain a free education for their children, or that respondents' defense to the Board's 1997-1998 tuition claim was frivolous, so as to permit the Board to pursue a potential claim for attorney's fees in court. (Board's Exceptions

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case" and affirmed that "if the Judge knew that there was only one (1) year of tuition in issue, rather than four (4) years, she might find it easier to decide against the [respondents]." (*Id.*)

at 3) The Commissioner, therefore, denies the Board's motion with respect to these issues, *without prejudice.* Similarly, noting the absence of arguments on the record pertaining to the issue of pre-judgment interest, the Commissioner makes no findings on this issue at this stage of the proceedings. The Commissioner further determines that the Board's request for findings regarding post-judgment interest is premature, in that post-judgment interest may be awarded when a respondent has been determined through adjudication to be responsible for a judgment, but has failed to satisfy the claim within 60 days of its award. (*N.J.A.C.* 6:24-1.16(c)2)

With respect to the Board's request for monetary sanctions against respondents under *N.J.A.C.* 1:1-14.14 for failure to complete discovery in accordance with OAL regulations, the Commissioner recognizes that he is not the agency head for purposes of review of said sanctions, and that the Board's request must be reviewed by the Director of the OAL in accordance with *N.J.A.C.* 1:1-3.2(c)4.

Accordingly, the recommended Order of the ALJ is affirmed; the Board's motion for summary decision is granted in part, and denied in part for the reasons expressed in the ALJ's Order and amplified above. This matter shall continue at the OAL, with further proceedings in accordance with this Order and the Board's Amended Petition of Appeal, which asserts a claim for reimbursement of costs for the 1998-1999 school year.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

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[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

February 2, 2000
Date of Mailing, February 2, 2000

49-00

EDU #6247-98
C # 49-00R
SB # 13-00

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
E.F. AND G.F.,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 2, 2000

For the Petitioner-Respondent, James P. Granello, Esq.

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 7, 2000

Date of mailing JUN 08 2000

SB/49-00

SBE # 531-06/99-227
SB # 49-00

IN THE MATTER OF THE SUSPENSION	:	STATE BOARD OF EDUCATION
OF THE TEACHING CERTIFICATE	:	DECISION
OF SAWSAN LABIB.	:	

Decided by the State Board of Examiners, May 11, 2000

For the Respondent-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Petitioner-Respondent, Michael C. Walters, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from a determination by the State Board of Examiners to suspend for two years the teaching certification of Sawsan Labib (hereinafter "respondent"), a special education teacher who had been dismissed from her tenured employment by the Commissioner of Education on the basis of tenure charges filed against her by the State-Operated School District of the City of Jersey City (hereinafter "District").

The District's charges were based on respondent's attendance record over an eight-year period. The focus of the charges and of the tenure proceedings was exclusively on the fact of respondent's absences, rather than the circumstances of those absences, and there was no dispute between the parties as to the substance of respondent's attendance record. Hence, the parties were able to stipulate as to respondent's absences during her employment by the District.

JAN. 3, 2001

As stipulated by the parties, respondent had been absent for 15 days in the 1988-89 school year, 15 days in 1989-1990, 14 days in 1990-1991, 30 days in 1991-1992, 15 days in 1992-93, 85 days in 1993-1994, 150 days in 1994-95, including a continuous absence from March 7, 1995 to the end of the school year, and the entire 1995-96 school year. The parties further stipulated that respondent had been absent without leave since September 21, 1995, that her increment had been withheld in 1994-95 for unsatisfactory teaching performance caused by her absenteeism in 1993-94 and in 1995-96 based on her absenteeism during 1994-95. The parties stipulated that respondent's absences had adversely impacted her classroom teaching performance and had adversely affected the continuity of instruction. The parties also stipulated that respondent claimed that she was permanently disabled and would never be able to return to her employment with the District in any capacity, and that she had applied for an accidental disability pension.

The Administrative Law Judge ("ALJ") based her determination of the tenure charges entirely on the parties' stipulations, which, again, focused on the fact of respondent's absences. On the basis of the parties' stipulations, the ALJ found that respondent's absenteeism was chronic and excessive and that it had adversely affected the continuity of instruction to her students so as to warrant removal from her tenured position. As expressed by the ALJ:

> Whatever the reason for the employee's absence, chronic and excessive absenteeism such as here obviously does not benefit the pupils or the community.

Initial Decision, slip op. at 6.

Neither party filed exceptions to the ALJ's recommended decision with the Commissioner. On the basis of the record before him, the Commissioner concurred with the ALJ that the District had demonstrated that respondent was guilty of excessive absenteeism. In doing so, the Commissioner noted that respondent did not dispute that her absenteeism had adversely affected her classroom teaching performance. The Commissioner also observed that the District had proven its efforts to fairly notify respondent about her absenteeism problem and that respondent had not asserted that her problem would improve. Therefore, on November 17, 1998, the Commissioner adopted the ALJ's recommended decision and directed respondent's dismissal from her tenured position.

At that point, the matter was transmitted to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6 in order for that board to ascertain whether action against respondent's certification was warranted. Based on its review of the Commissioner's decision in the tenure matter and the charges of excessive absenteeism upon which that decision was grounded, the Board of Examiners issued an order on June 17, 1999 for respondent to show cause why her teaching certificates should not be revoked or suspended.

Following notice from the Board of Examiners that her request for a hearing was denied because "it appeared that no material facts were in dispute regarding the tenure charges," State Board of Examiners' decision, slip op. at 3, respondent filed a written submission in response to the show cause order. That submission included substantial documentation relating to respondent's teaching performance, the circumstances surrounding her absences, and the medical consequences of the incidents that had

resulted in the absences that had led to the tenure charges. In her submission, respondent argued that no action against her certification was warranted because her absenteeism had resulted from three separate incidents of student assault, that her evaluations established that she was a quality teacher, and that all of her absences were for legitimate reasons and were medically verified. She further argued that she had stipulated her absences during the tenure proceedings because she was still unable to return to work at that time. Respondent contended that this fact gave the Commissioner no choice but to remove her from her tenured position, but did not preclude her from performing some type of educational work in the future. She also argued that revocation was not appropriate because she had not been found guilty of unbecoming conduct.

The Board of Examiners rejected respondent's arguments. Initially, the Board found that respondent's "offense" as set forth in its show cause order provided a proper basis to take action against her certificates because respondent's "chronic and excessive absenteeism greatly affected the students in her charge," and because although respondent can document her absences during 1994 and 1995, "she has not explained her excessive absenteeism for the years prior to those." Id. at 5.

Without any further discussion, the Board of Examiners then considered the "appropriate sanction" in this case. While indicating that it was bearing in mind that many of respondent's absences stemmed from injuries that were sustained through no fault of her own, the Board of Examiners found that respondent's actions prior thereto indicated that she had a pattern of absenteeism about which the District had warned her. Stating once again that respondent's absences had adversely affected the

continuity of education, the Board of Examiners concluded that while revocation was not warranted, "some sanction is necessary to remind [respondent] of her professional responsibilities." Id. Consequently, it directed that her certification as a Teacher of the Handicapped be suspended for two years.

Initially, we stress that as reflected by our decision in In the Matter of the Revocation of the Teaching Certificates of John Ahern, decided by the State Board of Education, August 5, 1987, it has long been established that the responsibility of the State Board of Examiners under N.J.S.A. 18:6-38 is not the same as the Commissioner's obligation to determine the appropriate penalty once tenure charges brought against a teaching staff member have been sustained. In Ahern, we indicated that:

> dismissal from a tenured position and revocation of certification serve different purposes, and that the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. [Cox v. State Board of Examiners, Docket #A-3527-81T3 (App. Div. 1983)], slip op. at 2-3. Accordingly, revocation of certification is not automatic following dismissal pursuant to N.J.S.A. 18A:6-10. See N.J.A.C. 6:11-3.7. Because the Board's decision to revoke or suspend precludes employment as a teacher in any school district in this state, and because revocation is not automatic following dismissal pursuant to N.J.S.A. 18A:6-10, the responsibility imposed on the State Board of Examiners when it makes its decision to revoke or suspend is a significant one. We conclude that this responsibility requires that the Board make an independent determination as to whether the individual should be precluded from employment in other districts, whether permanently or temporarily, based on all the evidence relating to this question.

Ahern, supra, slip op. at 3-4.

We find the record in this matter to be such that it does not sustain the Board of Examiners' conclusion that a two-year suspension of respondent's certification was warranted in this case. To the contrary, on the basis of our own review of the record as developed before the Board of Examiners, and given our authority as the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we reverse the decision of the State Board of Examiners.

It was not inappropriate for the Board of Examiners to rely on the conduct established in the tenure proceedings as its point of departure. In the Matter of the Teaching Certificate of Michael Gwaley, decided by the State Board of Education, August 5, 1987 (subsequent history omitted). However, examination of the Board of Examiners' decision shows that it misconstrued the factual record established in those proceedings. As set forth above, the stipulations in the tenure proceedings establish respondent's attendance record over an eight year period. In contrast to the Board of Examiners' conclusion, examination of that record shows that respondent's attendance record during her first five years was acceptable. As shown by the parties' stipulations, respondent was not criticized or warned concerning her attendance until February 1994, shortly before she suffered the first of her on-the-job injuries that caused her attendance to deteriorate dramatically. The first sanction imposed on her by the District was the withholding of her increment for 1995-96, when she had already begun to be continually absent because of work-related injuries. In short, the record from the tenure proceedings does not support the Board of

Examiners' conclusion that the respondent had a pattern of excessive absenteeism prior to 1994.

Moreover, respondent has not failed to explain her "excessive" absenteeism before that time. Prior to 1994, the only year when respondent's absenteeism exceeded her annual allotment of contractual sick days was 1991-92, when respondent was absent 30 days. However, the record before us clearly shows that her absences that year were due to a surgical procedure, arthroscopic cholecystectomy.

While the parties' stipulations for the tenure proceedings indicate that the District considered the circumstances of respondent's absences when it certified the tenure charges, the tenure matter did not focus on those circumstances. However, the documentation submitted in these proceedings clearly establishes the circumstances of respondent's absences. Most significant is that the dramatic deterioration in respondent's attendance beginning in 1994 was due to the fact that she suffered three separate assaults by students while at work. The record before us fully documents the medical consequences of those assaults, including the fact that on November 4, 1999, the State Division of Workers' Compensation found respondent to be 35% permanently disabled and awarded her 234 weeks of benefits covering the period from March 1, 1995 through September 1999.

Thus, in contrast to the tenure proceedings, it is now clearly established that beginning in 1994, respondent suffered three work-related injuries that rendered her incapable of fulfilling her role as a full-time teacher and caused the continuous absences that led to the tenure charges. As respondent now argues, those

circumstances, including her incapacity to return to work at the time of the tenure proceedings, may have given the Commissioner no choice but to direct her dismissal from her tenured employment. However, based on all of the evidence, there is no justification to suspend her certification. To the contrary, although the record indicates that respondent lacks the physical capacity to be employed as a full-time classroom teacher, there is nothing to suggest that she is unfit to be a teacher. Rather, the record shows that respondent was a good teacher who can no longer work full-time because of the medical consequences of a series of work-related injuries.

Under these circumstances, it is ludicrous to "remind [respondent] of her professional responsibilities" by imposing a "sanction" on her in the form of a two-year suspension of her certification. State Board of Examiners' Decision, slip op. at 5. Nothing in the record suggests that respondent engaged in any inappropriate conduct or was in any way responsible for the assaults that led to her disability. Nothing indicates that she is not fit to teach, although the record establishes that she currently lacks the physical capacity to be employed as a full-time classroom teacher. Again, lack of capacity to fulfill one's responsibilities may justify dismissal from tenured employment. It does not, however, justify suspension of an individual's teaching certification. In this respect, we stress that, as respondent argues, her certification is important to her because, despite her disabilities, her certification may qualify her for part-time employment or other employment in education for which she has the physical capacity. In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak, Docket #A-3298-87T7 (App. Div. 1998).

In sum, for the reasons expressed herein, we reverse the determination of the State Board of Examiners and direct that respondent's certification be reinstated. In light of our decision, we need not act upon respondent's motion for a stay of the Board of Examiners' determination.

January 3, 2001

Date of mailing JAN 04 2001

50-00

NEW JERSEY SCHOOL BOARDS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner New Jersey School Boards Association (NJSBA) filed a Petition for Declaratory Judgment seeking an order directing Respondent Board of Education of the Township of Wyckoff (Board) to pay NJSBA $106,206 in dues assessed to it for fiscal years 1993-1994 through 1999-2000 and to make future timely payments of assessed dues. The Board's Answer raised four affirmative defenses: (1) NJSBA's filing was untimely pursuant to *N.J.A.C.* 6:24-1.2(c); (2) under the terms of *N.J.S.A.* 18A:6-50, NJSBA may seek payment only for the Board's proportionate share of NJSBA's necessary expenses; (3) the Board is entitled to a setoff for the reasonable value of services normally provided to it during the period it was not paying dues to NJSBA; and (4) NJSBA may not assess to or recover dues from the Board because the provisions of *N.J.S.A.* 18A:6-50 violate N.J. Constit. Art. 4, sec. 7, par. 4, a claim which the Board did not pursue in its supporting briefs.

The Commissioner determined that, even if NJSBA's appeal was, *arguendo,* untimely filed for fiscal years 1993-1994 through 1998-1999 because its claim for those years was submitted beyond the 90-day time limit set forth in *N.J.A.C.* 6:24-1.2(c), the factual circumstances of this matter—the Board's admitted, intentional disregard of *N.J.S.A.* 18A:6-50 in refusing to pay dues assessed by NJSBA—warrant relaxation of the 90-day rule because a compelling public interest is presented.

The Commissioner found the Board's remaining arguments to be entirely without substance, noting that the Board could have challenged the reasonableness of the dues before NJSBA's Delegate Assembly, the body with the statutory power to approve NJSBA's assessed dues, or in a legal forum of appropriate jurisdiction. The Commissioner rejected as meritless the Board's claim of setoff amounting to the reasonable value of services denied to it by NJSBA when it revoked the Board's "good standing" status, emphasizing that the Board's intentional refusal to pay dues will not be rewarded by reducing the amount of monies owing to NJSBA.

The Commissioner ordered the Board to pay NJSBA the sum of $106,206 for the assessed dues owing to NJSBA pursuant to *N.J.S.A.* 18A:6-50 for fiscal years 1993-1994 through 1999-2000 according to a mutually acceptable payment schedule to be approved by the Bergen County Superintendent of Schools and directed the Board to pay future dues in compliance with the provisions of statute.

February 3, 2000

AGENCY DKT. NO. 281-9/99

NEW JERSEY SCHOOL BOARDS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Cynthia J. Jahn, Esq. (New Jersey School Boards Association)

Mark G. Sullivan, Esq. (Sullivan & Sullivan)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education (Commissioner) on September 13, 1999 through the filing of a Petition for Declaratory Judgment by the New Jersey School Boards Association (NJSBA) seeking an order that the Wyckoff Township Board of Education (Board) pay to the NJSBA $106,206 in dues assessed to the Board pursuant to *N.J.S.A.* 18A:6-50 for the fiscal years 1993-1994 through 1999-2000. The NJSBA also seeks an order that the Board make future timely payments of the assessed dues. The Board filed its Answer to Petition for Declaratory Judgment on September 28, 1999, requesting that the Commissioner not entertain the petition and in the alternative that he deny the requested relief. The Board's Answer also raised four affirmative defenses, i.e., the NJSBA's filing was untimely pursuant to *N.J.A.C.* 6:24-1.2(c); under the terms of *N.J.S.A.* 18A:6-50, the NJSBA may seek payment only for the Board's proportionate share of the NJSBA's necessary expenses; the Board

is entitled to a setoff for the reasonable value of services normally provided to it during the period it was not paying dues to the NJSBA; and the NJSBA may not assess to or recover dues from the Board because the provisions of *N.J.S.A.* 18A:6-50 violate N.J. Const., Art. 4, sec. 7, par. 9.[1]

On October 1, 1999, the parties were notified that the Commissioner would decide the matter on a declaratory judgment basis and a briefing schedule was established. Briefs were filed by the parties on October 26, 1999. A reply letter brief was submitted by the NJSBA on November 12, 1999 and a letter response to letter brief was filed by the Board on November 15, 1999, at which time the record closed.

STATEMENT OF FACTS

Based upon review of the Petition for Declaratory Judgment and the Board's Answer thereto, the facts listed below are found to be undisputed by the parties.

1. A statement of dues was mailed to the Board for each of the following fiscal years.

Fiscal Year	Amount of Dues
1993-1994	$15,981
1994-1995	$15,981
1995-1996	$15,981
1996-1997	$15,981
1997-1998	$15,981
1998-1999	$10,320

2. In each of the six fiscal years, the NJSBA notified the Board of its dues assessment and responsibility to pay. The NJSBA has repeatedly requested payment through written correspondence, telephone conversations and personal appearances by NJSBA staff before the Board.

3. Despite repeated requests for payment, the Board has failed to pay dues assessed it for the above-listed six fiscal years by the

[1] It is noted for the record that the Wyckoff Board of Education's legal arguments which were submitted to the Commissioner for his review in deciding this Petition for Declaratory Judgment did not advance such claims of unconstitutionality.

NJSBA pursuant to *N.J.S.A.* 18A:6-50. The arrearage for these six years totals $90,225.

4. The Board's assessment for dues for fiscal year 1999-2000 is $15,981. Pursuant to the NJSBA's Bylaws, dues are to be paid by July 31 or within ten days after the next regularly scheduled board of education meeting occurring after July 31. The Board met on August 31, 1999. The NJSBA has requested payment of the Board's assessed dues for 1999-2000.

5. The arrearage of assessed dues being sought by the NJSBA from the Board for fiscal years 1993-1994 through 1999-2000 totals $106,206.

TIME BAR: LEGAL ANALYSIS AND DETERMINATION

Preliminarily, the Board argues that the NJSBA's claim for dues for the period from 1993-1994 through 1998-1999 is barred by *N.J.A.C.* 6:24-1.2(c), which mandates that a "petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." The Board avers that the NJSBA has clearly been on notice that it was "intentionally" (Board's Brief in Opposition to Petition for Declaratory Judgment at 4) not paying dues that were assessed to it as early as June 1993, yet the NJSBA waited until September 1999 to request relief; thus, the Board contends the matter is time-barred for all past dues but fiscal year 1999-2000. *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993).

The NJSBA urges that its claim for current and outstanding dues was timely filed because the claim is grounded in statute, *N.J.S.A.* 18A:6-50, which reads in pertinent part:

> For the purpose of defraying the necessary expenses of the association, the various district boards shall pay the necessary expenses incurred by its delegates, *and shall appropriate annually such sums for dues as may be assessed by the association at any delegates meeting.****** Dues shall be payable by the custodian of school moneys of the school district to the treasurer of the association. (NJSBA's Letter Brief at 4) (emphasis in original)

NJSBA maintains that the language of this statute clearly creates an entitlement for it to receive such dues as may be assessed, and imposes a mandatory obligation on school boards to pay those dues. The NJSBA further avers that its authority to impose an assessment for dues has already been judicially affirmed. *N.J. State AFL-CIO v. State Fed. of Dis. Bds. of Ed.*, 93 *N.J. Super.* 31 (Ch. Div. 1966). Consequently, it argues that the 90-day rule cannot apply to defeat an obligation such as the statutory dues payment to the NJSBA at issue herein. In support of this legal position, the NJSBA cites *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145 (1982), wherein the Court held that *N.J.S.A.* 18A:29-11 created a statutory right in a teacher for salary credit for military service because the military credit benefit was not directly related to the petitioner's employment services but rather represented the Legislature's goal to reward veterans for service to their country in time of war. Consequently, even though the teacher waited nine years to seek that credit, the Court determined that the statute of limitations did not bar the teacher's claim. *Lavin, supra* at 150-51.

As further support for its position that time limitations do not operate to bar a statutory right or obligation as presented in the instant matter, the NJSBA relies, *inter alia,* upon *North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587 (1984); various other earlier court decisions such as *Miller v. Bd. of Chosen Freeholders, Hudson County,* 10 *N.J.* 398 (1952), which was discussed by the Court in *Lavin, supra;* and a string of court decisions referenced in *Miller, supra,* and *Warren County v. Harden* , 95 *N.J.L.* 122 (1920).

The Board urges that the NJSBA's argument with respect to the applicability of *Lavin, supra,* to the instant matter is incorrect, averring, *inter alia*, that the 90-day rule in dispute herein, *N.J.A.C.* 6:24-1.2(c), was not at issue in *Lavin* but rather *N.J.S.A.* 2A:14-1, which deals with the six-year statute of limitations. As to this, the Board emphasizes that the wording of *N.J.S.A.* 2A:14-1 contains a listing of those types of actions to which the statute of limitations

applies, none of which falls under the heading of what would be considered a statutory entitlement. The Board further argues that *N.J.A.C.* 6:24-1.2(c) contains no such listing and by its terms applies to all petitions which may be filed regardless of what they involve.

Having carefully considered the record and the legal arguments of the parties, the Commissioner initially finds it unnecessary to reach the question of statutory entitlement raised by the NJSBA. Rather, the Commissioner finds and determines that even accepting *arguendo* that the instant matter does not raise a statutory right within the meaning of *Lavin, supra,* and, therefore, the NJSBA's appeal was untimely filed for fiscal years 1993-1994 through 1998-1999 because its claim for those years was submitted beyond the 90-day time limit set forth in *N.J.A.C.* 6:24-1.2(c), the factual circumstances herein warrant relaxation of the 90-day rule because a compelling public interest is presented. Pursuant to the authority granted by *N.J.A.C.* 6:24-1.15, the Commissioner may relax the 90-day rule under exceptional circumstances or if there is a compelling reason to do so. *Kaprow, supra*; *DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.*2d (EDU) 449, 453. As was recently stated by the Commissioner in *Board of Education of the Gloucester County Institute of Technology, Gloucester County v. Board of Education of the Lenape Regional High School District, Burlington County,* "Such authority, *** is rarely invoked unless strict adherence thereto would be inappropriate, unnecessary or where injustice would occur, *DeMaio* at 453, or where he finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064." (Slip op. at 13)

Review of the record indicates that for seven consecutive fiscal years, commencing with fiscal year 1993-1994, the Wyckoff Board of Education has, by its own

admission, intentionally disregarded[2] the statutory provisions of *N.J.S.A.* 18A:6-50 by refusing to pay dues assessed by the NJSBA, an association to which, by law (*N.J.S.A.* 18A:6-45), all school boards must belong. The statutory obligation of the NJSBA, and its predecessor, the State Federation of District Boards of Education, has been for nearly a century to "encourage and aid all movements for the improvement of educational affairs of this state." (*N.J.S.A.* 18A:6-47). Moreover, there is no doubt that the Wyckoff Board of Education was fully aware of the statutory obligation of boards of education to pay their assessed dues to the NJSBA. If the Wyckoff Board desired to contest or dispute the payment of its assessed dues, the proper course of action would have been for it to seek redress through the legal forum of appropriate jurisdiction, *not* to take it upon itself to disregard intentionally and flagrantly the statutory provisions enacted by the New Jersey Legislature for payment of dues to NJSBA by all boards of education in this state. In this regard, the Commissioner cannot and will not countenance a board of education's long-standing refusal to fulfill its statutory obligation. Having determined that relaxation of the time limitation of *N.J.A.C.* 6:24-1.2(c) is deemed warranted, the Commissioner will now review the substantive issues in dispute in this matter.

POSITION OF THE PARTIES

The Board's first point of argument in its Brief in Opposition to Petition for Declaratory Judgment asserts that *N.J.S.A.* 18A:6-50 requires only that necessary expenses be paid; thus, a review of what is "necessary" should be made by the Commissioner. As to this, the Board argues, *inter alia*, that the statute is silent as to how the determination of "necessary" is to be made. It does acknowledge, however, that *N.J.S.A.* 18A:6-50 provides a mechanism for determining how the *assessment itself* is to be made, i.e., by a vote of two-thirds of the delegates

[2] *See* Board's Brief in Opposition to Petition for Declaratory Judgment, wherein the Board states at page 2 that a review of its Board Secretary's affidavit and exhibits attached thereto can lead to no other conclusion than that "Petitioner knew Respondent hadn't paid the requested dues and in no way intended to do so." *See also* page 4, wherein the Board states "As can be seen from the facts, the petitioner has been clearly aware that respondent was *intentionally* not paying dues that were assessed to it as early as June of 1993." (Emphasis supplied)

presented at a meeting called for that purpose and that Article VIII, Section 1 (a) of the NJSBA's Bylaws states that the annual dues are determined by the association's Board of Directors. In summation, the Board avers that it is calling into question whether the amount of dues sought by the NJSBA is, in fact, reasonable and that to ascertain whether the dues are reasonable, the Wyckoff Board must be afforded the opportunity to review and provide comment to the Commissioner upon the annual budgets, financial statements and audits for the years in question.

In response, the NJSBA avers that its dues structure is fully compliant with the statutory provisions of *N.J.S.A.* 18A:6-50 and that the structure for its operating dues is fully supported by the statutory language concerning the assessment of dues. *N.J.S.A.* 18A:6-50 reads:

> For the purpose of defraying *the necessary expenses of the association, the various district boards shall pay the necessary expenses incurred by its delegates, and shall appropriate annually such sums for dues as may be assessed by the association at any delegates meeting.* The assessment of dues shall be made upon a graduated scale and shall be made only upon two-thirds vote of the delegates present at such delegates meeting, after notice of the taking of such vote shall have been given to each district board in writing at least 60 days before such delegates meeting. However, the dues assessed any board of education shall not be increased for any year by more than 33 1/3% of the dues assessed that board during the preceding year. Dues shall be payable by the custodian of school moneys of the school district to the treasurer of the association. (Emphasis supplied)

More specifically, the NJSBA argues that the above-cited statute requires boards of education to pay two separate items, the first being the necessary expenses of their delegates, the amount of which is limited by actual expenditures incurred by the delegates in carrying out their responsibilities, and the second being the payment of dues as may be assessed by the NJSBA at any delegates meeting based upon a graduated scale and made by a two-thirds vote of the delegates present at the delegates meeting. It is the NJSBA's position that this statutory language provides flexibility to the delegates to determine their own dues schedule and, in fact, the law was amended in 1973 to increase the ability of the delegates to establish their own dues

without the statutory constraints that had previously existed, *P.L.* 1973, c. 120, sec. 1 effective May 9, 1973. It further argues, *inter alia*, that its dues structure is proportional in nature, based on each local district's current expense budget, the structure/formula of which is set forth in the NJSBA's Governance and Operations Manual, GO/3211, which reads:

> The NJSBA dues formula is designed to be equitable, easy to administer, responsive to changing economic conditions and capable of sustaining Association services. The formula is:
>
> Base + (.0012 x CEB) = Dues (limited by a Maximum)
>
> For the 1981-82 fiscal year, the Base figure equals $750 and the Maximum figure equals $10,000. In subsequent years, these two figures will be adjusted according to an inflation factor, defined as the budget cap for a district spending at the state average with respect to per pupil expenditures. This budget cap is calculated by multiplying ¾ times the latest annual percentage increase in the total state equalized valuation, or the average of the last three years, whichever is higher. Should the state alter the formula by which it derives this cap figure, NJSBA will continue to compute its dues inflation factor in the manner described above. (NJSBA's Letter Brief at 11)

The NJSBA further asserts that the statutory language of *N.J.S.A.* 18A:6-50 gives its delegates the authority to establish dues in accordance with the formula currently in place and, if the Wyckoff Board believes that a different structure is preferable or the assessed dues unreasonable, its recourse is to raise the issue at the association's Delegate Assembly, the originating body of the current dues policy. NJSBA's annual budgets and annual audit are public information that, during all the years in question herein, have been available for review by the delegates and member boards of education. Thus, the NJSBA contends, the Wyckoff Board had the ability to raise issues about the reasonableness of the assessed dues with the Delegate Assembly, a democratic process which the NJSBA avers was contemplated by the Legislature. (*See, e.g.*, Governor's Press Release on Signing A-2147, NJSBA's Exhibit II). Moreover, the NJSBA points out that its dues have not increased in any of the years at issue herein, which it

attributes to the "effectiveness and democratic nature of the internal mechanism over NJSBA's dues assessment." (NJSBA's Reply Letter Brief at 2)

Lastly, the Wyckoff Board argues that it is entitled to a setoff amounting to the reasonable value of services denied to it by the NJSBA because, subsequent to the association's determining to deny Wyckoff "good standing" status, it denied to the Board the "accoutrements of membership," which presumably have some inherent monetary value and should, thus, be deducted from amounts claimed to be owed by respondent. In response, the NJSBA emphasizes, *inter alia*, that it is not a fee-based organization and the value of services cannot be "unbundled" so as to place a dollar value on them.

COMMISSIONER'S DETERMINATION

Upon full consideration of the record, the legal arguments advanced by the parties and the applicable statutory provisions in this matter, the Commissioner finds and determines that the Board is, as are all boards of education in the State of New Jersey, obligated by the clear and unequivocal language of *N.J.S.A.* 18A:6-50 to pay the dues assessed to it by the NJSBA. The Board's arguments to the contrary are found to be entirely without substance. If the Wyckoff Board wished to "call into question" the reasonableness of dues being assessed by the NJSBA, the appropriate recourse would have been to bring that issue before the association's Delegate Assembly, since it is this body which by law has the statutory power to approve NJSBA's assessed dues. Moreover, as stated earlier in this decision, if the Wyckoff Board desired to contest the constitutionality and/or reasonableness of the dues being assessed by the NJSBA, the proper course of action would have been to pursue such claims in a legal forum of appropriate jurisdiction. Intentional refusal to pay statutorily mandated dues to the NJSBA cannot and will not be countenanced.

The Commissioner likewise rejects as meritless the Board's argument that it is entitled to a setoff amounting to the reasonable value of services denied to it by the NJSBA when

the Board's "good standing" status was removed by the association. When the Board embarked on its long course of intentional refusal to pay dues assessed by the NJSBA, it acted at its own peril and will not now be rewarded for such willful disregard of the law by having the amount of monies owing to the NJSBA reduced in the manner argued by respondent.

Accordingly, the Wyckoff Board of Education is directed to pay to the NJSBA the sum of $106,206 for the assessed dues which are owing to NJSBA pursuant to the statutory requirements of *N.J.S.A.* 18A:6-50 for fiscal years 1993-1994 through 1999-2000. Such payment shall be pursuant to a mutually acceptable payment schedule to be arranged by the parties and approved by the Bergen County Superintendent of Schools. Further, the Wyckoff Board is directed to pay to NJSBA the dues it is assessed in future fiscal years in a manner which is in compliance with the provisions of statute.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 3 - 2000

Date of Mailing: FEB 4 - 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SB/51-00

SB #51-00

IN THE MATTER OF THE DENIAL OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF NEWARK PREP, THE CHARTER	:	DECISION
SCHOOL FOR HEALTH SCIENCES	:	
AND TECHNOLOGY, ESSEX COUNTY.	:	

Decided by the Acting Commissioner of Education, September 1, 2000

For the Appellant, Warren, Tosi & Semeraro, P.C. (Dwayne D. Warren, Esq., of Counsel)

By letter dated September 1, 2000, Acting Commissioner of Education Jeffrey V. Osowski notified the proposed Newark Prep, the Charter School for Health Sciences and Technology (hereinafter "appellant"), that it was being denied final approval to operate a charter school as a result of its failure to secure an appropriate facility. On September 6, 2000, counsel for the appellant wrote to the Acting Commissioner requesting to file an appeal from that determination. By letter dated September 8, 2000, the Director of the State Board Appeals Office (hereinafter "Director") informed counsel for the appellant that his letter was being considered as a notice of appeal to the State Board of Education. He was further advised that the briefing schedule was being placed in abeyance pending preparation of a statement of items comprising the record on appeal by the Attorney General's Office pursuant to N.J.A.C. 6A:4-1.8(b).

DEC. 6, 2000

Following receipt of the record on appeal, the Director notified counsel for the appellant by letter dated September 22, 2000 that the appellant's brief in support of its appeal was due on October 16, 2000. The appellant, however, failed to file a brief by that date. By letter dated November 1, 2000, the Director notified the counsel for the appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of the appellant's failure to perfect the appeal.

The appellant has still failed to file a brief in support of its appeal, more than seven weeks after the deadline for such filing and five weeks after it was notified of such failure. Nor has the appellant offered any explanation for its failure to file or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

December 6, 2000

Date of mailing DEC 06 2000

52-00

C # 52-00DHPBL
SB # 20-00

IN THE MATTER OF THE DISQUALIFICATION : STATE BOARD OF EDUCATION

FROM SCHOOL EMPLOYMENT OF A.N.C., JR. : DECISION

Decided by the Assistant Commissioner of Education, February 9, 2000

For the Petitioner-Appellant, Granata, Wernik & Zaccardi (Louis E. Granata, Esq., of Counsel)

For the Respondent-Respondent, Terri Cutrera, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

The decision of the Assistant Commissioner of Education is affirmed for the reasons expressed therein.

May 3, 2000

Date of mailing MAY 05 2000

53-00

F.B. AND M.B., on behalf of minor children, J.B. AND L.B.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners appealed the Board's decision to suspend J.B. and L.B. from classes and extra-curricular activities for five and ten days, respectively, for consumption of alcohol off school premises prior to a school-sponsored dance.

The ALJ concluded that the Board's punishment of J.B. and L.B. was arbitrary and capricious since it did not enforce its Drug and Alcohol Policy against all students suspected of involvement in the incident. The ALJ further determined that the Board was not authorized by its policy to impose sanctions for this type of conduct since the policy's express terms do not clearly extend to such conduct, noting that the prohibition against drinking "near school property" is vague and overbroad and no one standing on school property would have been able to see or be affected by the prohibited activity.

The Commissioner adopted the Initial Decision of the ALJ for the reasons expressed therein but clarified that distance is not determinative of the nexus between alcohol consumption and school functions, citing *R.F. v. Park Ridge Board of Education.* The Commissioner directed the Board to revise its policy to eliminate the phrase "near school property" to reflect more clearly the sphere of the Board's disciplinary authority and to remove from J.B.'s and L.B.'s school records all references to the disciplinary action imposed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2655-99

AGENCY DKT. NO. 41-3/99

F. B. AND M. B. ON BEHALF OF MINOR CHILDREN, J. B. AND L. B.,

Petitioners,

v.

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

Respondent.

Kenneth D. Roth, Esq., for petitioners (Davis, Reberkenny & Abramowitz, attorneys)

John G. Dyer, III, Esq., for respondent

Record Closed: October 15, 1999 Decided: November 16, 1999

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on March 11, 1999, when F. B. and M. B., parents of J.B. and L.B. (hereinafter petitioners) filed a petition of appeal with the Commissioner of Education seeking an order that the determination of the Board of Education of the Township of Moorestown (hereinafter respondent) suspending J. B. and L. B., was arbitrary, capricious and unreasonable. The petition sought recession of the suspensions and expungement from the

student records. An answer to the petition was filed on behalf of respondent on April 22, 1999 and on April 27, 1999, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted by telephone conference call on July 13, 1999, at which time it was determined that the parties would submit a joint stipulation of facts and cross-motions for summary decision. A joint stipulation of facts was filed on August 31, 1999. Petitioners' motion for summary decision and supporting papers, including the certifications of petitioners and counsel, were received on August 30, 1999. A supplemental certification of petitioners' counsel was received on September 15, 1999. Respondent's cross-motion and supporting brief were received on September 30, 1999, and a reply on behalf of petitioners was received on October 13, 1999. Oral argument on the cross-motions was conducted by telephone conference call on October 15, 1999, whereupon the record closed.

FINDINGS OF FACT

The facts in this matter have been stipulated by and between the parties as follows:

1. On January 29, 1999, respondent, the Moorestown High School District Board of Education (Respondent), sponsored the "Snow Ball" dance (the Dance) at Mount Laurel's Radisson Hotel.

2. On January 29, 1999, at approximately 6:30 p.m., prior to going to the Dance, J.B. and L.B., sons of petitioners F.B. and M.B. (Petitioners), met some fellow students in a vacant field behind a friend's house.

3. While at the field, J.B. and L.B. drank some beer.

4. The field is not on school property.

5. J.B. and L.B. left the field at approximately 7 p.m. and, ultimately, arrived at the Dance.

6. At approximately 10:45 p.m., J.B. and L.B. prepared to leave the Dance. As they were leaving, John Walsh, an

assistant vice principal, approached them and told them to come with him.

7. Mr. Walsh told J.B. and L.B. that he had reasonable suspicion to believe that J.B. and L.B. were drinking alcohol prior to arriving at the Dance.

8. Mr. Walsh's suspicion was based on information provided to him by the parent of another student whose child had been accused of violating Respondent's Drug and Alcohol Policy (Policy) on the night of the Dance. His suspicion was not based upon any personal observation.

9. J.B. and L.B. did not appear to Mr. Walsh to be intoxicated when he confronted them at 10:45 p.m.

10. J.B. and L.B. did not appear to the teachers or administrators to be intoxicated at any time during the Dance.

11. Mr. Walsh told J.B. and L.B. that they could take a breathalyzer test.

12. J.B. and L.B. admitted to drinking alcohol while at the field before the Dance.

13. Respondent did not arrange for medical examinations of J.B. and L.B.

14. Respondent telephoned Petitioners who picked up J.B. and L.B. from the Dance.

15. J.B. and L.B. were both immediately suspended from school for five days and from extra-curricular activities for ten days. J.B. and L.B. served their suspensions.

16. The suspensions of J.B. and L.B. were based on J.B. and L.B.'s alleged violation of the Policy.

17. Respondent contends that J.B. and L.B.'s admissions amount to admissions of violating the Policy.

18. N.J.A.C. 6:29-6.3(a) gives Respondent authority to adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils who possess, consume, or who on reasonable grounds are suspected of

being under the influence of alcoholic beverages in school or at school functions.

19. The Policy provides that "[t]he abuse, use, consumption . . . of alcohol is . . . strictly prohibited on or near school property, or at any school-related activity such as an athletic event, field trip or prom."

20. The Policy further provides that if a "student verbally acknowledges [a] policy violation, the pupil shall be suspended from school for a minimum of five days."

21. The Policy provides that "[w]henever it shall appear to any... educational personnel . . . that a pupil may be under the influence of [alcohol] . . . that . . . educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal . . ." who "shall immediately notify the parent . . and the superintendent . . . and shall arrange for an immediate examination of the pupil by a doctor selected by the parent..."

22. Respondent's Policy does not provide for a breathalyzer test nor does it establish any blood alcohol level that would constitute a pass or fail.

23. Respondent's parent/student handbook states that "students are prohibited from the use . . . of alcohol . . . on or near school property or at any school activities."

24. Respondent's parent/student handbook further states that "[w]hen there is reasonable cause to believe a student has used, consumed or abused alcohol, the principal . . . will notify the parents and Superintendent of Schools" and that "[a] medical examination/assessment will be immediately arranged."

25. After L.B. served his five-day suspension from classes and ten-day suspension from extra-curricular activities in accordance with the school policy, he was notified by the student government president and the faculty advisor for student government that he was also suspended from participation in student government for the remainder of the marking period.

In addition to the foregoing, the following additional undisputed material facts appear from the motion papers submitted: The vacant lot where J.B. and L.B. consumed the beer is located more than one-and-a-half miles driving distance from the high school and more than three miles driving distance from the hotel where the Dance was held. The parent referenced in the paragraph numbered 8 hereinabove provided school administrators with four other names of students who had been present at the pre-dance gathering at the vacant lot in addition to J.B. and L.B. Three of those students had already left the dance by the time the parent called the school administrators at about 10:30 p.m. The school principal called the parents of those three students and apprised them of the known details concerning the events of the evening. The three students apparently were never asked by school administrators if they had in fact been drinking alcohol at the gathering, and no action, other than parental notification, was taken with respect to these three who had already left the dance. (The other student whose name was on the list provided by the parent insisted that although she had been present, she had not consumed any alcohol, and the breathalyzer test which she agreed to take confirmed her contention.)

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was modified in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter

> but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the parties stipulate that none of the material facts are in dispute and accordingly, this matter is ripe for summary decision.

In March 1981, the New Jersey Legislature amended N.J.S.A. 18A:37-2 to add the following conduct to the list of specifically enumerated offenses constituting good cause for suspension or expulsion of a public school pupil guilty of such conduct:

> j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

The Senate Education Committee Statement which accompanied the bill explained:

> . . .
>
> The purpose of this bill, as amended with the sponsor's approval by the Assembly Judiciary, Law, Public Safety and Defense Committee, is to help control the problem of youth/alcohol abuse, especially in the schools. This bill would make possession, consumption or being under the influence of alcohol in school one of the specifically listed causes for suspension or expulsion. This bill would reaffirm the social policy of the State, and the concerted effort that is being made to eliminate youth/alcohol problems.

> The effort is reflected in the series of youth/alcohol bills enacted last session, including laws which raised the drinking age to 19, mandated more comprehensive alcohol education for students and teachers, and prohibited as an offense the public possession or consumption of alcohol by under-age persons. It is further reflected by Assembly Bill No. 67, which recently passed the Assembly by a unanimous vote, a bill to prohibit as an offense the unauthorized bringing by adults of alcoholic beverages onto school premises.
>
> . . .

In accordance with N.J.S.A. 18A:40A-11,* through the adoption of N.J.A.C. 6:29-6.3(a), the State Board of Education required local boards of education like respondent to "adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils whose use of alcohol or other drugs has affected their school performance or who possess, consume or who on reasonable grounds are suspected of being under the influence" of alcoholic beverages "in school or at school functions." The policy respondent adopted in compliance with the requirements of N.J.A.C. 6:29-6.3(a), provides in pertinent part, as follows:

> The abuse, use, consumption, possession, sale, purchase, distribution, or transfer of alcohol, any controlled, dangerous substance, or substance as defined by the applicable statute, code or otherwise referenced in this policy, or drug paraphernalia is strictly prohibited on or near school property, or at any school-related activity such as an athletic event, field trip or prom.

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* N.J.S.A. 18A:40A-11 provides:

> Each board of education shall adopt and implement, in accordance with rules and regulations promulgated by the State board, policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances as defined in section 2 of this act, on school property or at school functions, or who show significant symptoms of the use of those substances on school property or at school functions. In adopting and implementing these policies and procedures, the board shall consult and work closely with a local organization involved with the prevention, detection and treatment of substance abuse approved by the Department of Health.

Substance abuse is statutorily defined at N.J.S.A. 18A:40A-9 to include alcoholic beverages and provides:

> "Substance abuse" shall mean the consumption or use of any substance as defined herein for purposes other than for the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings.

It is respondent's position herein that the behavior of J.B. and L.B. between 6:30 p.m. and 7 p.m. on January 29, 1999 falls within the prohibitions of the articulated policy and therefore constitutes just cause for the suspensions which were imposed. Petitioners make several arguments in support of their application to have the discipline imposed by respondent reversed and removed from the student records. They argue that the specified conduct does not fall within the articulated parameters of the policy adopted by respondent, that the language in the policy attempting to control behavior "near" school property is unconstitutionally vague and overbroad, that respondent is without legal authority to discipline the students for this specific off-campus conduct and that respondent administered its policy on the evening in question in an arbitrary, capricious and unreasonable manner by treating similarly situated students differently. Petitioners also argue that respondent failed to follow the requirements of its own policy by failing to arrange medical exams for the students.

The specific conduct which is under scrutiny herein consisted of the consumption of alcohol by two students under the legal age to consume alcoholic beverages. This offense occurred on the same day as the high school Snow Ball Dance, but not on school property or at a school function. The two students were not accused of being under the influence of intoxicating beverages at the dance; no one observed and reported any behavior during the dance which would so indicate, and at the time the boys were questioned around 10:45 p.m., the school administrators acknowledged the boys did not appear to be under the influence. The language of the statute and regulation cited hereinabove both authorize respondent to discipline students for alcohol consumption actually occurring on school property or at school functions and for the demonstration of alcohol related symptoms on school property or at school functions. Neither of these specified circumstances took place in the within matter. There are certain off-site

behaviors for which a school board may impose sanctions/remediation. In his opinion in R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337, 343-344 (Ch. Div. 1970), Judge Lane explained the circumstances under which a board of education is authorized to discipline students for conduct which occurs off campus:

> There can be no doubt that the establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. Such rules and regulations are equally necessary for the protection of public school students, faculty and property. The power of public school officials to expel or suspend a student is a necessary corollary for the enforcement of such rules and the maintenance of a safe and orderly educational environment conducive to learning. But public school officials cannot exercise this power where the activity which is the subject of the proposed suspension or expulsion does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. . . .
>
> In New Jersey public school officials have the authority to suspend or expel students for events happening out of school hours. . . . This court is unable to find a New Jersey decision holding that school officials have the right to expel or suspend a pupil for conduct away from school grounds, but the better view is that school authorities have such a right where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property.
>
> . . .
>
> [Citations omitted]

Since there was no behavior at the Dance for which respondent might discipline the two students in question, the only inappropriate conduct in issue is the drinking at the pre-dance gathering. Because the drinking age in New Jersey is 21 years of age, and there is no indication that petitioners had given their parental permission, the students' consumption of beer in any amount was without legal authority. The mere fact that a student's off-campus conduct is unlawful or inappropriate, however, does not confer upon a board of education such as respondent the legal authority to discipline because of it. Underage drinking is a societal

problem which has been and needs to be addressed by all sectors of society, institutional as well as parental. No one condones the pre-Dance conduct of the two students herein. The legal issue raised in these proceedings is not whether the conduct should have been punished, however, but whether respondent had the authority to discipline the boys under these circumstances.

Respondent acknowledges that the students did not exhibit symptoms of alcohol consumption and that the abuse or use of alcohol did not take place on school property or at any school-related activity, but argues that there is a sufficient nexus between the conduct and the Dance to bring the conduct within respondent's area of authority. In support of its position respondent cites R.F. v. Board of Educ. of Park Ridge, Bergen County, 93 N.J.A.R. 2d (EDU) 79, aff'd, 93 N.J.A.R. 2d (EDU) 416 and R.F. v. Board of Educ. of Park Ridge, Bergen County, 97 N.J.A.R. 2d (EDU) 1. In that case, two young women who were under the legal age for drinking alcoholic beverages at the time acknowledged that they had consumed champagne in the limousine on the way to the prom/snowball dance. In that matter, as in this one, the students did not appear to be under the influence of alcohol and they were not required to submit to examination and testing. The two young women were disciplined by the school administrators who required them to leave the prom and barred them from participating in year-end ceremonies at the school, including their graduations. In that matter, however, the Park Ridge Board of Education had promulgated regulations which were sent to the parents prior to the prom with a sheet for their signatures and for those of the students. The regulations provided in pertinent part:

> 1. Recent court rulings have stated that hosts of parties where alcohol/drugs are served and consumed will be held liable for injuries ensuing. We insist that students not host or attend pre-prom/snowball parties where alcohol/drugs will be served.
>
> 2. School officials reserve the right to inspect limousines which chauffer students to and from the Prom/Snowball if there is reasonable suspicion of alcohol/drug consumption.
>
> . . .

The administrative law judge and the Commissioner concluded that the Park Ridge Board had acted reasonably and in accordance with the regulations which the students had signed acknowledging their agreement. Although the Commissioner noted that the matter was moot because the students in question had graduated and no record of the incident in question remained in their records, because of the important public policy question raised, he commented on the merits:

> . . . Let there be no misunderstanding of the Commissioner's conviction in this regard: be it a sip, a slug, or a keg of alcohol consumed on the way to, during, or following a school-sponsored event, such behavior as exhibited by these teenage students, who were fully cognizant of the consequences that could flow from their voluntary act, cannot and will not be sanctioned, excused, or mitigated in the face of the Legislature's clear intent as stated in N.J.S.A. 18A:37-1 and reflected in the Board's policy on prom deportment. . . .

In the present matter, however, the policy and the student handbook provisions contain no language concerning drinking at pre-prom parties or during travel to the prom. The only language in the policy in question which might apply is the phrase which prohibits drinking "near school property." The distances specified herein, one-and-a-half miles driving distance from the high school and more than three miles driving distance from the hotel where the Dance was held, do not strike me as being "near" school property. No one standing on school property would have been able to see these prohibited activities or be affected by them. Accordingly, I **CONCLUDE** that the student conduct herein does not fall within the specific provisions of respondent's articulated policy. Furthermore, as petitioners have argued, "near school property" is vague and overbroad. Whether "near" means a block, a mile, the geographic boundaries of the municipality or some other geographic restriction, it could include behavior legally sanctioned pursuant to N.J.S.A. 2C:33-17, occurring at home, at the homes of friends or relatives, or at a church or synagogue. I **CONCLUDE** that the term "near" suffers from the same constitutional infirmities that "prior to" was determined to exhibit in Claiborne v. Beebe Sch. Dist., 687 F.Supp. 1358 (E.D. Ark. 1988). In that matter, the minor plaintiffs had each consumed several sips of orange juice mixed with vodka enroute from their own school to attend a Friday night football game away. When questioned later by the principal, each minor plaintiff admitted to

drinking enroute to the game and each was suspended from school for ten days and ultimately expelled by the school board after a hearing for the fall semester. The specific provision of the policy at issue in that case stated:

> Upon verification by local authorities, self-admittance or substantiated evidence, any student using alcohol or drugs prior to coming on school grounds or to school sponsored events will be expelled from school for one semester.

The District Court disagreed with the school board which asserted that the language of the policy provided sufficient and adequate notice such that the ordinary student would be able to conform his conduct to the policy. The Court held that the term "prior to" was so general and overly broad, since it might include behavior which occurred days previously and with the permission of the parents and which did not affect the behavior of students on school grounds or the school sponsored event and did not even include the smell of alcohol on the student, as to violate the Fourteenth Amendment right to due process. The same is true with respect to the prohibition "near school property" in respondent's policy.

For the foregoing reasons I **CONCLUDE** that respondent was without legal authority to impose sanctions upon J. B. and L. B. for their conduct which occurred one to one half hours prior to the Dance and which did not affect their behavior or appearance at the Dance. Even if the conduct did fall within respondent's disciplinary authority, however, I would nevertheless **CONCLUDE** that the manner in which respondent enforced its policy on January 29, 1999 was arbitrary, capricious and unreasonable so as to require reversal and expungement of the disciplinary action herein. Substantive due process and fundamental fairness require that similarly situated persons receive similar treatment from disciplinary authorities. The three students whose names were provided to school administrators along with the names of J. B. and L. B. as students who participated in the pre-Dance gathering, but who had already left the Dance before they could be confronted, were in exactly the same position as J. B. and L. B. in terms of their conduct and their attendance at the Dance. Nevertheless, although the parents of these students were called and notified, these students were neither called back to the Dance nor called to the school office the next day. If questioned, some or all of those students may have been as

honest as J. B. and L. B. and if they had denied drinking, medical examinations could have been arranged for them as easily as for those students who were still at the Dance.* I **CONCLUDE** that respondent's failure to even question those students who had already left the Dance, while questioning and punishing J. B. and L. B., was arbitrary, and accordingly, the resultant disciplinary action with respect to J. B. and L. B. should be set aside and expunged from their student records.

With respect to petitioners' argument that respondent failed to follow the requirement of its own policy, I **CONCLUDE** that the policy does not require a medical exam where the student admits to having consumed alcohol.

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of respondent suspending J. B. and L. B. from classes for five days and from extra curricular activities for ten days is hereby **REVERSED** and respondent is directed to remove from the students' school records all references to this disciplinary action. Respondent is also directed to revise its official school policy to eliminate the phase "near school property;" any substituted language should be drafted with an appropriate degree of precision to avoid violating the due process provisions of the Fourteenth Amendment and to ensure that the regulated conduct is within the proper sphere of respondent's disciplinary authority. In this regard there may be some off-site conduct which may be within this scope if there is a sufficiently articulated connection to the school function, e.g., travel enroute.

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

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* Respondent argues that with respect to those students who had already left the Dance, no breathalyzer test could be administered in the event that they denied drinking. The breathalyzer test is not even mentioned in respondent's school policy, however; the students could not be required to take the breathalyzer test in any event. If they chose to do so they could have returned promptly to the Radisson Hotel or they could have proceeded directly to a medical examination with the doctor of their choice as indicated in the school policy.

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

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

November 16, 1999
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/18/99
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 1999
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 2655-99
AGENCY DKT. NO. 41-3/99

F.B. AND M.B., on behalf of minor children, J.B. AND L.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his independent review of the record in this matter, the Commissioner concurs with the ultimate conclusion of the Administrative Law Judge (ALJ) that the Board's action in suspending J.B. and L.B. from classes for five days and from extra-curricular activities for ten days was arbitrary and capricious since the Board did not enforce its Drug and Alcohol Policy towards all students who were suspected of involvement in this incident. The Commissioner concurs with the ALJ that "[s]ubstantive due process and fundamental fairness require that similarly situated persons receive similar treatment from disciplinary authorities." (Initial Decision at 12)

The Commissioner further concurs that the Board was not authorized by its own disciplinary policy to impose sanctions for conduct of the type at issue herein since

the wording of that policy does not clearly extend to such conduct. Notwithstanding such concurrence, however, the important public policy question raised in this matter necessitates comment on the ALJ's conclusions regarding the language "near school property" as found in the Board's policy. While the Commissioner agrees that the phrase "near school property" is vague and that the Board should revise its policy to reflect more accurately the sphere of the Board's disciplinary authority, the Commissioner disagrees with any intimation that the Board's authority is restricted to a distance from the school where "[n]o one standing on school property would have been able to see these prohibited activities or be affected by them." (*Id.* at 11) The Commissioner avers that distance is not determinative of the nexus between alcohol consumption and school functions. Whether the alcohol consumption occurs within the boundaries of the school district, before or after a school event, or on the way to or from a school event, within or across school boundaries, the Commissioner's sentiment regarding alcohol consumption by students remains unambiguous, as articulated in *R.F. v. Park Ridge Board of Education*, 93 *N.J.A.R.* 2d (EDU) 79, 82, *aff'd* 93 *N.J.A.R.* 2d (EDU) 416 and *R.F. v. Park Ridge Borough Board of Education,* 97 *N.J.A.R.* 2d (EDU) 1:

> Let there be no misunderstanding of the Commissioner's conviction in this regard: be it a sip, a slug, or a keg of alcohol consumed on the way to, during or following a school-sponsored event, such behavior as exhibited by these teenaged students, who were fully cognizant of the consequences that could flow from their voluntary act, cannot and will not be sanctioned, excused or mitigated in the face of the Legislature's clear intent as stated in *N.J.S.A.* 18A:37-2 and reflected in the Board's policy***.

The Commissioner therefore adopts the Initial Decision of the ALJ for the reasons expressed therein, as clarified above.[1] The Board is directed to revise its policy to eliminate the phrase "near school property" and to reflect more clearly the sphere of the Board's disciplinary authority, consistent with the cautions articulated by the ALJ. The Board is further directed to remove from J.B.'s and L.B.'s school records all references to the disciplinary action imposed. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Commissioner notes, with reference to the statements of the ALJ (Initial Decision at 9 and 11), that although parents are excluded from prosecution under certain circumstances pursuant to *N.J.S.A.* 2C:33-17, the conduct at issue herein would be unlawful even if parental permission had been given.

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

February 15, 2000
Date of Mailing, February 16, 2000

~~287-00~~
53-00

EDU #665-99
C #287-00
SB # 53-00

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

PETITIONER-RESPONDENT,

V.

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

RESPONDENT-APPELLANT,

AND

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

PETITIONER-RESPONDENT,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 5, 2000

For the Petitioner-Respondent Board of Education of the West Windsor-Plainsboro Regional School District, Parker, McCay & Criscuolo, P.A. (James F. Schwerin, Esq., of Counsel)

For the Petitioner-Respondent Board of Education of the Township of Nutley, Genova, Burns & Vernoia (Elizabeth A. Daly, Esq. and J. Frank Vespa-Papaleo, Esq., of Counsel)

For the Respondent-Appellant, John T. Barbour, Esq.

This appeal involves a single issue: Is the school district in which a group home is located responsible for the transportation costs related to out-of-district placements of classified children receiving special education services who are placed in the group home by the Division of Youth and Family Services ("DYFS") or the Division of Developmental Disabilities ("DDD")?

In her initial decision, Administrative Law Judge ("ALJ") Kathleen Duncan concluded that the district in which the child's parent or legal guardian is domiciled is responsible for the transportation costs related to the child's educational placement and not the district in which the group home is located. Observing that the question of how to fund the free appropriate education required by the Individuals With Disabilities Act is a matter of State law, ALJ Duncan concluded that under the New Jersey Administrative Code and statute, transportation for classified students is part of the educational services required to be funded by the school district in which the parent or guardian is domiciled and for which that district may receive State aid pursuant to N.J.S.A. 18A:46-23 and N.J.S.A. 18A:7F-25. Based on her review of the entire statutory scheme related to the State Facilities Act of 1979, L.1979 c. 207,[1] ALJ Duncan found that there

[1] The State Facilities Act of 1979 ("Act") is codified at N.J.S.A. 18A:7B-1 et seq. Enacted in the face of at least one lawsuit and questions as to whether some of the State facilities could meet the requirements of federal law mandating the provision of a free and appropriate education to all handicapped children, the purpose of the Act was to provide a thorough and efficient education for children in all State facilities. Senate Education Committee Statement accompanying Assembly, No. 86-L.1979, c. 207. When enacted, the Act applied to educational programs in State schools and day training centers for the mentally retarded, State psychiatric hospitals, State residential youth centers, and State correctional facilities.

By enactment of L.1979 c. 207, the Legislature at the same time amended N.J.S.A. 30:4C-26 to provide that:

> whenever the Division of Youth and Family Services shall place any child...in any school district, the child shall be entitled to the educational benefits of such district; provided, however, that the district of residence, as determined by the Commissioner of Education pursuant to law, shall

was no statutory or regulatory reference that would place the financial burden for transporting classified children from their group homes to their out-of-district educational placements on the district in which the group home is located and that there was no logical reason for doing so.

In reaching her conclusion, the ALJ recognized that the Commissioner of Education had been provided with written legal advice bearing on the issue before her by a Deputy Attorney General ("DAG") in 1984. The ALJ further recognized that the DAG had advised the Commissioner that since N.J.S.A. 18A:7B-4, which had been enacted as part of Chapter 207 of the Laws of 1979, permitted funds received by the Department of Human Services and the Department of Corrections to be used for child study team services but did not mention transportation costs, the word "tuition" as used in N.J.S.A. 30:4C-26, which imposed the costs of tuition for children placed in group homes by DYFS on the child's district of residence, did not include transportation costs.[2] The ALJ, however, pointed out that although the Administrative Agency Advice ("AAA") from the DAG acknowledged that N.J.S.A. 18A:7B-4 did not apply to the education of children in group homes, the AAA failed to recognize that because the children to whom that statute applied were, with one exception, residents of State facilities, transportation was not at issue. In this respect, the ALJ stressed that for those children to whom N.J.S.A. 18A:7B-4 applied but who attended day training centers, the costs of transportation had been specifically shifted by the Legislature by enactment of N.J.S.A.

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be responsible for paying tuition for such child to the district in which he is placed. N.J.S.A. 30:4C-26(c).

The statutory question in this case is whether the word "tuition" in N.J.S.A. 30:4C-26(c) includes transportation costs for out-of-district placements.

[2] See supra. note 1.

18A:46-18.1 from the child's district of residence to the State Department of Human Services. Therefore, and based on her overall analysis of the statutory scheme, ALJ Duncan concluded that the more logical interpretation of the Legislature's silence as to transportation costs was that it had not intended to shift the financial responsibility for such costs from the district of residence to the district where the group home happened to be located.

Before the Commissioner arrived at his decision in the matter, the Director of the Bureau of Controversies and Disputes requested administrative agency advice on his behalf as to whether the AAA provided in 1984 remained valid. By memorandum issued on June 20, 2000, the Commissioner was advised by a Deputy Attorney General that the Administrative Agency Advice provided in 1984 remained valid. In reaching this conclusion, the DAG who authored the memorandum acknowledged that ALJ Duncan was correct in pointing out that several statutes bearing on the question of transportation costs had been changed since 1984. However, the DAG concluded that the 1984 Administrative Agency Advice remained valid because N.J.S.A. 30:4C-26, the statute that authorizes group home placements, had not been significantly altered since that time. Hence, in a decision based on the advice that had been provided to him, the Commissioner directed that Delran, the district in which the group home in this case was located, reimburse the petitioning districts, which were the districts of residence of two of the children who had been placed in the group home, for the transportation costs at issue and to continue funding those costs for a third child who was currently in the group home.

The Delran Board has appealed to the State Board of Education from the Commissioner's decision, and we have considered its arguments very carefully. In doing so, it has become increasingly clear to us that it is inequitable to continue to impose the costs at issue exclusively on those school districts in which group homes happen to be located. This is especially true given that the number of children placed in such homes today is far greater than in 1984 and that the transportation costs are considerable because the educational placements of these children may be quite distant from the group home. Moreover, we cannot ignore that in contrast to the funding system in place in 1984 and to which the DAG specifically pointed in her 1984 memorandum, school districts are no longer entitled to be reimbursed by State aid for 90% of the costs of transporting these children from the group homes to their educational placements. However, although the State Board of Education disagrees with the most recent written advice from the Attorney General's Office sustaining the continued validity of the AAA provided to the Commissioner in 1984, the State Board, like the Commissioner, is required to follow that advice. We are therefore compelled to affirm the decision of the Commissioner in this matter.

April 3, 2002

Date of mailing APR 08 2002

54-00

BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

February 15, 2000

OAL DKT. NO. EDU 4145-99
AGENCY DKT. NO. 101-5/99

BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and Stipulation of Settlement, returned by the Office of Administrative Law, have been reviewed. This agency being a party to the present matter, the Stipulation of Settlement is deemed the final decision, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), and the within matter is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000
Date of Mailing: FEB 16 2000

55-00

S.E., on behalf of minor child, J.E. AND L.F., on behalf of minor child, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

February 15, 2000

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11589-99
Agency Dkt. No. 322-10/99

S.E. on behalf of Minor J.E. and
L.F. on behalf of Minor J.T.

v.

BOARD OF EDUCATION OF
MORRIS HILLS REGIONAL
SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

Sandor Einsten, *pro se,*

Larry Flanigan, *pro se*

Record Closed: December 17, 1999 Decided: December 30, 1999

BEFORE **MICHAEL L. RAVIN**, ALJ:

STATEMENT OF THE CASE

Petitioners are appealing a two day in-school suspension alleging that the Morris Hills Regional School District, Morris County, violated their 1st and 14th amendment rights. On November 3, 1999 the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

On the scheduled hearing date, the parties agreed to settle this matter and have prepared the attached Settlement Agreement. I have reviewed the record and the settlement terms and **FIND:**

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

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

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

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

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

December 30, 1999
DATE

Michael L. Ravin, ALJ
MICHAEL L. RAVIN, ALJ

1-5-00
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

JAN - 6 2000
DATE

Mailed to Parties:
Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

jrp

Sandor Einstein as guardian ad litem to Jared Logan Einstein and Larry Flanigan as guardian ad litem to John Edward Titus,
Petitioners.

v.

Morris Hills Regional District

Docket No EDU 11559-99
AGENCY DKT NO 322-10/99

Parties hereby agree to settle this matter, and Petitioners agree to dismiss this matter with prejudice in exchange, the minors Petitioners, Jared Logan Einstein and John Edward Titus will ~~do~~ submit a letter of apology to the Board and will receive (one) 1 Saturday detention. The Board will change the infraction from "Insensitivity" to "Inappropriate Speech."

The letters and the (one) 1 day Saturday detention will be completed by January 23, 2000.

Sandor Einstein, Pro se

Larry Flanigan, Pro se

Peter A. Marra, Esq.

OAL DKT. NO. EDU 11589-99
AGENCY DKT. NO. 322-10/99

S.E., on behalf of minor child, J.E. AND L.F., on behalf of minor child, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 15, 2000
Date of Mailing, February 16, 2000

SB/55-00

SB #55-00

IN THE MATTER OF THE REVOCATION OF :
THE CHARTER OF THE SIMON BOLIVAR : STATE BOARD OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY. : DECISION

Decided by the Assistant Commissioner of Education, September 1, 2000

For the Appellant, Harold R. Edwards, Sr.

On September 29, 2000, the Chairperson of the Simon Bolivar Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Assistant Commissioner of Education revoking the school's charter. On October 2, 2000, the Director of the State Board Appeals Office (hereinafter "Director") advised the appellant that:

> we are unaware of anything that would authorize a non-lawyer to represent a corporation in legal proceedings before an administrative agency. Therefore, a letter of representation from an attorney who will be representing the charter school's interests is required before proceedings to resolve the appeal can occur. We are placing this matter in abeyance pending receipt of a letter of representation.

The appellant was further advised that the notice of appeal was deficient in that it did not include proof of service on the Commissioner or the State-Operated School District of Newark, as required by N.J.A.C. 6A:4-1.6(a).

By letter dated October 12, 2000, the Director advised the appellant that the record on appeal had been received as required by N.J.A.C. 6A:4-1.8(b), but that the

deficiencies addressed in her letter of October 2 were required to be corrected before the appeal could be considered.

The appellant did not respond to either letter. By letter dated December 5, 2000, the Director notified the appellant that unless a letter of representation was received by December 20, 2000, the appeal would be referred to the Legal Committee of the State Board for consideration of whether to dismiss it for failure to perfect.

The appellant has still failed to provide a letter of representation or proof of service of its notice of appeal on the Commissioner and State-operated District, more than four months after its appeal was filed. Nor has the appellant responded in any way to any of the above-mentioned correspondence. Given these circumstances, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

February 7, 2001

Date of mailing FEB 09 2001

56-00

E.L., on behalf of minor child, A.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning grandparent challenged Board's residency determination.

The ALJ concluded that petitioner satisfied the two-part statutory test under the "affidavit student" provision of *N.J.S.A.* 18A:38-1b(1) to be entitled to a free public education in respondent's District.

The Commissioner affirmed the ALJ's determination that A.H. was entitled to attend school in the District pursuant to the "affidavit student" provision in *N.J.S.A* 18A:38-1b(1) for the period prior to March 25, 1997. The Commissioner modified the Initial Decision as it pertains to the period after March 25, 1997, the date on which A.H. reached the age of majority, underscoring that after that date A.H. acquired the right to choose her own domicile, the record demonstrated that A.H. was domiciled in respondent's District and, thus, A.H. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1a.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3172-97
AGENCY DKT. NO. 32-1/97

E.L. and J.L., on behalf of their minor grandchild, A.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT,
Respondent.

E.L. and **J.L.,** *pro se*

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

Record Closed: December 20, 1999 Decided: January 3, 2000

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

Statement of Case

This is an appeal on behalf of a high school student seeking enrollment in the Morris Hills Regional School District. Petitioner is living with her maternal grandparents in Denville, New Jersey because her mother has abandoned her. She came to live with the grandparents because mental health professionals recommended that petitioner needs the emotional support of her extended family. Her mother has remarried and the

new husband wants nothing to do with the petitioner. Until mid-January 1997, the petitioner attended private school in Connecticut at her mother's expense. Petitioner's mother receives $195 per month in child-support payments from petitioner's father and contributes $200 per month to the grandparents for petitioner's living expenses.

The dispute involves whether petitioner is entitled to a free public education under the "affidavit-student" provision of *N.J.S.A.* 18A:38-1(b), which applies to students living with relatives (other than parents) or friends, who reside in the district. Basically, the issue is whether petitioner satisfies the two-part statutory test for admission as an affidavit student: first, the "hardship test," whether the child's parent is incapable of supporting or providing care for the child "due to a family or economic hardship;" and, second, the "gratis test," whether she is "supported by such other person gratis as if [s]he were such other person's own child."

Procedural History

On January 31, 1997, the grandparents filed a verified petition with the Commissioner of Education ("Commissioner") contending that petitioner is eligible to attend school in the district. Respondent Board of Education of the Morris Hills Regional School District ("Board") filed its answer and counterclaim on February 19, 1997. Pursuant to *N.J.S.A.* 18A:38-1(b), petitioner was admitted to school, provided that the grandparents would be liable for tuition if the Board ultimately prevailed in this litigation.

Subsequently, on March 3, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on July 18, 1997. Witnesses and exhibits are listed in the appendix. Shortly thereafter, on August 5, 1997, the Board filed a legal brief.[1] On December 20, 1999, the OAL held a telephone status conference.

[1] Petitioner's representatives made a closing statement at the hearing, but chose not to file a post-hearing brief.

Findings of Fact

(1) Family Hardship

Petitioner does not claim that her mother suffers any economic hardship which prevents her from providing financial support. Instead, petitioner's argument rests solely on the existence of family hardship. A.H. was only four years old when her father left her and her mother. Recently she turned eighteen, but she is not yet financially self-sufficient. She has had a troubled relationship with her mother for many years. Reportedly, her mother blames her for causing the breakup of her second marriage. In or about 1993, her mother married a third husband, with whom the mother currently lives in Westchester County, New York. It is the new husband's first marriage and he has no patience in dealing with children. He is a partner in a successful brokerage house and is used to getting his own way. Once he told the grandfather that the child "is making [his] marriage impossible" and that he "wants her out of his life."

Moreover, petitioner's mother felt that she had lost control over her daughter's behavior. Despite a suggestion that the family seek counseling, the stepfather was unwilling to go to therapy. Petitioner's mother placed a high priority on preserving her third marriage. Faced with choosing between her husband or her daughter, she chose her husband. Accordingly, in September 1994, the parents shipped petitioner for her first year of high school to Milford Academy, a private boarding school in Connecticut. While she was at school, her parents visited her only once. Over the summer of 1995, they sent her to sleep-away camp "to keep her out of the house." Petitioner returned to Milford Academy for her second year in September 1995.

Both grandparents recounted a number of incidents that illustrate the mother's uncaring attitude toward her daughter. During the summer of 1996, petitioner had a job at a travel agency in New York, where her mother also worked. When petitioner got into an argument with her mother and ran away from home, her mother changed the locks on the door and told petitioner that she could never come back. Her grandparents tracked her down, and found her sleeping on the floor of a friend's house

in Connecticut. She had taken a part-time job at a clothing store and was living what her grandparents described as "a minimal life style." Her two uncles, with whom she is very close, reported that petitioner was "not doing well." Although her mother continued collecting child support, she gave no money whatsoever to petitioner. Therefore, the grandparents went to Connecticut in July 1996 and brought petitioner back to live with them for the remainder of the summer.

In September 1996, petitioner returned to Milford Academy for her third year. Her grandmother described the "negotiations" necessary to regain possession of petitioner's belongings stored at her mother's house. Petitioner and her grandmother traveled to the mother's house in New York but were not allowed beyond the living room, where all of petitioner's possessions had been "dumped in a pile." Removal of petitioner's property was "supervised" by the stepfather's younger brother, who was occupying what had previously been petitioner's bedroom. He refused to let them take her computer and television set, even though petitioner had used both items in school. By the time that petitioner arrived in Connecticut to start her studies, she appeared "exhausted emotionally."

Petitioner's emotional state worsened during the fall term. According to her grandmother, petitioner sounded "very upset" and cried a lot during her telephone calls from school. Her voice was "high pitched" and "weak." More than once, petitioner had to hand the phone to someone else, because she could no longer talk due to her crying. Since the grandparents had attended an open house and were listed as the contact persons on student records, the school referred any problems to them. Nearly every two weeks, the dean of the school would call the grandparents to say that petitioner had gotten into a fight with her teachers or had burst into tears for no apparent reason. Petitioner spent two weekends at her grandparent's home, missed a full week of school in October to be with her grandparents, and came back to them for her winter vacation. After her October visit, the grandparents arranged for therapy in order to provide petitioner with an emotional support system at school.

In a well-intentioned effort to bring about a reconciliation, the grandfather asked mother and daughter to prepare a written list of grievances against each other. When he received the mother's list in December 1996, however, he decided not to show it to petitioner because of its "angry" tone. While the mother's grievances seemed to be fairly typical of parental complaints about teenagers, each entry was a whole page and expressed in unsympathetic language. One month later, in mid-January 1997, the grandfather authorized petitioner's social worker to share her mother's grievances with her. This turned out to be "a big mistake." Petitioner became distraught at her mother's overt hostility toward her. Next day in school, she asked her teachers why her mother didn't want her. Hearsay testimony indicates that petitioner was "hysterical" and made suicidal threats. School officials telephoned the grandparents and advised them to pick her up right away. That same day, her social worker called to say that petitioner was in terrible emotional shape and should not be left alone.

On January 17, 1997, her grandmother drove to Milford Academy to retrieve petitioner. Petitioner was glad to see her and confided that she "needed to be around family." Her face was "tear-stained" and "red and puffy." Most of her belongings were already packed. She cried "on and off" during the two-hour trip home. Soon after bringing her into their home, the grandparents applied to enroll petitioner in the local school system and furnished the required affidavits to the Board. When the Board refused to admit petitioner, the grandparents instituted this law suit to avoid any interruption in petitioner's education.

Michelle Rabin, a licensed clinical psychologist with many years of experience in dealing with adolescents, testified that the mother's repeated rejection has "overwhelmed" petitioner. Dr. Rabin started treating petitioner in March 1997 and has been seeing her regularly on a weekly basis. Ordinarily, Dr. Rabin meets with the biological parent when she is treating an adolescent. When Dr. Rabin contacted her in late April, the mother was "very reluctant to set up an appointment," and put off any meeting until late June. About a week before the scheduled session, the mother abruptly called to cancel the session. Although Dr. Rabin told her how "destructive" such cancellation would be to her child, the mother made it "very clear that she didn't

want a relationship with her daughter." Dr. Rabin even offered to stay late so that the mother could come from New York, but the mother was unwilling to reconsider her decision. Since then, Dr. Rabin has had no further communication from the mother. Predictably, petitioner's reaction to her mother's rebuff was "anger" and "hurt" feelings. Again, her mother has repudiated petitioner's sincere efforts to reach out and reestablish some kind of relationship. In another recent instance, petitioner stopped by her mother's house and discovered a "for-sale" sign on the property. Adding further insult, her mother declined to invite her in for a visit.

At the hearing, Dr. Rabin explained that the "predominant theme" of petitioner's life is "abandonment," originally by her father when she was young and now by her mother. Dr. Rabin diagnosed petitioner as suffering from "depression," which led her to "snap" emotionally. Petitioner's sudden departure from boarding school was "not a well thought-out plan." Rather, she ran away "because she could not handle it anymore." In Dr. Rabin's professional judgment, the possibility of living with her mother has become "moot" in light of the fact that her mother wants nothing to do with her. Meanwhile, petitioner "has finally made a connection" with stable and supportive adults. Consequently, Dr. Rabin has "urged [petitioner] to remain at her grandparents house where she can continue her high school education for one more year."

Other mental health professionals personally familiar with petitioner's situation corroborate the opinions of Dr. Rabin. Before coming to New Jersey, petitioner had been under the care of a mental health clinic in Connecticut for a period of three months. Karyn Ertel, a social worker affiliated with the clinic, commented that petitioner had experienced "serious family discord and conflicts which prevent her from being able to visit or live with her mother." In a written report to the grandparents, Ms. Ertel stated that petitioner's "best interests would be served by her returning to live with you, or other extended family members, until she is in a position to live independently, or until her mother is able to resolve some of the issues which have prevented their reunification ." Another social worker, Stefanee Wolfsie, worked with her for one month in January 1997, when petitioner came to live with her grandparents. She agreed that petitioner "was dealing with issues of depression, school transition and different living

arrangements." In order to observe family interaction, she facilitated a telephone conversation between petitioner and her mother. Ms. Wolfsie observed that petitioner "became easily upset and tense throughout the phone call." Like the other experts, Ms. Wolfsie recommended against "disturbing residency, school and a stable environment." Additionally, she remarked that petitioner "has become comfortable and is thriving in her present environment."

I FIND that the mother is incapable of providing care for her child due to a genuine family hardship. Significantly, this is not a case where it is merely inconvenient for the mother to take care of her child. Expert testimony establishes that petitioner comes from a dysfunctional family and that her mother lacks the normal parental instinct to nurture and protect her. Exposure to her mother's unloving attitude has already caused substantial damage to petitioner's self-esteem and emotional resilience. It is unrealistic to expect that she could live with her mother at the present time. Furthermore, the record strongly supports the view that petitioner is too emotionally fragile to remain at boarding school. Three experts in child care concur that petitioner requires the secure family bonds which her grandparents are able to provide. The Board offers no professional opinion to rebut this consensus.

(2) Supporting the Child Gratis

As previously mentioned, the mother has sufficient sources of income to pay for the financial support of her daughter. She is gainfully employed by a New York travel agency and her husband is a partner in a brokerage company. Their joint federal income tax return for 1995 reflected a combined gross income of $159,460.[2] In addition, the biological father of petitioner pays monthly child support of $195[3]. Prior to her third marriage, the mother purchased a house in West Harrison, New York at the cost of $325,000, subject to an outstanding mortgage of an undisclosed amount. While

[2] The record does not provide a breakdown of earnings between husband and wife.
[3]This is the figure to which the grandparents testified at the hearing. However, the mother's sworn affidavit contains the different figure of $173 per month. Attached to the affidavit was a court order, entered in September 1986 in the Florida divorce

petitioner attended Milford Academy in Connecticut, the mother was responsible for payment of tuition and living expenses of approximately $13,000 per year.

Affidavits submitted in support of petitioner's application show that the mother gives the grandparents $200 per month towards petitioner's living expenses. Also, the child is covered under the medical insurance plan provided by the mother's employer.[4] If a doctor is within the particular health network, the insurance company pays 80% of the bill and the grandparents have been paying the remaining 20%.[5] Although the grandparents hope that the mother will reimburse them for any co-payments, thus far she has only paid the nominal sum of $60.

The grandparents have estimated the additional expenses incurred as a result of petitioner having come to live with them. Comparing their expenditures in various categories for the first six months of 1997 with the corresponding period in 1996, they calculate the average monthly increase to be as follows:

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proceedings, directing petitioner's father to pay child support of $65 per week or roughly $280 per month. It is unknown whether there is a more recent court order.

[4]Proofs not indicate whether the mother must pay any extra premium to add her child to the medical plan furnished by her employer. Similarly, it is unknown whether the child's pre-existing injuries would be covered if petitioner had to purchase her own medical insurance on the open market.

[5] Some of the service providers treating petitioner, *e.g.,* Dr. Rabin, are outside the network, so that the grandparents incur a greater expense.

Heat and Electricity	$102[6]
Food	112
Telephone	60[7]
School Lunches	55[8]
Incidental Expenses	100[9]
Allowance	100
Total Monthly Increase	$529

Deducting the $200 monthly payment received from the mother, the out-of-pocket monthly expense incurred by the grandparents is $329 or roughly 60% of the total. Since they contribute more than half of their granddaughter's living expenses, they plan to claim her as a deduction on their 1997 income tax return.

In addition, the grandparents are purchasing a used car for petitioner as "a symbol of her freedom." As soon as she has a car, petitioner will no longer receive an allowance and the money will go toward automobile insurance premiums, which the grandparents will pay. She will be responsible for gasoline and maintenance. Petitioner has a part-time job as a cashier for a large supermarket chain.. She earns minimum wage and pays for her own clothing and entertainment expenses. Her grandparents occasionally pay for "big ticket" items, such as a coat costing $130.

I FIND that the grandparents incur extra expenses of approximately $529 per month as a result of their granddaughter's living arrangements. Petitioner's mother contributes $200 per month toward petitioner's living expenses, representing mainly a "pass-through" of child support payments from the biological father. The grandparents pay the remainder of $329 per month or about 60% of petitioner's ordinary and usual living expenses. Although petitioner is covered under her mother's health insurance

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[6]On cross-examination, the grandmother acknowledged that she made no adjustment for differences due to changes in weather conditions between 1996 and 1997.

[7] Telephone expenses are for the first five months only. Currently petitioner is paying her own telephone charges.

[8]Because school is only in session for about thirty-six weeks per year, the actual cost of $80 per month for school lunches has been prorated.

[9]Incidental expenses are a monthly estimate of assorted nonrecurring expenses, such as a bathroom rug, a passport, drivers license fees, and a college-preparatory study course.

plan, the grandparents have been paying most of the co-payment amount. They will claim petitioner as a dependent on their 1997 income tax returns.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that petitioner satisfies the statutory criteria and is entitled to a free public education in the Morris Hills Regional School District.

At all relevant times, petitioner was either underage or unemancipated. Accordingly, petitioner lacked the legal capacity to choose a domicile of her own, *see Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J.L.* 474 (Sup. Ct. 1925), and the situation is governed by the "affidavit-student" provision of the school laws. *N.J.S.A.* 18A:38-1(b) provides that public schools shall be free to any person over five and under 20 years of age "who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child" upon the filing of two affidavits establishing eligibility.

A sworn statement from the resident attesting:

> that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term.

Together with a sworn statement from the child's parent or guardian attesting:

> that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education in the district.

These affidavits "shall be accompanied by documentation to support the validity of the sworn statements." If the school board determines that the evidence does not

support the validity of the claim, it may deny admission to the child and the resident may appeal to the Commissioner for a hearing. At such hearing, the resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection." Such proceedings are subject to the requirements of due process, and a district board may not automatically deny an application on the basis of inadequate documentation without consideration of the full circumstances developed at the evidentiary hearing. *J.A. v. Bd. of Educ. for South Orange and Maplewood*, 318 *N.J. Super.* 512 (1999). *Gunderson v. Bd. of Educ. of Brigantine*, 95 *N.J.A.R.*2d (EDU) 39 (Comm'r Sept. 15, 1994).

Indisputably, the grandparents, who own their own home and have lived in Denville for many years, are "domiciled" within the Morris Hills Regional School District. [10] Likewise, petitioner's parent is clearly incapable "of supporting or providing care for the child due to a family or economic hardship" as that term is used in the statute. As the Board would interpret that language, petitioner cannot meet the hardship test because her mother possesses sufficient financial wherewithal to place her in private school and summer camp. Such narrow reading ignores the plain statutory language, phrased in the disjunctive, that parental incapacity may be due to either "family *or* economic hardship." (emphasis added). School law decisions have recognized this distinction and have granted relief on the basis of family hardship, even when parents were financially able to support their child. Illustratively, in *J.B. v. Bd. of Educ. of Ocean Twp.*, 96 *N.J.A.R.*2d (EDU) 628 (Comm'r March 25, 1996), a child unable to tolerate his father's unrealistic academic expectations exhibited suicidal tendencies and had threatened to run away from home. He went to live with his grandmother, where he no longer felt pressured by his father and was "much happier than when he was at his parent's home." *J.B.*, at 629. Notwithstanding that his parents could afford to send him to private school, the Commissioner held that the "unique and compelling circumstances . . . rise to the level of family hardship sufficient to meet the standard of the pertinent statute." "To hold otherwise," the Commissioner explained, "harms a party

[10]Morris Hills Regional School District is a regional high school district serving the New Jersey municipalities of Denville, Rockaway Borough, Rockaway Township and Wharton.

the Legislature never meant to penalize . . . and overlooks the substantial State interest in ensuring the education of all its children." *J.B.* at 632. *See also*, *Gunderson*, at 42.

Our own case presents equally poignant and compelling circumstances. Regardless of the mother's financial balance sheet, the record clearly shows that she lacks the emotional resources necessary to provide support and care for her daughter. Indeed, the evidence portrays a destructive family dynamic and a mother who has abandoned her own child. While *J.B.* was decided on the facts alone, here there is professional guidance to inform the decision. Mental health experts agree that petitioner's health and welfare would not be promoted by relegating her to an institutional setting and that she requires the personal support and care which her grandparents are able to offer.

Much more difficult is the question of whether petitioner is able to satisfy the "gratis" test. Nowhere is that term expressly defined in the statute, and the legislative history provides little help in ascertaining its meaning. The standard dictionary definition of the word is "without charge or recompense; free," WEBSTER'S NEW INTERNATIONAL DICTIONARY 992 (3d ed. 1967), or "without reward or consideration; done or received freely or gratuitously," BLACK'S LAW DICTIONARY 700 (6th ed. 1990). Certainly the grandparents did not act in expectation of financial gain or profit, like a baby-sitting service or child-care center. Their motivation arose solely out of love and concern for their grandchild and was not dependent on making money. It is equally apparent that petitioner did not enter her grandparent's household, in the language of the statute, "solely for the purpose of receiving a free public education within the district." She went to live with them because her mother did not want her, she was miserable at the boarding school, and she had nowhere else to turn.

The Board concedes that the gratis test does not necessitate that the caretaker provide "all of the financial support" for the child in their home. Numerous examples exist where children living with relatives have been admitted to local school districts even when the caretaker has obtained some measure of outside financial support. For example, in *Bd. of Educ. of East Brunswick* v. *J.R.*, 96 *N.J.A.R.*2d (EDU) 285, 287

(Comm'r Dec. 12, 1995), the Commissioner upheld a ruling that it is sufficient if the grandparents provide "a substantial portion of the financial support" for their grandchild. In that case, the grandparents took care of their severely-disabled grandchild because his mother and stepfather had busy schedules and could not give him the extensive attention he needed. The child's natural father, who was divorced from the mother, made support payments, which the grandmother put into a bank account for the child. Moreover, the mother paid for her child's clothing and diapers and his medical, dental and drug expenses were covered under his parent's health insurance policy. Although the specific amount of assistance is not quantified, it appears from the factual discussion to be more nominal. Nonetheless, the Commissioner adopted the recommendation that the grandparents had assumed all obligations "relative to his school requirements," *J.R.* at 287, and concluded that they "satisfy the criteria set forth in *N.J.S.A.* 18A:38-1(b)(1)." *J.R.*, at 288 Nothing in the Commissioner's rationale suggests that the outcome depends on the deposit of the support payments into a separate account, since presumably the trust funds could always be invaded if the grandmother needed the money to pay for her grandchild's necessities.

Other cases have also decided that the fact that the child happens to be covered under his parent's medical insurance does not destroy the gratis nature of the caretaker's support. *See R.A. v. Bd. of Educ. of Ewing Twp*, 95 *N.J.A.R.*2d (EDU) 49, 50 (Comm'r Oct. 5, 1994); *J.B.*, *supra*, at 629. Occasional small gifts are not enough to alter the fundamental relationship among the parties. *J.B.*, *supra* at 630 (a winter coat, some jeans and shirts, and some dress clothes). Of particular significance, the Commissioner declared that receipt of social-security survivor benefits "does not, in itself, disqualify [the child] from school attendance within the intendment of the law's *gratis* support requirement." *Gunderson*, *supra*, at 42. Rather than treating social security benefits as compensation to the caretaker, the Commissioner regarded them as "a direct government benefit to [the child], with petitioner merely acting as payee [.]" *Ibid.*

Continued payment of child support by the biological father does not undermine the grandparents' status as supporting their granddaughter "gratis." They contribute

more than half of petitioner's living expenses, a substantial portion of her support and enough to claim her as a dependent on their next income tax return. Like social security payments, child support is not recompense to the grandparents for their services, but a court-mandated obligation for the direct benefit of the child. Public policy places an absolute obligation on parents to support their children. *N.J.S.A.* 9:17-30 to 59. See also, *N.J.S.A.* 44:1-140. *Bergen Cty Welfare Bd. v. Cueman*, 164 *N.J. Super.* 401 (J. & D.R. Ct. 1978). It is doubtful that the Legislature would have intended that a family hardship requiring transfer of custody should absolve a natural parent of his legal responsibility to support his children. More appropriately, the two statutory schemes should be read harmoniously together, so that a child living with her grandparents can attend her local public school free of charge and continue receiving child support. That would be the case if a divorced custodial parent moved into the school district, and should be no different for grandparents who are supporting their granddaughter as if she were their own child.

Order

It is **ORDERED** that petitioner is eligible to receive a free public education in the Morris Hills Regional School District.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 3, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1-5-00
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN - 6 2000
DATE

Barbara A. Kerner
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Witnesses

1. Dr. Michelle B. Rabin, licensed clinical psychologist

2. E.L., grandfather of A.H.

3. J.L., grandmother of A.H.

4. Manual Edward Deus, business administrator/board secretary, Morris Hills Regional District

List of Exhibits

No.	Description
P-1	Copy of letter to Mr. and Mrs. E.L. from Karyn M. Ertel, LCSW, dated March 28, 1997
P-2	Copy of affidavit of resident, dated January 25, 1997
P-3	Copy of affidavit of parent/guardian, dated January 24, 1997
P-4	Copy of letter addressed to Whom it May Concern from Stefanee L. Wolfsie, LSW, dated April 17, 1997
P-5	Copy of letter to the Office of Administrative Law from Michelle B. Rabin, Ph.D., dated July 8, 1997
R-1	Copy of letter to L.M. and G.M. from E.L. and J.L., dated August 21, 1996

OAL DKT. NO. EDU 3172-97
AGENCY DKT. NO. 32-1/97

E.L., on behalf of minor child, A.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm, with modification, the Initial Decision of the Administrative Law Judge (ALJ). In so doing, the Commissioner underscores that, *prior to March 25, 1997*, the date on which A.H. turned 18 years old, this matter was governed by *N.J.S.A.* 18A:38-1b(1), that portion of the relevant statute known as the "affidavit student" provision, which permits a child who is living with another person who is domiciled in the district to attend school free of charge, under certain conditions, where the domiciliary provides the requisite affidavits and proofs. Like the ALJ, the Commissioner is satisfied that, for the aforementioned period of time, A.H. was entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1b(1).[1]

[1] Here, the Board issued its ineligibility decision on January 27, 1997 and petitioners filed their Petition of Appeal on January 31, 1997. The record indicates that the Board *was aware* that A.H. would soon turn 18, (*see* Answer at 2, para. 4; Board's Exhibits A and B), notwithstanding that its submissions were rife with references to "the minor, A.H." (Board's Initial Set of Interrogatories, June 20, 1997 at 5, 7, 8, 11, 12)

However, upon reaching age of majority, A.H. acquired "the same legal capacity to act and the same powers and obligations as a person 21 or more years of age." *N.J.S.A.* 9:17B-3.[2] As such, the Commissioner finds that A.H. acquired the right to choose her own domicile.[3] Thus, after March 25, 1997, as long as A.H. was a domiciliary of the District, she was entitled to attend school there, pursuant to *N.J.S.A.* 18A:38-1a. In this connection, the record indicates that A.H. had lived in Denville since July of 1996 (Initial Decision at 4), and that, when this matter was heard in the summer of 1997, A.H.'s driver's license listed the Denville address, her passport identified the Denville address as her address of record, and she had both bank and phone accounts established in Denville. (Board's Initial Set of Interrogatories, June 20, 1997 at number 5). *Indeed, the Board offered no evidence that A.H. resided elsewhere while she attended school in the District.* Consequently, the Commissioner determines that A.H. was entitled to a free public education in the Board's District after March 25, 1997, pursuant to *N.J.S.A.* 18A:38-1a.[4]

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[2] "Effective January 1, 1973, the Legislature lowered the age of majority in New Jersey from twenty-one to eighteen. *L.*1972, *c.* 81 (codified at *N.J.S.A.* 9:17B-1 to –3). *N.J.S.A.* 9:17B-1 consists of a legislative declaration of intent, pending revision and amendment of other statutes, to extend to eighteen-year-olds the basic civil and contractual rights and obligations that previously had been available only to those twenty-one years of age or older:

> ***including the right to contract, sue, be sued and defend civil actions, apply for and be appointed to public employment, apply for and be granted a license or authority to engage in a business or profession subject to State regulation, serve on juries, marry, adopt children, attend and participate in horse race meetings and parimutuel betting and other legalized games and gaming, *** sell, purchase and consume alcoholic beverages, act as an incorporator, registered agent or director of a corporation, consent to medical and surgical treatment, execute a will, and to inherit, purchase, mortgage or otherwise encumber and convey real and personal property.***"

Green v. Auerbach Chevrolet Corp., 127 *N.J.* 591, 594 (1992).

[3] In so finding, the Commissioner does not agree that financial self-sufficiency is a relevant consideration in a matter of this type (Initial Decision at 3), as opposed to a proceeding to determine emancipation for purposes of deciding entitlement to continued maintenance and support.

[4] Although the parties do not so specify, it appears from the record that A.H. was a junior in high school at the time this matter was filed in January 1997 and, therefore, has likely graduated.

Accordingly, the Initial Decision of the ALJ is affirmed and modified as noted herein.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

[5] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

57-00

IN THE MATTER OF THE TENURE	:	
HEARING OF TIMOTHY MC ENROE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON MOTION
TOWNSHIP OF BERKELEY	:	
HEIGHTS, UNION COUNTY.	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 1372-98
AGENCY DKT. NO. 476-12/97

IN THE MATTER OF THE TENURE HEARING OF TIMOTHY McENROE, BOARD OF EDUCATION OF BERKELEY HEIGHTS, UNION COUNTY

Robin T. McMahon, Esq., for petitioner
(Martin R. Pachman, P.C., attorney)

Sheldon Pincus, Esq., for respondent
(Bucceri & Pincus, attorney)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 5, 1997, the petitioner, Board of Education, Township of Berkeley Heights (Petitioner or Board) filed with the Commissioner of Education tenure charges against the respondent, Timothy McEnroe, (respondent or McEnroe) a custodian in its school district. The tenure charges charged the respondent with conduct unbecoming a public employee based on the fact that he had been arrested and charged with committing a burglary in violation of *N.J.S.A* 2C 18-2(a)(1), theft, in violation of *N.J.S.A.* 2C:20-3(a) and criminal mischief in violation of *N.J.S.A.* 2C:17-3. The Borad further

alleged that the respondent had admitted complicity in the charges, thus warranting a forfeiture of his position.

On December 31, 1997, respondent filed a petition of appeal. Following a prehearing conference, an Order was entered on November 19, 1998 whereby this matter was placed on the inactive list pending resolution of the criminal charges against the respondent. After disposition of the criminal matter, the petitioner moved for summary judgment. The respondent did not oppose the motion.

FACTS

The Board of Education of the Township of Berkeley Heights, Union County, hired the respondent as a custodian on October 30, 1995, and granted him tenure in due course. McEnroe was assigned to an elementary school, where he was in regular contact with students.

The Board certified a charge of misconduct against McEnroe on December 10, 1997. The charge is based upon his arrest on October 29, 1997 on charges of burglary, theft, and criminal mischief.

On December 15, 1997, McEnroe appeared before the Berkeley Heights Municipal Court and entered a plea of guilty to the criminal mischief charge.[1]

On June 24, 1998, McEnroe was indicted on counts of burglary, theft, and conspiracy to commit those crimes. On October 19, 1998, he pled guilty to the charge of burglary in the third degree. On March 23, 1999, a judgment of conviction on the count of third degree burglary was formally entered which included an order of forfeiture of McEnroe's public employment.

[1] McEnroe also appeared before the Cranford Municipal Court on September 1, 1997, and pled guilty to a charge of criminal mischief.

DISCUSSION, FINDINGS AND CONCLUSIONS

Petitioner moves for summary decision. The New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-1.1 et seq.) provide that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(a). In considering the parties' motion for summary decision, this tribunal must determine whether "the papers and discovery . . . together with the affidavits. . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b).

Recently, the Supreme Court of New Jersey held that when deciding a motion for summary judgment under R 4:46-2,

> . . . [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light must favorable to the non-moving party, are sufficient to permit a rationale fact finder to resolve the alleged disputed issue in favor of the nonmoving party.
>
> [*Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995)]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law". *Id.* At 533. See also *N.J.A.C.* 1:1-12.5(b) ("[A]n adverse party [to a summary decision motion] in order to prevail must be responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding."

I **FIND** and **CONCLUDE** that this matter is appropriate for summary disposition since there no materially disputed facts.

N.J.S.A. 2C:51-2 provides for the forfeiture of public employment as a consequence of a conviction for certain crimes. The statute provides in relevant part as follows:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense, shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or a crime of the third degree or above
>
> . . . .
>
> b. A court of this State shall enter an order of forfeiture pursuant to subsection a.:
>
> (1) immediately upon a finding of guilty by the trier of fact or a plea of guilty entered in any court of this State unless the court, for good cause shown, orders a stay of such forfeiture pending a hearing on the merits at the time of sentencing. . .

The statute expressly provides alternative grounds for mandatory forfeiture: conviction of a crime involving dishonesty or conviction of a crime of the third degree or above. *In Turner v. State Operated School District of the City of Newark*, 96 *N.J.A.R.2d* (CSV) 146, it was held that:

> It is well settled that forfeiture automatically occurs by operation of law at the time of sentencing for conviction of a crime of the third degree or above. . . (citatons omitted).
>
> . . . .
>
> Civil Service Decision involving *N.J.S.A.* 2C:51-2 have uniformly stated that a hearing is unnecessary if the conviction is for a crime of the third degree or above. For example, in *DeLeone v. Essex County*, 94 *N.J.A.R.2d* (Vol. 2B) 544, 546 (Merit Sys. Bd.), the Board declared that forfeiture is "not only appropriate but is mandated" by a conviction for third degree aggravated assault. Likewise, in *Rivera v. City of Bridgeton*, 92 *N.J.A.R.2d* (Vol. 2) 311, 312

(Merit Sys. Bd.), involving convictions for the first-degree crime of aggravated sexual assault and the third-degree crime of terroristic threats, the Board noted that "the convictions are dispositive of this case." See also, *Startling v. Essex County Citizens Service*, 92 *N.J.A.R.2d* (Vol. 2) 431, 432 (Merit Sys. Bd. (holding that the forfeiture statute is self-executing where the employee entered a guilty plea to the third-degree crime of receiving stolen property.)

Turner v. State-Operated School District of the City of Newark, 96 *N.J.A.R.2d* (CSV) 146, 147.

In *Turner*, the petitioner "was convicted of crimes serious enough for the Legislature to classify them as crimes of the third degree." Ibid. Here, McEnroe also plead guilty to third degree crimes. Cases concerning such grave crimes "obviously disqualify the employee for further [governmental] service." *Id.* At 147 (citing, *Moore v. Youth Correctional Institute*, 119 *N.J.* 256, 268). I **FIND** and **CONCLUDE** the respondent's plea of guilty to a third degree crime and subsequent court order for forfeiture of his public employment position is grounds for forfeiture of his public employment position with the Board under *N.J.S.A.* 2C:51-2.

ORDER

Therefore, the petitioner's motion for Summary Decision is hereby **GRANTED**. The tenure charges are hereby sustained and the petitioner is hereby terminated from his position as a custodian, effective December 5, 1997.

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

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

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

1/6/2000
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

1/7/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 1372-98
AGENCY DOCKET NO. 476-12/97

IN THE MATTER OF THE TENURE	:	
HEARING OF TIMOTHY MC ENROE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON MOTION
TOWNSHIP OF BERKELEY	:	
HEIGHTS, UNION COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law in the form of an Order of Motion for Summary Judgment have been reviewed. No exceptions were filed by the parties.

Upon review of the record and the recommended order of the Administrative Law Judge (ALJ), the Commissioner does not agree with the disposition of the matter as set forth by the ALJ. The order of termination sought by the Berkeley Heights Board of Education is unnecessary. As a result of the order of forfeiture of public employment ordered by Superior Court on March 19, 1999 against respondent, the tenure charges against him were rendered moot and his employment with the Board ceased, effective upon the date of the forfeiture order. *See In the Matter of the Tenure Hearing of Kenneth Wilburn, School District of the City of Atlantic City, Atlantic County*, decided by the Commissioner May 24, 1999.

Accordingly, the Board's Motion for Summary Judgment and Petition of Appeal are hereby dismissed as moot.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

*This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

58-00

GEORGE MONTGOMERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff member alleged that the Board wrongfully withheld his annual increment in violation of *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:29-14.

The ALJ granted summary decision to the Board and dismissed the appeal with prejudice, determining that the appeal was never properly before the Commissioner since the Public Employment Relations Commission had asserted its jurisdiction over this matter from the outset through the arbitrator's ruling that petitioner's increment was withheld for primarily disciplinary reasons.

Finding petitioner's exceptions without merit, the Commissioner affirmed the Initial Decision for the reasons stated therein. Summary decision was granted to the Board and the Petition of Appeal was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12289-95
AGENCY DKT. NO. 419-10-95

GEORGE MONTGOMERY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

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

Record Closed: December 17, 1999 Decided: January 4, 2000

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On October 24, 1995, petitioner filed a Petition of Appeal with the Commissioner of Education (Commissioner) alleging that respondent, the Board of Education of the City of Irvington (Board), wrongfully withheld his annual increment for the 1996-97

school year in violation of *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:29-14. On November 22, 1995, the Board filed its answer and affirmative defenses. On December 8, 1995, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Following the Board meeting of September 20, 1995, at which the Board resolved to withhold Montgomery's increment for the following school year, petitioner filed a grievance pursuant to his employment contract challenging the same increment withholding that is the subject of this present proceeding. This grievance resulted in a binding arbitration hearing before the Public Employment Relations Commission (PERC), initiated on behalf of petitioner by the Irvington Education Association (IEA), Montgomery's employee union.

As a result of the arbitration, on March 7, 1996, respondent requested that the present matter be placed upon the inactive list pending the outcome of the arbitration. This matter became inactive by an Order of Inactivity dated March 19, 1996. A second Order of Inactivity, dated October 30, 1996, continued the inactive status of this case before the Office of Administrative Law until April 30, 1997. By order dated May 9, 1997, inactivity was continued until November 10, 1997, because the arbitration proceeding was not yet completed. A subsequent Order of Inactivity, dated November 24, 1997, continued the inactive status until May 26, 1998. One final Order of Inactivity, dated June 19, 1998, kept the case inactive until December 21, 1998. Any further return to the inactive list was denied. The matter was scheduled for hearing on November 3, 1999, the first mutually convenient day available.

On the scheduled hearing date, the parties were not prepared to proceed. After a discussion off the record, it was determined that this matter should be conducted on the papers by cross-motions for summary decision. A briefing schedule was established and the record closed on December 17, 1999 when the final submissions were received.

INCONTESTABLE FACTS

1. The Board alleged that, on June 21, 1995, at a public meeting of the Board, petitioner physically assaulted the District's parent coordinator, Harry Padden, and had to be forcibly removed from Mr. Padden.

2. After an investigation of the incident, at its August 16, 1995, meeting, the Board determined that the appropriate sanction for petitioner's conduct was to withhold Montgomery's 1995-96 employment and adjustment increments (henceforth to be collectively designated "increment").

3. It was soon realized that, since Montgomery is a twelve-month employee, his salary for the upcoming school year had already vested as of July 1, 1995. As a result, the Board rescinded its action at its September 20, 1995, meeting and voted to withhold Montgomery's increment for the 1996-97 year instead.

4. Montgomery filed his petition on October 24, 1995, with the Commissioner under *N.J.S.A.* 18A:6-10. He also initiated a grievance through his union, the IEA, at about the same time, which resulted in a binding arbitration hearing with the PERC, pursuant to the amendments to the New Jersey Employer-Employee Relations Act, specifically, *N.J.S.A.* 34:13A-22 through -29 (Amendments), effective January 4, 1990. The provisions of the Amendments will be discussed in full below.

5. On October 1, 1996, the initial hearing on Montgomery's grievance was held before arbitrator Lawrence I. Hammer of the PERC Voluntary Labor Arbitration Tribunal. The jurisdictional issue raised at this hearing was whether the dispute could be arbitrated. The PERC's jurisdiction requires that the reason for withholding petitioner's increment be disciplinary rather than based upon his performance. The only other issue before the arbitrator at that time was the following:

> Is the Board of Education statutorily barred or unauthorized to take the action embodied in the Resolution of September 20, 1995?

6. On February 10, 1997, the arbitrator issued his initial Award, which stated that Montgomery's increment was withheld for primarily disciplinary reasons and was therefore subject to binding arbitration. He further ruled that the Board was "NOT statutorily barred nor unauthorized to take the action embodied in its Resolution of September 20, 1995." He then ordered that the matter proceed to a hearing on the merits "forthwith."

7. The hearing on the merits of Montgomery's grievance was held before Hammer on December 3, 1997, and May 3, 1998. The issues were the following:

> Did the Irvington Board of Education violate the just cause provision of the 1993-1996 Collective Bargaining Agreement when it denied George Montgomery's (1996/97) employment and adjustment increment?
>
> If so, what shall the remedy be?

8. As a result of the evidentiary hearing, the arbitrator found that Montgomery engaged in a physical confrontation with a parent at the June 21, 1995, Board meeting and, in his Award of July 24, 1998, held that Montgomery's conduct constituted "just cause" for the imposition of the increment withholding for the 1996-97 school year. The prior arbitration award had already determined that the Board was authorized to take this action.

9. The IEA, on behalf of Montgomery, brought an Order to Show Cause and Complaint in the Superior Court of New Jersey, Chancery Division, Essex County, under docket number ESX-C-287-98, to vacate the arbitrator's awards. By Order of Julio M. Fuentes, J.S.C., dated January 5, 1999, the petitioner's Complaint was dismissed with prejudice.

10. Montgomery has appealed the Chancery Division Order to the Appellate Division (Docket No. A-3329-98T1). He seeks to vacate the order of Judge Fuentes and to vacate and reverse the arbitrator's awards. This appeal is presently pending.

RESPONDENT'S MOTION FOR SUMMARY DECISION

The Board argues that Montgomery's appeal should be dismissed because the subject matter of the appeal was never within the jurisdiction of the Commissioner of Education. Consequently, there is no dispute for the Commissioner to hear. Petitioner does not dispute that the only subject of both the present appeal and the arbitration before the PERC is the withholding of petitioner's increment for the 1996-97 school year.

THE APPLICABLE LAW

The Amendments are the statutes governing the present dispute. In particular, *N.J.S.A.* 34:13A-26 provides:

> Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of [*N.J.S.A.* 34:13A-29].

An "employer" includes "any local or regional school district." *N.J.S.A.* 34:13A-22. The Amendments, in fact, preclude the applicability of *N.J.S.A.* 18A:29-14 for disciplinary increment withholdings. *Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n*, 139 *N.J.* 141, 155 (1995).

As a result, if the reason for withholding an increment is "predominately disciplinary," the dispute "shall be resolved through the grievance procedures" pursuant to the negotiated agreement with the appropriate collective bargaining unit. *N.J.S.A.* 34:13A-27(c). *N.J.S.A.* 34:13A-29(a) requires that binding arbitration under the

jurisdiction of the PERC be the "terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act." "Discipline," under *N.J.S.A.* 34:13A-22, includes the withholding of increments pursuant to *N.J.S.A.* 18A:29-14. This latter statute allows any board of education to withhold an employment or adjustment increment, or both, for "inefficiency or other good cause."

Most important to the present motion is that the PERC is the agency designated by the Amendments to make the initial determination as to whether the withholding of an increment of a teaching staff member is predominately disciplinary. *N.J.S.A.* 34:13A-27(a). It is only when the PERC determines that the reason for withholding the increment "relates predominately to the evaluation of a teaching staff member's teaching performance" that the teaching staff member can file a petition with the Commissioner of Education seeking resolution of the dispute in that forum. *N.J.S.A.* 34:13A-27(d). This is the only exception to the rule that increment withholdings of teaching staff members are subject to binding arbitration. *Edison Bd. of Educ. v. Edison Principals and Supervisors Ass'n*, 304 *N.J. Super.* 459, 464 (App. Div. 1997).

The Commissioner of Education retained no concurrent jurisdiction over these matters. *Randolph Bd. of Educ. v. Randolph Educ. Ass'n*, 306 *N.J. Super.* 207, 212-13 (App. Div. 1997), *certif. denied*, 153 *N.J.* 214 (1998). Under the present statutory scheme, his jurisdiction starts only after the PERC has made its determination that the petitioner may file a petition with the Department of Education. *N.J.S.A.* 34:13A-27(a). In the present case, the PERC asserted its jurisdiction over this matter from the outset and I **CONCLUDE** that Montgomery's appeal was never properly before the Commissioner of Education.

Petitioner raised a second issue, that a determination by the Commissioner of Education as to Montgomery's increment withholding is not barred by the doctrines of *res judicata* or collateral estoppel. I **CONCLUDE**, based upon the Amendments, that this issue is without merit and it will not be addressed. Once the PERC asserted its dominion over Montgomery's appeal, pursuant to *N.J.S.A.* 34:13A-27(d), a legitimate determination by the Commissioner on the same subject can not exist. This is because

the Commissioner is precluded by the Amendments from hearing the appeal and making a determination on the subject matter. Consequently, the possible effect of the binding arbitration upon his decision is irrelevant.

ORDER

Since the Commissioner of Education is without jurisdiction to hear this appeal, it is **ORDERED** that summary decision is hereby **GRANTED** to respondent and the petition herein is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 4, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

1/7/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 12289-95
AGENCY DKT. NO. 419-10/95

GEORGE MONTGOMERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination herein.

Having conducted his own independent and thorough review of the entire record in this matter, the Commissioner, finding petitioner's exceptions without merit, affirms the Initial Decision of the OAL determining that, under the circumstances existing here, the Commissioner is without subject matter jurisdiction over the within controversy.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein. Summary decision is granted to the Board and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

59-00

COLLEEN MC COLLUM,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 7412-98

AGENCY DKT. NO: 186-6/98

COLLEEN MC COLLUM,

Petitioner,

v.

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

Respondent.

Gail O. Kanef, Esq., for petitioner
(Balk Oxfeld Mandell & Cohen, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: December 20, 1999 Decided: January 10, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 12, 1998 for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached attorneys' letters dated November 4, 1999 and December 17, 1999.

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

Accordingly, I **CONCLUDE** that the attached letters meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

1/10/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

1/14/00
DATE

Debbie Antonantis /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 2000
DATE

Barbara A. Harris
OFFICE OF ADMINISTRATIVE LAW

/g

KOCH, KOCH & BENNETT
ATTORNEYS AT LAW
70 MIDLAND AVENUE
P.O. BOX 495
ABOVE VALLEY NATIONAL BANK
KEARNY, NEW JERSEY 07032
Tel. (201) 991-1111
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CALVIN S. KOCH, JR.
GARY D. BENNETT
KENNETH J. LINDENFELSER*

FRANK KOCH, 1898-1948
CALVIN S. KOCH, 1929-1991

***member NY & NJ Bars**

November 04, 1999

Randi Doner April, Esq.
Balk, Oxfeld, Mandell & Cohen
50 Commerce Street
Newark, NJ 07102-4003

Re: McCallum v. KBOE
Docket No. EDU-7412-98

Dear Ms. April:

Enclosed please find:

1) Copy of Board Minutes Authorizing the restoration of Ms. McCallum's sick days;

2) Copy of Superintendent's Letter informing Ms. McCallum of the Board's actions;

3) Copy of Letter from Business Administrator's Office indicating the days have been restored; and

4) Print out of Ms. McCallum's time record indicating the days have been restored.

I trust this is sufficient to allow you to withdraw the above petition as being settled.

Please contact me if you require anything additional.

Yours very truly
KOCH, KOCH & BENNETT

Kenneth J. Lindenfelser
Attorney for Mr. Handlin

KJL:kat
Enc.
cc: Judge Thomas E. Clancy, A.L.J.

CERTIFIED TO BE A TRUE COPY

BY: Leslie J. Gaulton
Business Administrator/Board Secretary

Regular Meeting
August 24, 1998
7:35 P.M.

The Regular Meeting of the Kearny Board of Education was held in the Board Room, 100 Davis Avenue, on the evening of the above date.

President Stevenson called the meeting to order and announced that in accordance with Chapter 231, Laws of 1975, Open Public Meetings Act, adequate notice of the meeting was provided to the Observer and the Jersey Journal. Notice of the meeting was posted on the bulletin board in the lobby of the Board Office and filed with the Acting Town Clerk by letter dated August 4, 1998.

ROLL CALL

On roll call, the following members were present: Mr. Buehler, Mrs. Cifelli-Pettigrew, Mr. Doffont, Mrs. Torres, Mrs. Mc Keown, President Stevenson.

Mr. Robert P. Mooney, Superintendent of Schools, Dr. Ingrid Kiss, Assistant Superintendent of Schools, Mr. Leslie J. Gaulton, Business Administrator/Board Secretary, and Mr. Kenneth J. Lindenfelser, Esq., Board Attorney were also present.

BOARD MEMBER ABSENT

Mr. Dyl was absent from the meeting.

BOARD MEMBERS ABSENT DURING ROLL CALL

Mrs. Eckel and Mr. Martello were absent during roll call, and re-entered the meeting at 7:37 P.M.

PLEDGE OF ALLEGIANCE

Mr. Stevenson led the assembly in the Pledge of Allegiance to the Flag.

MOTION RE: APPROVAL OF MINUTES

It was moved by Mrs. Mc Keown and seconded by Mrs. Torres that the minutes of the following meeting be hereby approved:

Workshop Meeting, July 20, 1998 at 7:03 P.M.

On roll call, the following vote was recorded: Mr. Buehler, "not voting", Mrs. Cifelli-Pettigrew, "aye", Mr. Doffont, "aye", Mrs. Eckel, "not voting", Mr. Martello, "not voting", Mrs. Torres, "aye", Mrs. Mc Keown, "aye", President Stevenson, "aye".

There being five votes in the affirmative and three members "not voting", the motion was carried.

MOTION RE: APPROVAL OF MINUTES

It was moved by Mrs. Mc Keown and seconded by Mrs. Torres that the minutes of the following meetings be hereby approved:

NEGOTIATIONS - Mrs. Torres

Mr. Torres reported on the outcome of the arbitration hearing regarding a grievance filed by the Kearny School Employees Association against the Board of Education, in which the arbitrator ruled in favor of the Board.

PROJECT GRADUATION - Mrs. Torres

Mrs. Torres stated she had nothing to report at this time.

RESIDENCY - Mrs. Cifelli-Pettigrew

Mrs. Cifelli-Pettigrew stated she had nothing to report at this time.

MOTION RE: CLOSED SESSION

The following resolution was offered by Mrs. Mc Keown, who moved its adoption:

Resolved: by the Board of Education of the town of Kearny, in the County of Hudson, that in accordance with Chapter 231, Laws of 1975, Open Public Meetings Act, the Board will enter into Closed Session at this time to discuss District personnel matters and ongoing litigation.

When the matters under consideration and discussion have been completed, any action will be disclosed to the public.

Seconded by Mrs. Torres.

On roll call, the following vote was recorded: Mr. Buehler, "aye", Mrs. Cifelli-Pettigrew, "aye", Mr. Doffont "aye", Mrs. Eckel, "aye", Mr. Martello, "aye", Mrs. Torres, "aye", Mrs. Mc Keown, "aye", President Stevenson, "aye".

There being eight votes in the affirmative, the motion was carried.

BOARD ENTERS INTO CLOSED SESSION

The Board entered into Closed Session at 11:00 P.M.

BOARD RETURNS TO OPEN SESSION

The Board returned to Open Session at 12:35 A.M.

ROLL CALL

On roll call, the following members were present: Mr. Buehler, Mrs. Cifelli-Pettigrew, Mrs. Eckel, Mr. Martello, Mrs. Torres, Mrs. Mc Keown, President Stevenson.

MOTION RE: RESTORATION OF SICK DAYS

It was moved by Mrs. Torres, seconded by Mrs. Cifelli-Pettigrew and unanimously carried that the Kearny Board of Education hereby restores five (5) sick days to High School staff member Colleen Mc Collum, as a result of a workers' compensation accident.

TO: Mrs. Mc Donnell

FROM: Mr. Mooney

DATE: 11/17/98

RE: Colleen Mc Collum
D/A: 1/30/98

Regarding settlement of the above claim as reflected in the Board Minutes dated August 24, 1998, Colleen Mc Collum is to to have the following sick and/or personal days charged to worker's compensation: February 20,23, 24, 25, 1998 (sick), and April 23, 1998 (personal). Restoration of these days qualifies her for the Incentive Bonus for the School Year 1997-1998. She is to receive a total of $640.00 (0 sick = $540.00, 2 personal = $100.00).

cc: Colleen Mc Collum

Memo to: Kenneth J. Lindenfelser, Esq.
Attorney at Law

From: Anne Mc Donnell
Kearny Board of Education

Date: November 17, 1998

Re: Colleen Mc Collum

Attached you will find copies of the above employee's attendance record for S/Y 1997-98.

This reflects record before and after 4 sick and 1 personal day were restored. The current year (1998-99) was adjusted to reflect a balance of 65 sick days available. This is a total of 53 unused sick days from 1997-98 plus 12 sick day allotment for 1998-99.

Enclosed also is a copy of certified Board Minutes dated August 24, 1998 where this action was approved by the Board.

If you have any questions please feel free to call me.

Thank you for your assistance.

Before

PERSONNEL SCREEN #2 COMPANY: KEARNY BOARD OF EDUCATION SCH YEAR 1997/1998
COLLEEN MC COLLUM SICK: 53.0 4.0 49.0 VAC: .0 .0 .0
CALENDAR GROUP 10 1 2 3

	01.2.3.4.5.6.7.8.9.0.1.2.3.4.5.6.7.8.9.0.1.2.3.4.5.6.7.8.9.0.1	TOTALS
7 JUL	. . . . .	0.0
8 AUG	. . . . .	0.0
9 SEP	. . . . .	0.0
10 OCT	. . . . .	0.0
11 NOV	. . . . . P	1.0
12 DEC	. . . . . *	1.0
1 JAN	. . . . . P	1.0
2 FEB	. W W W W . . W W . . . . I . . I I I	10.0
3 MAR	. . . . .	0.0
4 APR	. . . . . P	1.0
5 MAY	. . . . .	0.0
6 JUN	W W W W W . . W W W W W . . W W W W W	15.0

PERSONAL DAYS 3.0 3.0 .0 .0 .0 .0 29.0
MONTH ENTER: 'MA'=MASS UPDATE OR 'EX'=TO EXIT

Alt-Z FOR HELP° VT320 ° FDX ° 9600 N81 ° LOG CLOSED ° PRINT OFF ° ON-LINE

After Restored

PERSONNEL SCREEN #2 COMPANY: KEARNY BOARD OF EDUCATION SCH YEAR 1997/1998
COLLEEN MC COLLUM SICK: 53.0 .0 53.0 VAC: .0 .0 .0
CALENDAR GROUP 10 1 2

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8 AUG	. . . . .	0.0
9 SEP	. . . . .	0.0
10 OCT	. . . . .	0.0
11 NOV	. . . . . P	1.0
12 DEC	. . . . . *	1.0
1 JAN	. . . . . P	1.0
2 FEB	. W W W W . . W W . . . . W . . W W W	10.0
3 MAR	. . . . .	0.0
4 APR	. . . . . W	1.0
5 MAY	. . . . .	0.0
6 JUN	W W W W W . . W W W W W . . W W W W W	15.0

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RESPOND TO: NEWARK

December 17, 1999

The Honorable Thomas E. Clancy, ALJ
185 Washington Street
Newark, New Jersey 07102

RE: Colleen McCollum vs. Kearny Board of Education
OAL Dkt. No: EDU 7412-98

Dear Judge Clancy:

Based on the documentation I have received from my adversary in the above matter and based on my conversations with my client, it appears that my client's sick day bank has been appropriately restored. Consequently, there is no need to proceed on the within matter. To that end, I would appreciate if Your Honor would mark this matter withdrawn.

Thank you for your anticipated courtesy and cooperation.

Very truly yours,
BALK, OXFELD, MANDELL & COHEN, P.A.

Gail O. Kanef

GAIL OXFELD KANEF

GOK:Jt
cc: Kenneth J. Lindenfelser, Esq.
Frank Cocuzza, NJEA

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OAL DKT. NO. EDU 7412-98
AGENCY DKT NO. 186-6/98

COLLEEN MC COLLUM,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter has been reviewed. Upon such review, the Commissioner finds that, inasmuch as petitioner's attorney has submitted a clear intent to withdraw this matter (Letter of December 17, 1999 to the Administrative Law Judge) and given the lack of a formal settlement agreement on the record, the Commissioner determines, instead, that this matter shall be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

~~290-00~~
59-00

EDU #1418-99
C # 290-00
SB # 59-00

M.G.L., on behalf of herself and minor children, B.S., DJ. AND V.J.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT-CROSS/APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 7, 2000

For the Petitioner-Appellant, Education Law Center (David R. Giles, Esq., of Counsel)

For the Respondent-Cross/Appellant, Stephen J. Christiano, Esq.

Petitioner in this case is the mother of three school-age children. On October 31, 1998, she arrived in the United States from Haiti. She and her children moved into her sister's apartment in West Orange where her mother, sister and her sister's child were already living. On November 3, 1998, petitioner went to the offices of the West Orange Board to enroll her children in school. The children, however, were not enrolled until December 2, which was one day after the Board was served with a petition of appeal to the Commissioner filed on behalf of petitioner by the Education Law Center.

By the petition, petitioner challenged the Board's actions in failing to enroll her children in school, characterizing those actions as a denial of admission and claiming

that the Board had improperly required her to have a certificate of inhabitancy completed by the municipal Zoning and Housing official before it would admit her children. She also alleged that the Board had failed to comply with the procedural due process requirements of N.J.S.A. 18A:38-1 and the United States Constitution by not providing written notice of its action and not advising her of the right to appeal to the Commissioner. She further alleged that the Board had violated the children's right to a thorough and efficient education under the New Jersey Constitution.

The matter was transmitted to the Office of Administrative Law, and a hearing was held on December 1, 1999. Following the hearing, counsel for petitioner filed a motion to amend the petition to include additional legal claims. On January 24, 2000, the Administrative Law Judge ("ALJ") denied the motion on the grounds that it was untimely.

On July 21, 2000, the ALJ issued his initial decision. The ALJ rejected petitioner's characterization of the Board's actions as denying the children admission to the district's schools. Based on his factual findings and finding that the testimony of the Board's registrar was more accurate and credible than that of petitioner and her sister, the ALJ determined that there was no denial of admission, but rather that registration and enrollment were delayed primarily pending receipt of satisfactory proof of residency. The ALJ concluded that in the absence of a denial of admission, there was no violation of N.J.S.A. 18A:38-1, which requires that a district board of education must notify a resident in writing of his right to contest the board's decision to deny a child admission to the district's schools. The ALJ further concluded that the Board had been to some extent dilatory when it delayed processing petitioner's application for enrollment for five

or six school days, but that petitioner had contributed to the delay by not furnishing satisfactory proof of residence in a timely fashion. He also found that the certificate of inhabitancy should not have been any part of the registration process, but that petitioner's inability to obtain compliance was not the cause of the delay in registration.

After considering all of the facts and circumstances, the ALJ concluded that the actions of the Board's personnel were not arbitrary, capricious, or unreasonable. He rejected petitioner's claim for compensatory education, finding that she had not proven that the children were educationally harmed by the relatively short delay in enrollment and that she had failed to prove any harm that might entitle her to damages. He found that petitioner's demands relating to the children's eligibility and admission to school were moot since they had been admitted to school on December 2, 1998.

The Commissioner agreed with the ALJ that it was improper for completion of the certificate of inhabitancy to be required as part of the registration process and directed that it be totally omitted from the process. The Commissioner, however, determined that the certificate of inhabitancy contributed more to the delay in enrollment than conveyed by the ALJ. The Commissioner found that it was not appropriate for enrollment to be delayed on the basis of incomplete transcripts in that student transcripts relate to a student's educational placement rather than eligibility to enroll and be admitted to school. The Commissioner also found that although incomplete immunization records may delay actual admission to school, they may not interfere with enrollment. The Commissioner therefore directed that the district could not permit the absence or incompleteness of transcripts and immunization records to interfere with the enrollment of a new student. He also directed the County Superintendent to review the

District's enrollment policies and procedures. The Commissioner denied all other relief sought by the petitioner, including amendment of her petition.

Petitioner appealed to the State Board of Education seeking reversal of that part of the Commissioner's decision which declined to rule on her claim that the Board's actions in this case violated her procedural due process rights under the Fourteenth Amendment of the United States Constitution. Petitioner continues to characterize the Board's action as a denial of admission and exclusion from school and, on the basis of that characterization, claims that the Board violated her constitutional rights by denying admission without providing procedural due process as required by the Appellate Division's decision in J.A. v. Bd. of Educ. for South Orange, 318 N.J. Super. 515 (App. Div. 1999). Again relying on that decision, she further argues that her constitutional claim was not rendered moot by the fact that the school law claim has been resolved by the children's admission to school.

The Board cross-appealed, seeking reversal of the Commissioner's determination that it delayed enrolling petitioner's children because of incomplete transcripts and immunization records. It also appeals from the Commissioner's directive that the County Superintendent review its admission policies and procedures and his directive that parents be immediately informed of the administrator to contact when they experience enrollment delays.

Initially, we concur with petitioner that although her children have been admitted to school, her appeal is not moot. We recognize that in contrast to the situation in J.A. v. Bd. of Educ. for South Orange, supra, the Board in this case has never contested the eligibility of petitioner's children to attend the district's schools. However, like the

petitioner in that case, petitioner herein is demanding relief beyond a confirmation of her children's eligibility to attend school in the district. Id. at 518. Similarly, petitioner in this case is also claiming that her due process rights have been violated and is entitled to have that issue decided. Id.

At first glance, there appears to be merit to the legal argument made by petitioner. The Appellate Division's decision in J.A. v. Bd. of Educ. for South Orange, supra, did hold that an administrative decision excluding anyone with a bona fide claim to domicile in a district from the schools of such district is subject to the requirements of procedural due process. 318 N.J. Super. at 523.

There is, however, a major distinction between J.A. v. Bd. of Educ. for South Orange and the case now before us. In stark contrast to J.A. v. Bd. of Educ. for South Orange, which arose from an express determination by the school district to deny admission to the student in that case, the matter now before us does not involve a denial of admission or an exclusion from school. Rather, as found by the ALJ, the pivotal event in this case was a delay in enrollment.

Moreover, as set forth in the ALJ's initial decision, the circumstances surrounding the delay from November 16 until December 2 were not such as to render it a denial of admission. As found by the ALJ, enrollment was delayed in this case for a period of five or six school days because the information submitted as proof of residence was incomplete. Initial Decision, slip op. at 11-12. Specifically, such proof was not submitted until December 2, at which time petitioner submitted a letter from the landlord verifying her residence. Id. at 12.[1] While we concur with the Commissioner that it was

[1] We note that the Commissioner found that the record did not satisfactorily establish why the children were not enrolled "upon presentation of the landlord's letter of verification in late November."

improper for the Board to require that a certificate of inhabitancy be completed as part of its registration process and agree that petitioner should not have been put in the position of having to make several visits to the West Orange Zoning and Housing Authority, we find, as did the ALJ, that petitioner's failure to obtain approval of the certificate of inhabitancy was not the cause of the delay. Id. at 13. This conclusion is well supported by the testimony of Josefa Lopez, registrar for the West Orange Board, who, as the ALJ pointed out, testified extensively and credibly that the delay was attributable to the fact that petitioner did not have sufficient proof of residency, rather than the fact that she had not submitted a completed certificate of inhabitancy. To reach any other conclusion would require us to engage in speculation as to what might have occurred had petitioner presented sufficient proof of residency prior to December 2. This we decline to do.

Given the facts of this case, there is no merit to petitioner's claim that her right to procedural due process was violated. Again we stress that J.A. v. Bd. of Educ. for South Orange, supra, involved a denial of admission rather than a delay in enrollment. Again, the length of the delay and the surrounding circumstances in this case were not such as to warrant characterizing it as a constructive denial of admission. In that there was no determination to deny admission, it is difficult to conceive how a hearing could have been conducted to resolve that issue. See J.A. v. Bd. of Educ. for South Orange, supra at 523-24 (exclusion from school is subject to the requirements of procedural due process). Nor could the Board have provided petitioner with a statement of the reasons

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Commissioner's Decision, slip op. at 28. However, as set forth in the ALJ's initial decision, the letter from petitioner's landlord verifying residency, although dated November 10, was not submitted to the registrar until December 2. Initial Decision, slip op. at 12.

supporting a determination that it had not made. See id. at 524 (due process requires that a board must inform student of the grounds for its decision to exclude her).

We fully agree with the ALJ and the Commissioner that the Board in this case should have moved with greater dispatch to enroll petitioner's children in school. We also agree with the Commissioner that, like any district, this district's policies and procedures for enrolling new students should assure that residency forms are easily understood and appropriate, that parents are informed of an administrator to contact if they experience delays or difficulties in enrollment, and that decisions on enrollment are issued expeditiously and that appeal rights are communicated to the parents. Given the Commissioner's responsibility for the supervision of New Jersey's public schools, N.J.S.A. 18A:4-23, and the role of the county superintendent, N.J.S.A. 18A:7-1 et seq., we find it entirely appropriate that the Commissioner directed the County Superintendent in this instance to review the Board's policies and procedures to ensure that they included these guarantees, and we reject the Board's cross-appeal in this respect.[2]

Further, like the ALJ and Commissioner, we find that inclusion of the certificate of inhabitancy in the Board's registration packet was inappropriate and affirm the Commissioner's determination that such practice must be discontinued. We also agree with the Commissioner that the Board must not allow incompleteness of transcripts and immunization records to interfere with the enrollment of a new student. However, as set forth above, we, like the ALJ, find that the delay in enrollment was primarily attributable to the fact that petitioner did not provide proof of residency until December 2 rather than

[2] We consider inclusion of these guarantees in the enrollment procedures followed by district boards to be of such importance that we proposed regulations to codify them on July 10, 2001. 33 N.J.R. 2790(a).

the failure to complete the certificate of inhabitancy or the incompleteness of transcripts and immunization records. Initial Decision, slip op. at 11-13 and 15-16.

Hence, for the reasons expressed, we reject petitioner's due process claims and, as modified herein, affirm the Commissioner's decision in this case.

Attorney exceptions are noted.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 04 2002

60-00

ALAN H. SKRILOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6238-99
AGENCY DKT. NO. 188-7/99

ALAN H. SKRILOFF,
Petitioner,
v.
BOARD OF EDUCATION
NORTH BRUNSWICK TOWNSHIP,
MIDDLESEX COUNTY,
Respondent.

Beth L. Finkelstein, Esq., for petitioner

Anthony B. Vignuolo, Esq., for respondent, (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Record Closed: January 11, 2000 Decided: January 11, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 30, 1999 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

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

JAN 1 1 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Jan. 13, 2000
DATE

D. N. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 1 4 2000
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

Settlement Agreement

BETH L. FINKELSTEIN
Attorney at Law
920 West State Street
Trenton, NJ 08618
(609) 599-2900
Attorney for Petitioner

ALAN H. SKRILOFF Petitioner, v. **BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY** Respondent	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Dkt. No. EDU. 06238-99S Agency Ref. No. 188-7/99 **STIPULATION OF SETTLEMENT & DISMISSAL**

THIS AGREEMENT is made this 23rd day of December, 1999 by and between **ALAN H. SKRILOFF**, (hereinafter "Petitioner") and the **BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK**, Middlesex County (hereinafter "Board").

WHEREAS, the Petitioner has filed suit against the Board before the Commissioner of Education of the State of New Jersey under Agency Docket Number 06238-99s and Agency reference No. 188-7/99 (hereinafter "the Litigation");

WHEREAS, the subject matter of the Litigation is the abolition of the Petitioner's position as Assistant Superintendent of Curriculum and Instruction;

WHEREAS, the parties desire to amicably resolve the Litigation and to release each other from any claims which may be asserted therein: and

4a

NOW, THEREFORE, in consideration of the promises and mutual covenants and agreements contained herein, and intending to be legally bound, the parties hereto agree as follows:

1. Releases. Upon fulfillment by the Board of all the terms of this Settlement Agreement, Petitioner hereby releases any and all claims he may have against the Board, with respect to this litigation and his employment relationship, which may have arisen at any time in the past up to the date of the signing of this Settlement Agreement. Upon receipt of Petitioner's signed letter of resignation, the Board hereby releases any and all claims it may have against Petitioner which may have arisen at any time in the past up to the date of the signing of this Settlement Agreement. All parties agree that the terms of this Settlement Agreement fully satisfy any such claim(s). Specifically excluded from this general release are Petitioner's right, upon cessation of employment with the district as indicated by the letter of resignation, to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA); any rights he may have arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations; any rights he may have for indemnification by the Board pursuant to *N.J.S.A.* 18A:16-6 and -6.1; and any rights he may have under the New Jersey Workers' Compensation Law, *N.J.S.A.* 34:15-1, *et seq.* In addition, this Release does not preclude either party from suing for enforcement of the terms of this Settlement Agreement. The within release shall also preclude the Petitioner from seeking future employment with the Board based upon any rights of tenure, seniority or prior employment with the Board. The Board shall be free without any claim on the part of the Petitioner to maintain, alter, modify or restructure its administrative and supervisory positions at any time hereafter.

2. Payment for Sick Days. Upon the signing of this Settlement Agreement, the Board agrees to pay Petitioner the sum of $10,000.00 in payment for accumulated sick days.

3. Resignation. The letter of resignation, dated NOV. 5, 1999 submitted by the Petitioner and accepted by the Board at its meeting on the 9th day of Nov. shall be honored in accordance with its terms. A copy of the letter of resignation is annexed hereto and made a part hereof.

4. Dismissal of Lawsuit. Upon execution of this Agreement by an authorized representative of the Board and upon approval by the Board of the terms contained herein, the Petitioner shall promptly cause his attorneys to dismiss with prejudice the lawsuit he has filed against the Board as referenced herein.

5 No Admission of Liability. By executing this Agreement, neither party hereto admits liability to the other. The parties agree that the contents of the within agreement are confidential and shall not be discussed, disclosed or communicated to any third party without the prior consent of the other party.

6. Miscellaneous Provisions. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors, and assigns.

THIS AGREEMENT sets forth the entire understanding and agreement between the parties with respect to the subject matter hereof and may only be amended or modified by a writing signed by each party intending to be bound thereby. Except as otherwise provided herein, it is understood and agreed that any and all previous discussions and agreements, whether oral or written, are hereby merged into this Agreement, and that this Agreement is intended to be final and complete resolution of the Litigation.

THIS AGREEMENT may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signatures of all the parties hereto are required for this Agreement to be binding on any party.

THE PARTIES to this Agreement have read it and understand it, and acknowledge that this Agreement is entered into and executed voluntarily without any duress or undue influence. The parties also acknowledge that they had the opportunity to seek independent counsel and have such counsel review this Agreement prior to their execution of same.

THIS AGREEMENT shall in all respects be interpreted, enforced, and governed under the laws of the State of New Jersey.

SAVINGS CLAUSE. If a specific clause of this Addendum is found to be illegal in federal or State law, the remainder of this Addendum, not affected by such a ruling, shall remain in force.

WHEREAS, this Agreement has been approved by a vote of the Board of Education of the Township of North Brunswick, Middlesex County at its meeting of Dec. 14, 1999 and has been made a part of the minutes of that meeting; and

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective on the date and year first written above.

BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BRUNSWICK

Gail E. DePaw

Alan Skriloff

President

Date December 22, 1999

Date: December 22, 1999

Witness

Witness

Date

Date:

OAL DKT. NO. EDU 6238-99
AGENCY DKT. NO. 188-7/99

ALAN H. SKRILOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) in the form of a Stipulation of Settlement and Dismissal have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. The Commissioner notes, however, that certain terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to the OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

61-00

KATHY VAUGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 2047-99

AGENCY DKT. NO. 30-2/99

KATHY VAUGHAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,

Respondent.

Michael B. Berman, Esq., on behalf of petitioner (Collins & Berman, attorneys)

R. Armen McOmber, Esq., on behalf of respondent (McOmber & McOmber, attorneys)

Record Closed: January 11, 2000 Decided: January 19, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the allegations of the petitioner, Kathy Vaughn, that her absences from work after an incident on November 6, 1998, are work related; and therefore, the respondent, the Board of Education of the Borough of Red Bank, Monmouth County should not deduct them from her accumulative sick leave time. I had telephone conferences with the parties regarding a settlement of the matter on July 12, 1999, September 22, 1999 and October 7, 1999. The parties have agreed to a settlement of this matter as part of the Workers' Compensation case

settlement. As to this case, the parties have signed a stipulation of dismissal with prejudice which is attached and incorporated herein.

I **CONCLUDE** that the matter be dismissed and that it is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED WITH PREJUDICE**.

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

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

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

January 19, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

JAN 20 2000
DATE

D. N. Centamaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 2047-99
AGENCY DKT. NO. 30-2/99

KATHY VAUGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision indicating that the parties have signed a stipulation of dismissal with prejudice have been reviewed.[1] Noting the absence of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

[1] The stipulation of dismissal with prejudice is neither attached to the Initial Decision, as indicated, nor contained in the record.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

~~310-00~~
61-00

EDU # 5619-99
C # 310-00
SB # 61-00

IN THE MATTER OF THE TENURE HEARING :

OF JOSEPH GRACEFFO, SCHOOL DISTRICT : STATE BOARD OF EDUCATION

OF THE TOWNSHIP OF WAYNE, : DECISION

PASSAIC COUNTY. :

Decision on motion by the Commissioner of Education, October 20, 1999

Decided by the Commissioner of Education, September 21, 2000

For the Respondent-Appellant, Robert M. Schwartz, Esq.

For the Petitioner-Cross/Appellant, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

In May 1999, the Board of Education of the Township of Wayne (hereinafter "Board") certified tenure charges of unbecoming conduct against Joseph Graceffo (hereinafter "respondent"), a tenured vice principal, charging that he had violated N.J.S.A. 18A:40A-12 and the Board's Policy No. 5131.6 by failing to arrange for the immediate medical examination of high school students who had been referred to him by staff members who suspected that the students were under the influence of drugs or alcohol.[1]

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[1] N.J.S.A. 18A:40A-12 provides, in pertinent part:

> a. Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 of this act, other than anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the

Two of the incidents alleged in the tenure charges involved student N.L. On January 21, 1999, the respondent had N.L. evaluated by the school nurse after a staff

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> principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence....

Board Policy No. 5131.6, "Drugs, Alcohol and Tobacco," provides, in pertinent part:

> A. Procedure for identifying and assisting students who may be at risk of developing alcohol and/or drug dependencies excluding classes involving anabolic steroids
>
> 1. Whenever it shall appear to any teaching staff member, school nurse and/or other educational or professional medical staff member that a pupil may have used, consumed and/or be under the influence of alcohol or other drugs, that staff member shall report the matter as soon as possible to the building's professional medical staff member and principal or other administrator....
> 2a. In compliance with N.J.S.A. 18A:40A-12, the principal or, in his absence, his/her designee shall immediately notify the parent/guardian and the Superintendent and arrange for the pupil to immediately be medically examined by a doctor selected by the parent/guardian....
> 2b. The principal or his/her designee shall explain to the student's parent/guardian the details of the examination process which will be used by the District if the student is not examined by the parent's/guardian's own doctor....
> 2c. As soon as possible after a student is reported as possibly being under the influence, the principal or designee and the school nurse shall verbally explain to the student's parent/guardian what the symptoms were which led to the reporting....
> 3. If the school authorities are unable to contact the parent/guardian and/or if the doctor selected is not immediately available, the school medical inspector or designee shall be immediately called upon to examine the pupil for the purpose of diagnosing whether or not the pupil is under the influence of alcohol or drugs pursuant to N.J.S.A. 18A:40A-12....
> 4. If such doctor, medical inspector or his/her designee is not immediately available or if the situation becomes life threatening, the pupil shall be immediately taken to the emergency room of the Wayne General Hospital or the nearest hospital, for examination and/or treatment....

member, Susan Ammerman, reported to the respondent that she had detected an odor of marijuana on N.L. When the school nurse told the respondent that she was not able to corroborate the teacher's suspicions, he decided not to arrange for further medical examination. The next day, another staff member, Robert Flower, reported to the respondent that he also had detected the odor of marijuana on N.L. The respondent again failed to arrange for an examination of N.L. Two weeks later, on February 6, 1999, N.L. died of a drug overdose.

The Board also charged that the respondent had engaged in unbecoming conduct with regard to the following incidents.[2] In 1991, Victoria Musetti, the Student Assistance Specialist, observed a student run out of the respondent's office in an agitated state and knock everything off of the counter in the front office (hereinafter "the rage incident."). She told the respondent that she believed the student might have been under the influence of drugs and that he should be tested. The respondent did not arrange for an examination since he felt that there was not a reasonable suspicion to believe that the student was under the influence.[3] In 1994, a teacher referred three students to the respondent for drug testing. The respondent failed to have one of the students, D.M., tested, allegedly telling Musetti that he did not want another confrontation with D.M.'s mother. On October 23, 1995, a guidance counselor referred a student, A.F., to the respondent for drug testing. The student was not tested until the

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[2] We note that the incidents from 1991 and 1994 were not included in the tenure charges certified to the Commissioner, but were raised by the Board during the proceedings in the Office of Administrative Law. Although the ALJ granted the respondent's motion to strike those charges, the Commissioner, upon interlocutory review, reversed the ALJ's ruling and allowed the Board to proceed on those charges, concluding that it had adequately set forth the incidents in question so as to allow the respondent to prepare a defense.

[3] Neither the respondent nor the Student Assistance Specialist could remember the name of the student involved in that incident.

following day. Finally, on November 5, 1996 at the end of the school day, Musetti referred a student, J.B., to the respondent, requesting that he be tested for drugs. The next morning, the respondent informed her that he could not implement the test since he was the only administrator in the building at that time. When another vice principal returned around noon that day, she arranged for J.B. to be tested.

In a decision issued on June 19, 2000, an Administrative Law Judge ("ALJ") observed that the parties differed with regard to what triggered the requirements of N.J.S.A. 18A:40A-12 and Board Policy 5131.6. The Board maintained that its policy was triggered whenever a staff member reported a suspicion that a student was under the influence. It contended that once a staff member made such a referral, neither the vice principal nor the school nurse had any role in determining whether the student would be tested. The respondent argued that the drug policy was not triggered by the referral. Rather, the decision to test a student for substance abuse was based on the totality of the circumstances and the standard of reasonable suspicion.

In interpreting N.J.S.A. 18A:40A-12, the ALJ reasoned that the underlying purpose of the statute – to identify students who are substance abusers, assess the extent of their involvement with such substances and, when appropriate, refer them for professional treatment – supported interpreting the phrase "shall arrange for an immediate examination of the student" as a mandatory directive. Thus, the ALJ concluded:

> administrators have no discretion to decide whether to test students '[w]henever it shall appear to any teaching staff member, school nurse or other educational personnel...that a pupil may be under the influence of substances.' N.J.S.A. 18A:40A-12(a). The legislative intent behind the statute reflects a 'zero-tolerance' attitude towards drug abuse and

> the statutory language leaves little room for interpretation. Moreover, there is nothing in the legislative history to indicate that the statutory provision was not intended to be mandatory. Accordingly, whenever a staff member reports a student whom she/he suspects might be under the influence of drugs, the administrator must implement the drug test.

Initial Decision, slip op. at 13.

The ALJ added that:

> logic dictates that no test would be required if a teacher referred a student for testing without having observed significant symptoms of possible drug use. Thus, the mandatory testing requirement is triggered upon a referral from the teacher that is based upon reasonable suspicion.

Id. at 14.

Applying N.J.S.A. 18A:40A-12 and Board Policy No. 5131.6 to the facts of this case, the ALJ concluded that the Board had established the respondent's unbecoming conduct with regard to four of the six charged incidents. She found that the Board had demonstrated that the respondent had violated the statute and policy with regard to the incidents involving students A.F. and J.B. and with regard to both incidents involving N.L. The ALJ found that the delay in arranging for an examination of A.F. until the next day violated the essential spirit and underlying purpose of the policy and law, concluding that the use of the word "immediately" in the statute implied a same-day examination. Similarly, the ALJ concluded that the respondent had violated the statute when he failed to arrange for an immediate examination of J.B., although she noted that all staff members involved in this incident had contributed to the one-day delay.

The ALJ also concluded that the respondent had violated the statute by not arranging for an examination of N.L. The ALJ found that the communications to the

respondent from both staff members were sufficient to trigger the requirements of the statute.

However, the ALJ found that the Board had not established unbecoming conduct with regard to the student involved in the "rage incident" in 1991. Applying "a sensible rather than a literal interpretation to the law and policy," initial decision, slip op. at 19, the ALJ found that the respondent was in a better position than the Student Assistance Specialist, who had had no prior contact with the student involved in that incident, to understand the reasons behind his rage. The ALJ concluded that a literal reading of the statute, which would require an administrator to automatically test every student referred by a staff member, was not a reasonable or sensible interpretation of the testing provisions.

The ALJ also concluded that the Board had not established the tenure charge involving D.M. Noting that the incident was not even raised until the hearing, the ALJ found that the evidence presented by the parties was "in a state of equilibrium with respect to whether certain facts exist." Id. at 25. Stressing that the burden was on the Board to demonstrate the truthfulness of the charge, the ALJ concluded that there was insufficient evidence to establish that the respondent had violated the statute or Board policy with regard to that incident.

In determining the appropriate penalty, the ALJ observed that the respondent was an experienced administrator who had exhibited poor judgment in not promptly arranging for medical examinations for A.F. and J.B. and by not arranging for an examination of N.L. after receiving separate referrals on consecutive days from two different staff members. Pointing out that the respondent had served in the district for

34 years with an unblemished record and had been active in school and community activities, the ALJ found that these mitigating factors outweighed the respondent's failure to properly implement the district's drug policy. Moreover, the ALJ, who had the opportunity to observe the respondent's demeanor, was persuaded that the respondent was remorseful over the death of N.L. Accordingly, the ALJ recommended that the respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits from the first 120 days of his suspension.

In a decision issued on September 21, 2000, the Commissioner of Education adopted the ALJ's conclusion that the Board had demonstrated unbecoming conduct with regard to the charges involving students A.F., J.B. and the two charges involving N.L. In reaching this conclusion, the Commissioner clarified that a principal or his designee was obligated under the law to arrange for an immediate medical examination of a student after a staff member advised the designated administrator of his or her belief that the student had exhibited signs of possible substance abuse and "articulate[d] the observations, symptoms and indicators underlying this conclusion." Commissioner's Decision, slip op. at 55. As expressed by the Commissioner:

> There is nothing in the plain language of N.J.S.A. 18A:40A-12, nor in its legislative history, to indicate that the statutory provision requiring an immediate medical examination was not intended to be mandatory upon a staff report of a student who appeared, based on specific observed indicators, to be under the influence of alcohol or other drugs....
>
> Within this framework, the mandatory medical examination is, therefore, triggered upon referral from the teaching staff member based upon the staff member's observation of specific indicators and determination based upon them that the student appears to be under the influence of alcohol and/or drugs. [Emphasis added.] There

> is nothing in N.J.S.A. 18A:40A-12 suggesting, much less authorizing, once a report has been made, that the designated administrator may first seek to validate the referring staff member's observations or judge the reasonableness of his or her conclusions before taking the actions required by statute. Instead, the administrator must act once the student has been reported....Neither is there anything suggesting that the staff member must specifically request that the student be chemically screened or otherwise examined before the required medical examination is arranged....[I]t is the referral itself that, under N.J.S.A. 18A:40A-12 and N.J.A.C. 6:29-6.5, unequivocally requires the principal or his designee to arrange for an immediate medical examination [emphasis omitted] of the student.

Id. at 55-57.

Significantly, the Commissioner emphasized that:

> ...a staff member need not be certain that a student is under the influence of alcohol or drugs, but need only have made a reasonable judgment, based upon symptoms and indicators he or she has observed in the student and articulated to the designated administrator, that the student appears to be under such influence.

Id. at 56-57 (emphasis omitted).

On the basis of this standard, the Commissioner sustained the four tenure charges involving students A.F., J.B. and N.L. The Commissioner concluded that the respondent had "made conscious decisions which he knew, or should have known, contravened statute and the Board's policy," id. at 66, and he agreed with the ALJ that the respondent's failure to arrange for an immediate medical examination of those students was a serious infraction deserving a significant penalty. The Commissioner also concurred with the ALJ that the Board had not demonstrated the tenure charge involving student D.M.

The Commissioner, however, did not agree with the ALJ's conclusion regarding the 1991 "rage incident." The Commissioner concluded that, under the standard he had articulated, the factual circumstances demonstrated by the Board in relation to this incident established the respondent's unbecoming conduct. In so finding, the Commissioner relied heavily upon the fact that Musetti, the reporting staff member, was a certified substance awareness coordinator serving in the position of Student Assistance Specialist.

The import given by the Commissioner to the fact that Musetti was a certified substance awareness coordinator reflected the great emphasis that he placed on the statutory requirements for in-service training of professional staff members with regard to the identification of students who might be under the influence of drugs or alcohol. See N.J.S.A. 18A:40A-15. The Commissioner however found that the in-service training that had been provided by the Board in this case had been "woefully inadequate." Id. at 65. The Commissioner therefore directed the Board to "undertake such revisions of its policies and procedures as are necessary to reflect the requirements of N.J.S.A. 18A:40A-12 and implementing rules consistent with the decision herein, [and] to institute a program of continuing education so that staff members will be able to fulfill their obligations under the law...." Id. at 67.

The Commissioner stressed, in addition, that a drug test did not equate to a medical examination within the requirements of the statute, as suggested by the ALJ, and that the statute's requirement for an immediate medical examination of a student who was reported as appearing to be under the influence of alcohol or drugs dictated that such an examination be conducted by a physician.

Despite his rejection of the ALJ's conclusion that the 1991 "rage incident" did not demonstrate unbecoming conduct, the Commissioner adopted the penalty recommended by the ALJ. Accordingly, he directed that the respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits from the first 120 days of his suspension, finding that the charges he had sustained warranted such a penalty under the circumstances.

The respondent filed the instant appeal to the State Board of Education, maintaining that the respondent "cannot be found to have exhibited conduct unbecoming or unprofessional conduct if his conduct followed a practice in the district which others followed as well, and if his supervisors not only failed to criticize him for what he did or didn't do, but testified that they agreed with what he did." Appeal Brief, at 39. The respondent insists that his mistakes were based on a common misunderstanding of the obligations imposed by the statute and that there is no credible evidence to support the conclusion that he knew that he was contravening statute or policy. The Board filed a cross-appeal, contending that the appropriate penalty under the circumstances is dismissal of the respondent from his tenured employment.

After a thorough review of the record, we affirm the Commissioner's decision as modified herein.

We agree with the Commissioner that although the tenure charge involving student D.M. cannot be sustained, the Board has demonstrated the respondent's unbecoming conduct by a preponderance of the credible evidence with regard to the charges involving A.F. and J.B. and the two charges involving N.L. The record clearly shows that the respondent made a conscious decision not to arrange for an immediate

medical examination in the cases of A.F. and J.B., as required by N.J.S.A. 18A:40A-12 and the Board's policy, and that he similarly failed to arrange for any examination of N.L. The fact that other staff members may also have misunderstood their obligations under the applicable statute does not excuse respondent's failure to comply with its requirements.

However, contrary to the Commissioner, we agree with the ALJ that the Board has not demonstrated that respondent violated the statute or policy when he failed to arrange for a medical examination of the student involved in the 1991 "rage incident." Although we fully concur that the standard articulated by the Commissioner is the proper standard for judging compliance with the applicable statutory framework, we find that he did not properly assess the factual circumstances of the "rage incident" under that standard.

Like the Commissioner, we stress that once a staff member reports that a student appears to be under the influence of alcohol or drugs and articulates the specific indicators that form the basis for his conclusion, a principal or his designee does not have the discretion to reject that conclusion. Commissioner's Decision, slip op. at 55-57.[4] However, we further emphasize, as did the Commissioner, that such conclusion must represent a reasonable judgment based upon the symptoms and indicators the staff member observed in the student. Id. at 56-57. Clearly, such judgment cannot be reasonable if the staff member is not able to articulate which of the

[4] Although not expressly articulated by the Commissioner, it is clear that the "indicators" repeatedly referenced in his decision are those which would be presented to staff members as part of their in-service training. See N.J.S.A. 18A:40A-15.

specific indicators formed the basis for his conclusion or if his perception of the factual circumstances underlying his assessment of the symptoms is patently flawed.

In contrast to the factual circumstances presented by the four charges that have been sustained, those presented by the 1991 "rage incident" are atypical. Musetti's observations, upon which the tenure charge relating to this incident was predicated, were limited to the aftermath of a disciplinary meeting between the respondent and a student, and she was unaware of the context of the conduct she was observing when she made her judgment concerning that conduct. As demonstrated by the record, Musetti had heard the respondent and the student yelling at each other in the respondent's office. She then observed the student come out of the office and, according to her testimony, "he was extremely, extremely angry. His face was contorted, he was bright red, he was very, very hostile....He came out of the office and he knocked everything off of the counter that was within his reach. He came around that counter and he flung open the door, it ricocheted off of the glass portion of the wall and he bolted out of the building." Tr. 12/7/99, at 42.

When Musetti asked the respondent if he thought the student's behavior might have been drug or alcohol related, he responded that the student was just very angry. She testified that "my thoughts were the child's high as a kite. And so I said, I think the child is possibly drug affected and I would like us to drug test this person." Id. at 43-44. She conceded that she did not know why the student had been in the respondent's office and that she had not spoken to the student that day or spent any time with him. Nor did she know any details about what had occurred or been discussed in the respondent's office. Tr. 12/8/99, at 14, 18-19. Musetti further acknowledged that her

suspicions were based solely on her brief observation of the student's agitated behavior after he had left the respondent's office. Id. at 21.

The respondent testified that the student had been in his office "for a long period of time" on a disciplinary matter. Tr. 2/28/00, at 113-14. He recalled that the student had angrily left his office and that he had told Musetti that "the student just came out of my office and he's upset over the issues that I was discussing with him." Id. at 115.

Under these circumstances, in which Musetti had briefly observed the aftermath of the student's meeting with the respondent, and, unlike the respondent, had had no involvement with the student or any knowledge of the circumstances of that meeting or what had occurred therein, we agree with the ALJ that a "sensible" application of the statute would not penalize the respondent for not arranging for a medical examination of that student. In this respect, we again stress that the respondent had just spent considerable time with the student involved in the incident and was in a unique position to know the circumstances leading to the conduct observed by Musetti and to understand the reasons for that behavior. She was not. Musetti was not aware of the reasons for the student's meeting with the respondent, did not know what had occurred in his office just prior to her observation of the student, and had not spoken to the student herself. She had simply observed the student leaving the respondent's office in an agitated state. Indeed, Musetti had no knowledge of the basis for the student's behavior. The respondent did. Under these particular facts, we agree with the ALJ that N.J.S.A. 18A:40A-12 and Board Policy No. 5131.6 did not require the respondent to arrange for a medical examination of that student.

Our conclusion with regard to that incident is reinforced by N.J.A.C. 6:29-6.3, which was in effect during the period relevant to this case and which represented the Department of Education's interpretation of N.J.S.A. 18A:40A-12. That regulation provided, in pertinent part, that:

> (a) District boards of education shall adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils whose use of alcohol and other drugs has affected their school performance or who possess, consume or who on reasonable grounds are suspected of being under the influence of [alcoholic beverages and controlled dangerous substances]." [Emphasis added.]

Consistent with that regulation and as set forth above, the Commissioner repeatedly stressed in his decision that, while a staff member need not be certain that a student is actually under the influence of alcohol or drugs, his judgment that the student appears to be under the influence must be a reasonable one, based on symptoms and indicators articulated to the designated administrator. See N.J.S.A. 18A:40A-11 (boards shall adopt and implement policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances on school property or at school functions or who show significant symptoms of the use of those substances).

We turn now to the appropriate penalty to be imposed on the respondent. In determining that penalty, it is necessary for us to consider the nature and gravity of the respondent's conduct under all of the circumstances involved, including mitigating and extenuating circumstances, and any injurious effect the conduct may have on the proper administration of the school district. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967). As found by the ALJ:

> Graceffo is an experienced administrator who exhibited poor judgment by not promptly testing A.F. and J.B. and by not testing N.L. after receiving a referral from Ammerman and Flower. Except for the pending charges, Graceffo's record is unblemished. He has served the District for thirty-four (34) years in many positions including teacher, director and coordinator of several departments and vice principal. He has also been active in school and community activities. These mitigating factors outweigh Graceffo's failure to implement the drug policy referenced in the charges.
>
> I have considered the Board's argument that any penalty short of dismissal will be futile, because if Graceffo is allowed to return to the District he will continue to live by his purported philosophy of laws were meant to be broken. Petitioner's Brief at 100. The argument is unpersuasive. I have observed Graceffo's demeanor and the demeanor of all the witnesses who appeared at the hearing. I am persuaded that Graceffo is remorseful over the death of the student who attended his school and that he has learned a lesson from all the embarrassment and humiliation that he has suffered from having to endure this protracted ordeal. Moreover, Graceffo's employment record does not square with the image of a reckless lawbreaker that is portrayed by the Board.

Initial Decision, slip op. at 30-31.

Notwithstanding the respondent's contention that he had acted with the approval of and in a manner consistent with that of other administrators in the district, we find that both N.J.S.A. 18A:40A-2 and the Board's policy are clear in requiring that the principal or his designee immediately notify the parents or guardian of a student reported to be under the influence of drugs or alcohol and arrange for an immediate medical examination of that student. The respondent failed to comply with those mandates on four separate occasions. In considering the nature and gravity of the offense under all the circumstances, including the fact that the Board has not countered any of the ALJ's credibility determinations, we reject the Board's argument that dismissal of the

respondent from his tenured position after 34 years of unblemished service is the appropriate penalty. However, we agree with the Commissioner that it is necessary to "impress most emphatically upon respondent the seriousness of his conduct." Commissioner's Decision, slip op. at 66. We therefore impose on the respondent the penalty recommended by the ALJ and adopted by the Commissioner – a permanent reduction of one step on the salary guide and forfeiture of all salary and benefits from the first 120 days of his suspension.

We recognize in so doing that we have set aside the Commissioner's determination with regard to the 1991 "rage incident." However, like the ALJ and the Commissioner, we have sustained the four charges against the respondent that involved students A.F., J.B. and N.L. Given the nature of these charges, we concur with the ALJ's determination that the respondent's conduct in failing to arrange for the immediate medical examination of those students warrants the imposition of this penalty.

In rendering our decision today, we recognize that new regulations became effective on May 7, 2001 providing for procedures for substance abuse intervention. See N.J.A.C. 6A:16-4.1 et seq. In view of our determination herein, we direct the Commissioner to review those regulations to ensure that they are consistent with our decision and that he propose to us any revisions that are necessary or advisable.

Attorney exceptions are noted.

December 5, 2001

Date of mailing DEC 07 2001

62-00

THOMAS JABOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING

CONTESTED CASE

OAL DKT. NO. EDU 10116-98S

AGENCY DKT. NO. 367-8/98

THOMAS JABOUR,

Petitioner,

v.

BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL SCHOOL DSITRICT, HUNTERDON COUNTY,

Respondent.

David B. Rand, Esq., for petitioner (Rand, Algeier, Tosti and Woodruff, attorneys)

John E. Collins, Esq., for respondent (Carroll, Weiss and Josephson, attorneys)

Record Closed: January 18, 2000 Decided: January 19, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Petition by Thomas Jabour, ("petitioner") with the Commissioner of Education on August 6, 1998, seeking reinstatement of sick time, medical coverage and reimbursement of amounts paid out to secure medical coverage and reinstatement of time under the Family Leave Act, allegedly denied him by the Board of Education of the Delaware Valley Regional School District ("respondent"). The matter was transmitted to the Office of Administrative Law on November 4, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On January 18, 2000, counsel for the parties submitted the attached Withdrawal of Petition indicating they had resolved the issues in this case and consent to withdraw the petition with prejudice. Therefore, having reviewed the record and for good cause shown, it is hereby **ORDERED** that this matter be **DISMISSED WITH PREJUDICE.**

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

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

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

January 19, 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Jan. 21, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

Rand, Algeier, Tosti & Woodruff
60 Washington Street
Morristown, NJ 07960

THOMAS JABOUR **Petitioner,** **DELAWARE VALLEY HIGH SCHOOL REGIONAL BOARD OF EDUCATION** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL Docket No.: EDUOR 10116-98S** **Agency Referral No. 367-8/98** **WITHDRAWAL OF PETITION**

Please be advised that the above matter has been amicably resolved and that the parties hereby consent to the withdrawal of the petition with prejudice.

THOMAS JABOUR

David B. Rand, Esq.

Dated: 12/13/99

DELAWARE VALLEY HIGH SCHOOL REGIONAL BOARD OF EDUCATION

John E. Collins, Esquire

Dated: 12/22/99

OAL DKT. NO. EDU. 10116-98
AGENCY DKT. NO. 367-8/98

THOMAS JABOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The Initial Decision and Withdrawal of Petition signed by the parties have been reviewed. Upon such review, the Commissioner approves the withdrawal of this matter pursuant to *N.J.A.C.* 1:1-19.2 and determines, accordingly, that it is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

62-00

EDU #1157-99
C# 327-00
SB# 62-00

NANCY J. DI COMO,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 2, 2000

For the Petitioner-Appellant, Oxfeld Cohen, LLC (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

For the reasons expressed herein, as well as those expressed by the Commissioner of Education, the State Board of Education affirms the decision of the Commissioner. In doing so, we fully agree with the Commissioner that N.J.S.A. 18A:7A-44(c) grants immediate tenure to an individual who had achieved tenure status in an administrative/supervisory position in the central office prior to the creation of a State-operated school district only if the State district superintendent rehires such individual to serve in an administrative/supervisory position in the central office upon its reorganization pursuant to N.J.S.A. 18A:7A-44(b).

Thus, we reject appellant's argument that the words of the statute confer immediate tenure on such individuals who, following the creation of a State-operated school district, are rehired in positions that are not part of the central office staff. The provision at issue reads in full:

> Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and non-instructional, other than those positions abolished pursuant to subsection a. of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the district and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did no have tenure in their prior position, they may obtain tenure pursuant to the provisions of N.J.S. 18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the position abolished herein.

N.J.S.A. 18A:7A-44(c) (emphasis supplied by appellant).

The language to which appellant points and upon which the ALJ relied is set forth in one sentence which appellant urges us to read out of context. To do so leads to a

result that not only is contrary to the thrust of N.J.S.A. 18A:7A-44, but which is also inconsistent with the overall statutory framework of which N.J.S.A. 18A:7A-44 is a part. E.g., Chasin v. Montclair State University, 159 N.J. 418 (1999).

Initially, as the Commissioner points out, all three provisions of N.J.S.A. 18A:7A-44 address what is to occur following the creation of a State-operated school district only with respect to those administrative and supervisory positions that are part of the central office staff. Commissioner's Decision, slip op. at 20. N.J.S.A. 18A:7A-44(a) provides for the abolishment of the positions of chief school administrator and the positions of those administrators responsible for curriculum, business and finance, and personnel. It also provides that the affected individuals may assert a claim to any positions to which they may be entitled by virtue of tenure or seniority in the district. N.J.S.A.18A:7A-44(b) requires that the State district superintendent implement a reorganization of the district's "central administrative and supervisory staff" after evaluating the individuals serving in those positions, but within one year of the creation of the State-operated school district. N.J.S.A. 18A:7A-44(c) specifies what is to occur with respect to the positions of the central administrative and supervisory staff that were not abolished by operation of N.J.S.A. 18A:7A-44(a) upon implementation of the reorganization mandated by N.J.S.A. 18A:7A-44(b).

The words of N.J.S.A. 18A:7A-44(c) authorize the State district superintendent to hire any individual whose position is abolished pursuant to this provision "based upon the evaluation of the individual and the staffing needs of the reorganized district staff." The evaluation referred to is that performed pursuant to N.J.S.A. 18A:7A-44(b) and the "reorganized district staff" is that which results from the reorganization of the district's

central administrative and supervisory staff mandated by N.J.S.A. 18A:7A-44(b). It is in this context that the requirement to hire individuals with immediate tenure if they had tenure in their prior administrative/supervisory positions must be read. We find that, read in context, the language at issue confers instant tenure on an individual who had achieved tenure in an administrative/supervisory position within the central office prior to the creation of a State-operated school district only if such individual is hired to fill an administrative/supervisory position within the central office following reorganization.

Quite simply, the language of the statute provides no basis to expand the tenure rights of those individuals who had acquired tenure as part of the central office staff so as to permit them to claim instant tenure in positions in which they had never served. In this respect, we stress that, like N.J.S.A. 18A:7A-44(a), N.J.S.A. 18A:7A-44(c) provides that any individual whose administrative/supervisory position is abolished is entitled to assert a claim or be placed on a preferred eligibility list for any position to which he may be entitled by virtue of tenure or seniority within the district. This protects the tenure rights of administrative staff members whose central office positions are abolished with respect to those positions in which such individuals had served. To interpret the language at issue so as to expand those rights to encompass positions in which individuals had not served would confer on administrative/supervisory staff within the central office of a school district that has failed to assure a thorough and efficient system of education greater rights than those possessed by similar staff members serving in the central offices of school districts that are providing their students with an adequate education. N.J.S.A. 18A:7A-15; N.J.S.A. 18A:7A-34. This result would be

educationally unsound and inconsistent with the overall purpose of the statutory framework to assure correction of serious educational deficiencies.

In short, examination of the language of N.J.S.A. 18A:7A-44(c) fails to disclose any intent on the part of the Legislature to confer tenure rights with respect to positions in which they had never served on individuals affected by the statutorily-required reorganization of the central office staff following the creation of a State-operated school district. To the contrary, to interpret the provision at issue to confer instant tenure as a vice-principal on appellant, who had never served in this position, would be inconsistent with the rigorous evaluation process required with respect to building principals and assistant principals following the creation of a State-operated school district. N.J.S.A. 18A:7A-45.

Consideration of the legislative history supports this view. The language at issue was not part of the original legislation, but was added when the bill was amended by the Senate Education Committee. Senate Education Committee, Statement to Assembly Bill No. 2927 with Senate committee amendments (May 4, 1987). As expressed in the Statement:

> Upon the establishment of a State-operated district the positions of the district's chief school administrator and those employees responsible for curriculum, business and finance, and personnel who report directly to the chief school administrator or the board will be abolished. Affected employees will be given 60 days notice or 60 days pay and retain "bumping rights" for other positions for which they may have seniority. The State district superintendent will evaluate all other central administration staff and reorganize the district's central administration within six months. With the implementation of the reorganization all remaining central administration staff positions will be abolished. Affected employees will be given 60 days pay and will retain "bumping rights" for other positions in the district for which

> they may have seniority. Employees may be rehired based upon the evaluation and the needs of the district. Any employee who is rehired for a position in the reorganized central administration shall be hired with tenure if he had tenure in their previous position. Individuals who did not have tenure may earn tenure in the new position.

(Emphasis added.)

This Statement eliminates any doubt as to the intent of the Legislature. Therefore, for the reasons stated, the State Board of Education affirms the decision of the Commissioner.

Margaret F. Bartlett abstained.

April 4, 2001

Date of mailing APR 06 2001

63-00

D.C. ON BEHALF OF T.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT,	:	
RESPONDENT.	:	
	:	

February 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 210-00
AGENCY DKT. NO. 20-1/00
19A

D.C. ON BEHALF OF T.C.,

Petitioners,

v.

STERLING RECIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent.

D.C., parent of T.C., for petitioners

William D. Hogan, Esq., for respondent (Cozen & O'Connor, attorneys)

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

STATEMENT OF THE CASE

Petitioners T.C. and D.C., his mother, bring claims for relief relative to school records made and maintained by the respondent Sterling Regional High School Board of Education (BOE); T.C.'s expulsion from the BOE's school system; and his future education.

More particularly, petitioners demand that the BOE remove from T.C.'s disciplinary records an entry relating to a theft charge. Also, petitioners demand that the BOE provide copies

of records made and maintained pursuant to the BOE's substance abuse prevention program. P-1. See N.J.S.A. 18A:40A-1 et seq. Also, petitioners claim that (although T.C. has been expelled) the BOE must provide to T.C. an education in a "proper . . . facility," etc. P-1.

Relative to the pupil records relating to discipline, the BOE points out that the subject entry has already been stricken from T.C.'s record and that petitioners have received copies of T.C.'s pupil records. See P-21, N.J.A.C. 6:3-6.1 et seq. Relative to substance abuse prevention program records, the BOE points out that, although there was a substance abuse prevention program inquiry relative to T.C., petitioners acknowledge that no action was found necessary and, in any event, the program's records are confidential and not subject to disclosure to students and parents. Relative to T.C.'s expulsion, the BOE points out that petitioners acknowledge that he engaged in the subject misconduct and that they do not allege that the BOE acted arbitrarily, etc. Given all the above, the BOE submits that the petition fails to state a claim upon which relief can be granted and that it is barred by the equitable doctrine of laches and that it must be dismissed. N.J.A.C. 6:24-1.1 et seq. See particularly N.J.A.C. 6:24-1.2c.

This order addresses whether an emergent order should be entered on petitioners' claims.

PROCEDURAL HISTORY

On January 14, 2000, the petition and attached exhibits were filed with the Department of Education and these are marked "P-1" et seq. N.J.S.A. 18A:6-9. The Department transmitted the petition, etc., to the Office of Administrative Law (OAL), designating it a motion for emergent relief. On January 19, 2000, the petition, etc., were filed as a contested case and scheduled for a February 3, 2000 hearing. N.J.S.A. 52:14B-2(b). On January 31, 2000, the BOE's FAXed answer, etc., were received in the OAL. On February 3, 2000, the motion was heard in the OAL in Trenton (Hamilton Township); petitioner D.C. testified; and additional exhibits were marked.

FINDINGS OF FACT

T.C.'s date of birth is May 21, 1983. He resides with his parents in the Borough of Magnolia, in the BOE's school district.

T.C., who has no sibling, has a history of misconduct and suspensions from elementary school and from the BOE's high school (as described below.) When asked what caused T.C.'s misconduct, D.C. testified that his grandmother's cancer and death in 1990 might have been a cause.

Relative to the 1997-98 school year, when T.C. was a high school freshman, the BOE's disciplinary records show the following:

For disruption in class on October 22, 1997, he received administrative detention (ADO) on October 28, 1997.

For disruptive behavior in the media center on November 3, 1997, he received internal detention on November 5, 6 and 10, 1997 and school officials conferred with his parent on November 21, 1997.

For cutting ADO on November 10, 1997, he ADO on November 11 and 12, 1997.

For cutting teacher's detention on January 28, 1998, he received ADO on February 2, 1998.

For being unprepared for physical education (PE) class on February 26, 1998, he received ADO on March 3, 1998.

For being unprepared for PE class on March 4, 1998, school officials conferred with his parents. P-2.

Relative to the 1998-99 school year, when T.C. was a sophomore, the BOE's disciplinary records show the following:

For misbehaving in class and failure to appear for detention on October 19, 1998, he received an ADO on October 22 and 24, 1998.

For cutting English class and PE on October 20, 1998, he received ADO on November 7 and 21, 1998.

For being late for PE class on October 27, 1998, he received ADO on October 29, 1998.

For use of inappropriate language and insubordination on October 28, 1998, he received ADO on October 29, 1998.
For failure to follow directions on October 27, 1998, a conference with his mother was held on October 30, 1998.

The BOE has a substance abuse prevention program in place and, when a student's actions indicate he might be at risk, the program's Core Team submits a referral form to the student's teachers. P-33, P-33b. In October 1998, T.C. was observed to be making more visits to the boys' rest room than normal and the referral form was submitted to his teachers. Contrary to BOE policy, Paul Hopkins, one of T.C.'s teachers, showed the form to T.C. and stated to him that he didn't appear to have a substance abuse problem. Naturally, this distressed T.C. and he mentioned it to D.C. D.C. demanded a copy of the referral form from the Core Team. Lori Leonard, the BOE's substance abuse coordinator and member of the Core Team, provided to D.C. materials, including information on the program and an example of the referral form. P-33b. However, citing the need for confidentiality to protect sources of information that are essential to the program (which is not used as a basis for discipline), Ms. Leonard declined to provide to petitioners a copy of the form shown by Mr. Hopkins to D.C. The BOE represents that, after T.C.'s teacher showed him the referral form, it notified its staff that substance abuse prevention program activities were confidential and that the teachers' actions were contrary to that policy of confidentiality.

In a letter dated February 4, 1999, D.C. requested that the school system transfer T.C. from one teacher's PE class to another and requested that the school system remove from T.C.'s records disciplinary actions relative to his use of restrooms and petitioners submitted to the school system a note from the office of David W. Bradway, M.D., dated October 20, 1998, wherein it is wtitten that T.C. suffered from digestive problems and that, when necessary, he should be excused to go to the rest room. P-6, P-3.

In a letter dated February 10, 1999, school superintendent Gary Kasprack wrote to D.C. that it had transferred T.C. to the PE class requested; he transmitted to her a copy of T.C.'s disciplinary record; and he pointed out that the disciplinary record included no reference to use of the restroom. P-7.

By letter dated February 10, 1999, superintendent Kasprack notified T.C.'s parents of the following: Because of T.C.'s "dangerous horseplay" in a locker room on April 29, 1999; "creating a confrontation during 1st period" on May 3, 1999; and abusive language, he had decided to place T.C. on "external suspension" for May 2, 4, and 5, 1999. That the suspension would continue until a conference was held between the parents and superintendent. They should telephone a given number to schedule the conference. Consistent with the BOE's policy and "Student/Parent Handbook," they had a right to an appeal the decision. P-8.

By letter dated May 6, 1999, superintendent Kasprack notified T.C.'s parents of the following: Confirming their conference, because of his T.C.'s repeated disciplinary infractions during the 1998-99 school year, he was placed on homebound instruction pending a psychiatric evaluation. P-9.

By letter dated May 6, 1999, D.C. requested an opportunity to appear before the BOE relative to a representation that T.C. was being evaluated and, on May 14, 1998, she submitted an appeal of the decision to place T.C. on homebound instruction pending the psychiatric evaluation. P-10, P-13.

By letters dated May 14, 1999, Superintendent Kasprack confirmed that he had previously sent to D.C. copies of his records; transmitted to her copies of his disciplinary record, latest report card and permanent record card; and notified T.C. that the BOE would meet with her on May 20, 1999. He also notified T.C.'s parents of the following: Consistent with the BOE's policy, they had a right to appeal in writing within 10 days and that some of what they sought to appeal was out-of time. On May 20, 1999, the BOE would hold a discipline and appeal hearing; during the hearing evidence and witnesses would be presented by the school system in support of the charges against T.C.; and petitioners had a right to be present and the right to an attorney, to cross-examine witnesses and to present evidence. Superintendent Kasprack also notified petitioners that homebound instruction would continue pending the outcome of the hearing, etc. Transmitted with the May 14, 1999 letter were copies of a notice of suspension and a letter setting forth the nature of the charges, etc. P-12, P-12a.

In a letter dated May 19, 1999, superintendent Kasprack wrote to D.C. as follows: By way of his May 14, 1999 letter, he had previously forwarded to her T.C.'s "complete records." "Core team records" are not part of T.C.'s student records and, therefore, she could not examine them. The psychiatric evaluation resulted from T.C.'s disciplinary record and not from action by the Core team. The hearing scheduled for May 20, 1999 would go forward and she should attend and participate in it. P-14.

On May 20, 1999, the BOE held the disciplinary hearing, etc. Petitioners appeared but offered no defense or documentary evidence and D.C. stated that she was not opposed to the psychiatric evaluation and that T.C. had been accepted to the Camden County Technical School for the 1999-2000 school year. The BOE adopted a resolution upholding the superintendent's decision to place T.C. on homebound instruction pending the psychiatric evaluation, etc., and denied petitioners' appeal. On May 21, 1999, school officials forwarded a copy of the resolution to petitioners. P-16. On May 25, 1999, the BOE adopted a resolution, with findings of fact on the charges and concluding as follows: T.C. was guilty of dangerous horseplay in the locker room; the homebound instruction should continue for the remainder of the 1998-99 school year; and, given T.C.'s intention to attend the Camden County Technical School for the 1999-2000 school year, unless he applied for admission to the BOE's high school, no psychiatric evaluation would be required. P-17.

T.C. enrolled in the Camden County Technical School for the 1999-2000 school year. However, after about two weeks, he decided he wanted to return to the BOE's high school. And, in September 1999, D.C. consented to psychiatric evaluation of T.C. P-18.

On October 18, 1999, Superintendent Kasprack met with petitioners and, in a letter dated October 19, 1999, Superintendent Kasprack confirmed the subjects of the meeting. T.C. would continue in external suspension pending receipt of the psychiatric evaluation. T.C. had been admitted to school on condition that he would behave well. However, during October 1999, T.C. had engaged in numerous instances of misconduct including use of profanity, horseplay, refusal to cooperate, etc. P-20.

In psychiatric evaluation dated October 19, 1999, James J. Hewitt, M.D., wrote the following: T.C. stated that, in high school proficiency test, he performed in a way that would show how bad a grade he could get to see "how the school would react." He demonstrated anxiety and cognitive deficits in terms of awareness and social contexts; but no overt persistent disturbance, depression or suicidal thinking. He tended to blame others. Dr. Hewitt's impressions included adjustment disorder with possible future bipolar disorder, manic type. Dr. Hewitt found no grounds for classification or accommodation through 504. P-19.

On October 25, 1999, petitioners signed an agreement whereby T.C. agreed to behave consistent with rules of behavior and that, in the event of misconduct, he was subject to expulsion. P-23. In a letter dated October 25, 1999, Superintendent Kasprack confirmed that, effective that day, T.C. was readmitted to the high school on condition that he comply with those rules of behavior. P-22.

By letter dated November 22, 1999, Superintendent Kasprack notified petitioners of the following: T.C. was charged with use of profanity, repeated disruptions in and out of class, cutting class and leaving the school building without permission, all in violation of the above-described agreement and rules. He was placed on external suspension for November 22, 23, 24, 29 and 30, 1999. Petitioners had a right to appeal the discipline. Copies of records relative to the misconduct accompanied the letter. P-24.

By letters dated December 1, 1999, Superintendent Kasprack transmitted to petitioners copies of T.C.'s academic, discipline and attendance records. He also notified them that, on December 9, 1999, the BOE would hold a discipline and appeal hearing; during the hearing evidence and witnesses would be presented by the school system in support of the charges against T.C.; and petitioners had a right to be present and the right to an attorney, to cross-examine witnesses and to present evidence. P-25, P-26.

On December 9, 1999, the BOE held the disciplinary hearing, etc. The petitioners offered no defense to the charges and T.C. left the hearing, stating, "This is all bullshit" and directing the middle finger gesture of contempt towards the BOE. Thereafter, the BOE adopted resolutions wherein it recited that T.C. was proven guilty as charged of use of profanity, repeated disruptions

in and out of class, cutting class and leaving the school building without permission, etc., in willful and repeated violation of the BOE's disciplinary code. The BOE further permanently suspended T.C. The BOE also resolved that, if T.C. were accepted by the Camden County Alternative High School, it would enroll him in that school in order to allow him to obtain credits sufficient to obtain his high school degree. However, if T.C.'s attendance in that school were below 85%, the BOE would not pay for his education in that school. P-28, P-30.

By letter dated December 23, 1999, the school system provided to D.C. the names, addresses, administrator names and telephone numbers of alternative schools in Camden, Gloucester and Burlington Counties, so that she could contact them and make arrangements for T.C.'s application for enrollment. P-31.

D.C. testified that she telephoned the alternative schools. However, D.C. testified that, because the schools' students are troubled - with substance abuse or other problems, she did not wish T.C. to attend them.

CONCLUSIONS OF LAW

Pupil Records

There is no claim that the BOE failed to properly make, maintain and provide copies of T.C.'s pupil records as defined in N.J.A.C. 6:3-6.1 et seq.

There is also no dispute that, although there was a referral to the BOE's substance abuse prevention program, there was no finding that T.C. had a substance abuse problem and there was no further action in that regard.

Clearly, the substance abuse prevention program provided for by N.J.S.A. 18A:40A-1 et seq. is dependent upon information that, without confidentiality, persons would be reluctant to provide and, without such information the program would be unable to assist students in need.

When T.C.'s teacher thoughtlessly showed him the referral form, he certainly acted contrary to the best interests of the substance abuse prevention program and T.C. However, his actions do not justify or require breaching the confidentiality upon which the program depends. In any event, petitioners have cited no authority that would require the BOE to provide copies of the subject form, etc.

Discipline

The State is required to provide a system of free public schools for the education of children between the ages of 5 and 18 years and this is accomplished through local school districts operated by boards of education. N.J. Const. (1947), Art. 8, S IV, par. 1, N.J.S.A. 18A:8-1 et seq.

However, a student's right to a public education is conditioned on his good behavior. State v. Conk, 180 N.J. Super. 140, 145 (App. Div. 1981). A student who engages in, e.g., continued and willful disobedience, or who engages in open defiance of the authority of any teacher or person having authority over him, or who engages in the habitual use of profanity or obscene language, is liable to punishment, suspension or expulsion from school. N.J.S.A. 18A:37-2.

Where a school administrator has a reasonable basis for suspension of a student, he may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. N.J.S.A. 18A:37-5. Consistent with the principles of due process and fundamental fairness, a student subject to suspension or expulsion has a right to notice of the charge on which the proposed suspension or expulsion is based; assistance of counsel; a hearing, during which the student may confront any witness against him or her; etc. See N.J.S.A. 18A:37-1 to -5; Tibbs v. Bd. of Ed. of Tp. of Franklin, 59 N.J. 506 (1971); R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337 (App. Div. 1970).

Generally, public entities are presumed to act lawfully and in good faith; a reviewing court will not substitute its judgment for that of a public entity that has exercised its lawful discretion; and the party challenging a public entity's action must prove that the action was

arbitrary, capricious and unreasonable. Bodies by Lembo, Inc., 286 N.J. Super. 298, 309 (App. Div. 1996); In re On-Line Games Contract, supra, 279 N.J. Super. at 590, Colonnelli Bros., Inc. v. Ridgefield Park, 284 N.J. Super. 538, 541 (App. Div.), certif. denied, 143 N.J. 327 (1995). See also Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966).

I see no allegation that the BOE acted unlawfully relative to the expulsion of T.C. To the contrary, on the record here, it appears that the BOE complied with laws governing the expulsion process. Further, petitioners have cited no law requiring that, having lawfully expelled a student, a local board of education must arrange for his education elsewhere. (Although I am happy to see that the BOE has offered to accommodate T.C. so that, through enrollment in an alternative school, he can obtain credits to obtain his high school degree.)

To succeed in a motion for a temporary restraint and interlocutory injunction, the movant must show, among other things, that, if the relief is not granted, he or she will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation, and that, when the case is fully heard, it will probably succeed in its claim. See, N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

I see no basis to find and/or conclude that petitioners have a probability of success or that they have otherwise satisfied standards for emergent relief.

ORDER

Consistent with the above, **I DENY** emergent relief.

The parties may serve discovery requests upon one another.

A hearing date will be scheduled and notice of same will be sent to the parties.

In the meanwhile, I suggest to petitioners that they make a good faith effort to gain admission to one of the alternative schools identified by the BOE.

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

Feb 4, 2000
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's Exhibits:

P-1 Petition, January 14, 2000

P-2 Disciplinary record, 1997-98 school year

P-3 Note from office of David W. Bradway, M.D., October 20, 1998

P-4 Letter from D.C., November 2, 1998

P-5 Cut slip, November 3, 1998

P-6 Letter from D.C., February 4, 1999

P-7 Letter from BOE Superintendent, February 10, 1999

P-8 Letter from BOE Principal, May 4, 1999

P-9 Letter from BOE Superintendent, May 6, 1999

P-10 Letter from D.C., May 6, 1999

P-11 BOE Agenda, May 6, 1999

P-12 Letter from BOE Superintendent, May 14, 1999

P-12a Letter from BOE Superintendent, May 14, 1999

P-12b Letter from BOE Superintendent, May 14, 1999

P-12c Letter from BOE Superintendent, May 14, 1999

P-13 Appeal to Superintendent or BOE, by D.C., May 18, 1999

P-14 Letter from BOE Superintendent, May 19, 1999

P-15 Letter from Governor's South Jersey Office, May 19, 1999

P-16 Letter from BOE Superintendent, May 21, 1999; BOE Resolution, May 20, 1999

P-17 Letter from BOE Superintendent, May 26, 1999; BOE Resolution, May 250, 1999

P-18 D.C.'s permission for psychiatric examination, September 21, 1999

P-19 Report of psychiatric examination by James L. Hewitt, M.D., October 19, 1999

P-20 Letter from BOE Superintendent, October 19, 1999

P-21 Disciplinary record, 1998-99 school year

P-21a Note relative to T.C.'s disciplinary record, undated

P-22 Letter from BOE Superintendent, October 25, 1999

P-23 Rules for behavior, etc., signed by petitioners, October 25, 1999

P-24 Letter from BOE Superintendent, November 22, 1999

P-25 Letter from BOE Superintendent, December 1, 1999, etc.

P-26 Letter from BOE Superintendent, December 1, 1999

P-27, BOE Agenda, December 9, 1999

P-28 Letter from BOE Superintendent, December 10, 1999; BOE Resolution, December 9, 1999

P-29 Letter/request for due process hearing, from D.C., December 10, 1999

P-30 Letter from BOE Superintendent, December 17, 1999; BOE Findings of Fact, December 16, 1999

P-31 Letter from BOE Superintendent, December 23, 1999

P-32 Letter from D.C., January 14, 2000

P-33 BOE Alcohol/Drugs/Substances policy

P-33a Brochure, High School's Department of Student Services

P-33b FAX transmittal sheet and Student Assistance Program Referral Form

Respondent Board of Education's Exhibits:

none

OAL DKT. NO. EDU 210-00
AGENCY DKT. NO. 19A-1/00

D.C. ON BEHALF OF T.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT,	:	
RESPONDENT.	:	
	:	

The audio cassette tape of the emergent hearing conducted at the Office of Administrative Law on February 3, 2000 and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6:24-1.5, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

Here, with respect to petitioner's request that the Board provide T.C. with an education in a "proper... facility," (Order at 2) petitioner fails to establish that T.C. will suffer irreparable harm, since she does not dispute that the Board has offered to pay both tuition and

transportation costs for T.C.'s attendance at one of three local alternative high schools, provided he maintains good attendance at such school.[1] Additionally, given the facts presently on the record, petitioner has not demonstrated a likelihood of succeeding on the merits of her claim. Noting that T.C. appears to have an extensive history of disciplinary infractions at Sterling High School and petitioner does not allege that the Board failed to accord him due process, the Commissioner finds that the equities lie on the side of the Board, which maintains a vital interest in ensuring that its disciplinary policy is enforced, to the safety and benefit of all its students.

Turning to petitioner's claim that she is entitled on an emergent basis to documents generated by the District's Core Team regarding T.C. in the 1998-99 school year, the Commissioner determines that petitioner has demonstrated no legal right to obtain these documents, to the extent any exist.[2] Indeed, petitioner's request appears to be based on her own need to know what T.C.'s teachers may have reported about him, rather than on any evidence, or even mere allegation, that failure to obtain them will result in irreparable harm to T.C. Moreover, the Commissioner finds that equity favors a denial of petitioner's request to obtain these documents, thereby acknowledging the Board's concern that preserving the confidentiality of documents generated by the Core Team is essential to the integrity of the team's operation and, correspondingly, to the team's ability to engender trust among the students it is designed to serve and assist.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein and amplified above. Petitioner's request for emergent relief is denied. This

[1] As of the date of the hearing, T.C. was not enrolled in any of these schools.
[2] The Commissioner herein recognizes that the Board takes the position that these documents do not constitute a "student record," as defined by *N.J.A.C.* 6:3-6.1.

matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 15 2000

Date of Mailing: FEB 16 2000

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

64-00

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS TRADING AS BENCH REALTY, FREDERICK A. JACOB, AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought determination as to whether land may be acquired by a board of education without submitting the question to voters. The Board and respondent sellers entered into an Agreement of Sale in 1995 for the land on which the Board intended to construct a new school. The Board did not seek voter approval, nor did it include an appropriation for the purchase of the land as a line item in the proposed budget. The Board did request and receive site approval from the County Superintendent.

The ALJ determined that voter authorization was not required, because petitioner did not borrow any money for the property purchase, having effectuated such purchase by using surplus funds. *N.J.S.A.* 18A:20-4.2(d). Thus, the ALJ concluded that, under the facts and circumstances of this matter, the Board did not violate the School Laws when it determined to purchase the real property for school property without submitting the proposal to its voters. Although the ALJ determined that the Board improperly failed to provide for a line item including the proposed expenditure in its annual school budget, the ALJ found that this procedural defect was not sufficient grounds to warrant overturning the Board's action to purchase the property in question. The ALJ concluded that the sale and purchase was in accordance with the law and ordered the acquisition of the property sustained.

The Commissioner affirmed in part, reversed in part and remanded for further proceedings. The Commissioner concurred with the ALJ that the Board erred in not including a line item appropriation for purchase of the property in the annual school budget submitted to the voters. The Commissioner did *not* concur, however, that the Board was able to purchase land without specific authorization from the voters to do so. Disagreeing with the ALJ's analysis of the history and construction of *N.J.S.A.* 18A:20-4.2, the Commissioner found instead that *N.J.S.A.* 18A:20-4.1 and 4.2 must be read in tandem, and that when so read in light of their legislative history, these statutes do *not* permit boards of education to purchase property without prior approval of the voters, regardless of whether or not money is borrowed for such purpose. However, the Commissioner declined to void the transaction in dispute or order other relief on the present record. Because the effect of a holding that the Board was not in substantive compliance with law had not been fully argued or considered at the OAL, the Commissioner remanded the matter for further proceedings on that issue.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10887-98

AGENCY REF. NO. 483-10/98

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,
Petitioner,

v.

ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS TRADING AS BENCH REALITY, FREDERICK A. JACOB, AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,
Respondents.

Frank DiDomenico, Esq., for the Fairfield Board of Education, petitioner

David J. Eddowes, Esq., for respondents Robert Ench and Sanderina R. Kasper (Davidow, Sherman, Eddowes & Geiger, attorneys)

Frederick Jacob, Esq., respondent, *pro se* (Jacob & Ferringo, attorneys)

Clark L. Cornwall, III, Esq., Vice-President/Regional Counsel for Old Republic National Title Insurance Company

Record Closed: September 27, 1999 Decided: November 10, 1999

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Fairfield (Board), seeks a determination as to whether, pursuant to *N.J.S.A.* 18A:20-4.1 and 18A:20-4. land may be acquired by a Board without submitting the question to voters.

The Board originally sought a Declaratory Judgment from the Commissioner of Education (Commissioner) pursuant to *N.J.A.C.* 6:24-2.1. However, the Commissioner declined to consider the Board's request, but rather, considered the matter to be a contested case, under *N.J.A.C.* 6:24-1.2 and transmitted it to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Two Prehearing Conferences were held wherein it was agreed that no material facts existed, and, therefore, the Board was granted leave to submit a Motion for Summary Decision, pursuant to *N.J.A.C.* 1:1-12.5, together with its Brief of Law. Subsequent to receipt of the responses thereto, the hearing record closed on September 27, 1999.

The Board's Position

Statement of Material Facts

Petitioner contends that there is no genuine issue of material fact as to the following material facts:

1. Respondents, Robert Ench and Sanderina R. Kasper, Executrix of the Estate of Benjamin Kasper, partners trading as Bench Realty. (hereinafter Sellers) were the owners of approximately 62.7 acres on Buckshutem Road, Fairfield Township, Cumberland County, New Jersey known as Block 12, Lot 27.02 (See Exhibit A, Agreement of Sale).

2. Petitioner Board by Resolution, agreed to purchase the land from the Sellers by a transfer of funds from surplus, and without submission of the purchase to the voters of the Township and/or without an appropriate line item on the budget respecting the purchase. (See, Exhibit B, Board minutes of October 18, 1995 and February 21, 1996).

3. The Board and Sellers entered into an Agreement of Sale dated October 30, 1995, for the purchase of the land at a price of $150,000. (See, Exhibit C, Board minutes of October 18, 1995).

4. The Agreement of Sale between the Board and Sellers was later amended to reflect a purchase of 62.7 acres and not 60 acres, at a revised price of $156,750, the final purchase price for the land in question. (See Exhibit D, Board minutes of February 21, 1996).

5. Settlement for the purchase of the land in question occurred on August 22, 1996, at which time title to the property was transferred from Sellers to the Board. (See Exhibit E, Deed dated August 22, 1996).

6. The Board intended to construct a new school on the property purchased, however, the referendum to construct the new school was defeated by the voters of Fairfield Township.

7. The Board did not seek voter approval, nor did it include an appropriation for purchase of the land as a line item on the proposed budget.

8. The Board requested and received approval from the County Superintendent as an approved site for a proposed school. (See Exhibit F, letter of Glenn E. Earl, Cumberland County Superintendent of Schools, dated November 14, 1995).

9. The Board requested and received approval from the Department of Education (DOE), Bureau of Facility Planning Services, to utilize the land as an elementary school site. (See Exhibit G, letter from the DOE dated May 3, 1995).

10. The Board requested and received approval from the New Jersey DEP, Office of Environmental Planning (OEP) approving the site for construction of a new school. (See Exhibit H, letter of Joseph M. Chiarello, Esquire, dated July 18, 1997, and letter from State of New Jersey DEP dated March 8, 1996).

11. The Board did not receive prior final approval from the DOE for the land purchase, however, subsequent to the land purchase all requirements of *N.J.A.C.* 6:22-2.1 were satisfied by the Board. (See Exhibit I, letter of Michael Azzara, Assistant Commissioner, DOE, dated October 20, 1997).

12. The Board attempted to negotiate an option to purchase the land in question, however, the option was never executed. (See Exhibit J, letter of Frederick A. Jacob, Esquire, dated September 30, 1997).

13. A resident of Fairfield Township, Cynthia Zirkle, wrote to the then Commissioner, requesting whether or not the Board's purchase of the land in question was valid pursuant to statutory authority. (See Exhibit K, letter of Cynthia Zirkle, dated September 16, 1997).

Procedural History

A Fairfield Township resident, Cynthia Zirkle, wrote to the Commissioner and questioned the validity of the land purchase by the Board. Michael Azzara, Assistant Commissioner, DOE, responded to Ms. Zirkle and advised her that there had been no formal adjudication as to the Board's purchase. Additionally, he advised Ms. Zirkle that she would need to seek a formal ruling by filing a petition with the Commissioner. No such petition was filed. Additionally, the Board is not aware of any other formal objections to the purchase of the land in question.

Notwithstanding the above, the Board filed a petition with the Commissioner seeking a declaration as to whether or not the land purchase was valid.

The Board now files this motion for summary decision seeking a determination of the Commissioner that the land purchase was, in fact, valid.

Law and Argument

Point I

The Board of Education was not in Violation of *N.J.S.A.* 18A:20-4.1 and/or *N.J.S.A.* 18A:20-4.2 When it Acquired Premises Known as Block 12, Lot 27.02, on the Tax Map of Fairfield Township for the Sum of $156,750 from its Surplus and Without Submitting the Proposal to the Voters of Fairfield Township

As there are no factual issues in dispute, the sole issue is whether or not the Board was in violation of state statute when it acquired the land on Buckshutem Road, Fairfield Township, known as Block 12, Lot 27.02. Therefore, an analysis of the applicable law is appropriate.

The easiest analysis is as to *N.J.S.A.* 18A:20-4.1, Type II Districts: Acquisition of Property Without Authorization of Voters. That section deals only with rentals on a year-to-year basis of for a term not to exceed five years, in the case of emergency, and options not to exceed one year in duration. The Board in the instant matter was not involved in a rental situation and, as noted, never entered into an option to purchase the property in question. Therefore, *N.J.S.A.* 18A:20-4.1 is not applicable. Our analysis, therefore, leads to *N.J.S.A.* 18A:20-4.2. Acquisition of Property: Authority Required. That section reads as follows:

> The board of education of any school district may, for school purposes:
>
> (a) purchase, take and condemn lands within the district and lands not exceeding 50 acres in extent without the district but situate in a municipality or municipalities adjoining the district, but no more

> than 25 acres may be so acquired in any one municipality, without the district, except with the consent, by ordinance of such municipality . . .
>
> (d) borrow money therefor, with or without mortgage: in the case of a Type II without a board of school estimate, when authorized so to do at any annual or special school election . . .

A careful reading of *N.J.S.A.* 18A:20-4.2, clearly indicates that voter approval for the purchase of land by a board of education is necessary only when "borrowing money therefor." It is not disputed that in the present matter, the Board purchased the land in question by utilizing surplus funds. Therefore, the Board was not required to borrow any money for the purchase. Nowhere in *N.J.S.A.* 18A:20-4.2 is there a requirement for a board of education to obtain voter approval or appropriate money as to line item on a proposed budget, in the event the board is not borrowing money.

Helpful is an analysis of the evolution of the present day *N.J.S.A.* 18A:20-4.2. During 1903, *R.S.* 18:7-73, an act to "authorize municipalities or school districts in this state to raise moneys for the purchase of lands for school purposes, and for erecting, enlarging, repairing or furnishing school houses" was adopted by the Legislature. *R.S.* 18:7-73 permitted boards of education to appropriate moneys for purchase of lands "in the same manner as other appropriations for school purposes are made by it." See attached *R.S.* 18:7-73, (Exhibit L). The statute was revised in 1945 to read as follows:

> With the previous authority of legal voters of the district, a board may purchase and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefore with or without mortgage. A board of education may sell or dispose of any of its real estate or rights or interest therein, which cease to be suitable or convenient for the use for which they were acquired or no longer needed for school purposes, in the manner set forth in Sections 18:5-25 to 18:5-29, both inclusive of this title.

The statute was again revised on June 12, 1948, to read as follows:

> With the previous authority of a vote of the legal voters of the district, a board may purchase and improve school grounds . . . . (See, attached *R.S.* 18:7-73.)

R.S. 18:7-73 became *N.J.S.A.* 18A:20-4.2 during 1967. Significantly, the language "with the previous authority of a vote of the legal voters of the district . . ." was deleted. All subsequent revisions to *N.J.S.A.* 18A:20-4.2 have also deleted the language requiring previous authority of the vote of the legal voters of a district.

The Legislature opted to delete language requiring a prior vote of the legal voters of a district before a board of education could purchase land. Deletion of that language gave boards of education greater flexibility in obtaining lands required for educational purposes. However, *N.J.S.A.* 18A:20-4.2(d) requires boards of education to obtain voter approval only if the board is borrowing money for the purchase.

In the present matter, as previously noted, the Board was not required to borrow money and effected the purchase by transferring $156,750 from its surplus funds. Therefore, no prior voter approval was required.

In the letter of Michael Azzara, Assistant Commissioner of Education, dated October 20, 1997, Mr. Azzara states in paragraph 2 "It has generally been the Department's position that voter approval to purchase land is required whether by outright purchase or through exercising an option in accordance with *N.J.S.A.* 18A:20-4.1(b), except were acquisition is exempt from voter approval by statutory authority such as lease purchase or gift." However, he cites no statutory authority and none can be found in *N.J.S.A.* 18A:20-4.2. As previously noted, *N.J.S.A.* 18A:20-4.1 simply does not apply to the facts now before the Court.

Therefore, the Board's purchase of the 62.7 acres on Buckshutem Road, known as Block 12, Lot 27.02, was a valid purchase.

Point II

Even if the Board's Purchase of the Land in Question Violated Statutory Authority, the Purchase should not be Voided and should be Affirmed by the Commissioner

Although there is no statutory authority which prevented the Board from purchasing the land in question without prior submission to the voters or inclusion of an appropriation as a line item on the budget, should the purchase be determined to be contrary to statutory authority, it should not be voided.

First, any actions by the Board were certainly done in good faith The Board obtained all approvals required, to include approvals by the DOE. Additionally, the referendum for construction of the new school building was presented to the voters, who defeated same. The Board relied upon the advice of its solicitor and purchased the land in question out of surplus funds. The Board strongly believes that the land is still suitable for a school and, in fact, is intending to present another referendum to the voters of Fairfield Township for construction of a new school on the land in question.

As noted in Michael Azzara's letter of October 20, 1997, the Board has, in fact, obtained all approvals for construction of a school pursuant to *N.J.A.C.* 6:22-2.1.

The Board purchased the property and title has been transferred to the Board's name. See attached deed. Additionally, the Board's ownership interest is insured by a policy of title insurance. The Board still has an asset worth at least what it paid, $156,750, if not more. Amongst other things, the site is serviced by sewer, making it an ideal site for a new school.

Voiding of the purchase at this point is simply not feasible and would be extremely detrimental to the Board. There is certainly no guarantee that the Sellers have retained all of the money paid for the land, and, in fact, that likelihood is remote. In short, nothing would be gained by a voiding of the purchase.

For these reasons, the purchase should be affirmed by the Commissioner.

For all the reasons cited in this brief, petitioner respectfully requests that a determination be made affirming the purchase of Block 12, Lot 27.02, Fairfield Township, Cumberland County, New Jersey, by the Fairfield Township Board of Education.

Respondents, Ench and Kasper's Position

There were no arguments by the parties opposing the Board's Motion for Summary Decision. Respondents Ench and Kasper submitted their letter memorandum in support of the Board's Motion where they say, in part, that:

> Robert Ench and Sanderin Kasper, d/b/a Bench Realty . . . entered into a contract which was presented to it by the attorney for the school board at the time. The Deed of conveyance was prepared after and pursuant to terms set forth in a title report from Commonwealth Title.
>
> At all times, Robert Ench and Sanderin Kasper, d/b/a Bench Realty have acted in good faith and been under the impression that the action would achieve the assumed affect of transference of title to the property from Bench Realty to the Fairfield Board of Education.
>
> Bench Realty has no objection to the relief sought by the plaintiffs motion and joins in the plaintiff's application for that relief.
>
> (Letter memorandum, September 20, 1999)

Respondent Jacob's Position:

I have received and reviewed the Motion for Summary Judgment submitted on behalf of Fairfield Township Board of Education. I agree in all respects with the argument of Mr. DiDomenico, particularly with regard to Point I of his excellent brief. His analysis of the legislative history of *N.J.S.A.* 18A:20-4.2 is particularly persuasive. I would like to point out,

moreover, that if *N.J.S.A.* 18A:20-4.2(a) is interpreted to require voter approval to buy land, then voter approval would also be required for the following:

1. Grade or drain land (sub-paragraph b);
2. Landscape land (sub-paragraph b);
3. Repair buildings (sub-paragraph c);
4. Furnish buildings (sub-paragraph c);
5. Lease buildings (sub-paragraph c);

It is absurd to argue that a Board needs voter approval to do all of the above -- particularly when sub-paragraph (d) incorporates by reference all of the above by requiring voter approval for same when the Boards need to "*borrow money, therefore*, with or without mortgage." [emphasis added]. Sub-paragraph (d) is meaningless, if voter approval is automatically needed whenever a Board engages in the activities described in sub-paragraphs (a), (b), and (c).

Obviously, if this tribunal agrees with Mr. DiDomenico with regard with Point I, all of the other issues in the original complaint become moot and must be dismissed. In the event summary judgment is denied, I would request leave to file my own motion with regard to the counts of the original petition that apply directly to me.

There was no response by Old Republic National Title Insurance Company.

DISCUSSION AND CONCLUSIONS

Having considered the entire record before me, I **FIND and CONCLUDE** that the instant matter is ripe for summary decision under the standards set forth by our Supreme Court in *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954), 17 *N.J.* 67 (1954) and modified in *Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc.* 142 *N.J.* 520 (1995).

Petitioner, as a duly constituted Board of Education under *N.J.S.A.* 18A:10-1[1], has been granted the general mandatory powers and duties, *inter alia,* to perform the following tasks:

> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district . . .; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.
>
> *N.J.S.A.* 18A:11-1

Additionally, among the specifically enumerated duties required of petitioner, is the annual preparation of a school budget. In this regard, *N.J.S.A.* 18A:22-7 provides in pertinent part:

> [t]he board of education of every . . . school district shall prepare a budget for the school district for the ensuing year, on or before March 22.
>
> *N.J.S.A.* 18A:22-7

[1] *N.J.S.A.* 18A:10-1(Constitution of boards and education, conduct of schools) provides in pertinent part:
> The schools of each school district shall be conducted, by and under the supervision of a board of education, which shall be a body corporate and which shall be constituted and governed, as provided by this title ***
> *N.J.S.A.* 18A:10-1.

The specific contents of such budget are detailed at *N.J.S.A.* 18A:22-8, which provides in relevant part:

> The budget shall be prepared in such detail and upon such forms as shall be prescribed by the commissioner and to it shall be annexed a statement so itemized as to make the same readily understandable, in which it shall be shown.
>
> a. In tabular form there shall be set forth the following:
>
> (1) The total expenditure for each item for the preceding school year, the amount appropriated for the current school year . . . . , and the amount estimated to be appropriated for the ensuring school year, indicated separately for each item as determined by the commissioner.
>
> (2) The amount of the surplus account available at the beginning of the current school year and the amount anticipated to be available for the ensuing school year ***
>
> *N.J.S.A.* 18A:22-8.

See also, N.J.S.A. 18A:22-10 (requiring petitioner, as a Board, to fix a date for a public hearing upon its proposed budget); *N.J.S.A.* 18A:22-11 and -12 (providing notice requirements for such hearing); and *N.J.S.A.* 18A:22-13 (providing procedural requirements for such hearing).

Petitioner, as Board, is also required to submit its proposal budget to the voters of its district at each annual school election. *N.J.S.A.* 18A:22-33, which governs this requirement, provides in pertinent part:

> The board of education, . . . shall at each annual school election, submit to the voters to the district, the amount of money fixed and determined in its budget . . . to be voted upon for the use of the public schools of the district for the ensuing school year, which amount shall be stated in the notice of the election ***
>
> *N.J.S.A.* 18A:22-33

Under the foregoing provisions, petitioner was required to detail the anticipated expenditures for the properly acquisition in its school budget. *N.J.S.A.* 18A:22-8(a)(1).

Petitioner was also required to account for its surplus funds, as well as any anticipated use of such funds in the ensuing school year. *N.J.S.A.* 18A:22-8(a)(2). *See, Bd. of Educ. of Branchburg Tpw., Somerset County v. Branchburg Twp. Committee,* 187 *N.J. Super.* 540, 545 (*App. Div.* 1983), *cert. denied* 94 *N.J.* 506 (1983) ("It is clear that a board [of education] has an obligation to account for surplus funds and investment income in planning its budget for the ensuing year.") Additionally, petitioner was required to hold public hearing on its proposal budget, inclusive of these specific line items. *N.J.S.A.* 18A:22-13. Finally, petitioner was required to submit its proposed budget, inclusive of these specific line items, to the district's voters at the annual school election. *N.J.S.A.* 18A:22-33. In the instant case, petitioner concedes that it did not meet any of these budget requirements, when it stipulates:

> It this case, the purchase price of the land acquired was obtained from surplus monies, was never a line item of any budget submitted to the voters and was never placed as a public question on any ballot at any regular or special school election.
> (Petitioner's brief at 6)

Accordingly, petitioner's failure to meet the statutory budget requirements regarding the acquisition of the property, as well as the accounting of surplus funds, constitute clear violations of the school laws.

Beyond the issue of school budget voting requirements, discussed *supra,* is the issue of whether petitioner was required to obtain voter approval, via a regular election or referendum, prior to acquiring the property. Petitioner, as a Board, has the general mandatory power to manage its schools and district property, as well as, "perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." *N.J.S.A.* 18A:11-1. Like all Boards, petitioner is given the authority to purchase and sell properly under *N.J.S.A.* 18A:20-2, which states in relevant part:

> The board of education of any district may, in and by its corporate name, acquire, by purchase or lease, receive, hold, hold in trust and sell and lease real estate and personal property ... subject to the restrictions provided in this title. *N.J.S.A.* 18A:20-2

See also, N.J.S.A. 18A:20-2(a) boards of education "[m]ay, for school purposes, purchase, take and condemn lands within the district.") Where a board of education *borrows* money for the purpose of purchasing real property for school purposes, "with or without mortgage," voter authorization at an annual or special school election is required. *N.J.S.A.* 18A:20-4.2(d). However, voter authorization is not required where boards of education:

> (a) Rent, on a year-to-year basis. or for a term not to exceed 5 years, in case of emergency, buildings to use for school purposes; and
>
> (b) Take an option not to exceed 1 year in duration, at a cost not to exceed the fair market value of such option, on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters to the purchase thereof, but such option may be exercised by the board only after authority to purchase the property covered by such option has been given at an annual or special school election.
>
> *N.J.S.A.* 18A:20-4.1[2]

In the instant case, voter authorization was not sought by petitioner prior to the acquisition of the property. *See, Pet. Br.* at 6 ¶ 29 ("[the purchase] was never placed as a public question on any ballot at any regular or special school election.") However, under the express terms of the aforementioned provisions, such authorization was not required, because petitioner did not *borrow* any money for the property purchase. *N.J.S.A.* 18A:20-4.2(d). Instead, petitioner effectuated its property acquisition by using its surplus funds. As such, these provisions of the School Laws were not violated.[3]/[4]

---

[2] Aside from these provisions concerning voter authorization and property purchases, the School Laws are silent.

[3] *Cf. Azzara* Letter which states:

> It has generally been the department's position that voter approval to purchase land is required whether by outright purchase or through exercising an option in accordance with *N.J.S.A.* 18A:20-4.1(b), except where acquisition is exempt from voter approval by statutory authority as lease purchase or gift. This cold be accomplished by a separate question at a special election or as part of the advertised school budget as you have indicated in your letter.

I **CONCLUDE**, therefore, that under the facts and circumstances of this matter, the Board did not violate the School Laws when it determined to purchase the real property for school purposes without submitting the proposal to its voters. Notwithstanding its failure to provide for the surplus funds in its annual school budget, that procedural defect is not sufficient grounds to warrant overturning the Board's action to purchase the property in question. That, in my considered judgment, would be placing form over substance and must be rejected.

I **CONCLUDE** that the sale and purchase was in accordance with the law and should be sustained.

ORDER

Accordingly, it is **ORDERED** that the Board's acquisition of the lands and premises known as Block 12, Lot 27.02 on the Tax Map of Fairfield Township for the sum of $156,750 is hereby **SUSTAINED** for the reasons set forth above.

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

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

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[4] *See also, N.J.S.A.* 18A:21-1 (authorizing boards of education to undertake capitol projects including acquisitions of land by purchase); *N.J.S.A.* 18A:21-2 (authorizing establishment of capital reserve fund accounts); and *N.J.S.A.* 18A:21-4 (prohibiting use of capital account funds for capital projects absent voter authorization in a referendum). In the instant case, since no capital account funds were used to finance the purchase of the property, voter authorization

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE STATE BOARD OF EXAMINERS, Office of Licensing, 329 West State Street, CN 503, Trenton, New Jersey 08625-0503**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 November 1999
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/17/99
DATE

Debbie Antanaitis
STATE BOARD OF EXAMINERS

Mailed to Parties:

NOV 18 1999
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 10887-98
AGENCY REF. NO. 483-10/98

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS TRADING AS BENCH REALTY, FREDERICK A. JACOB, AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,	:	DECISION
RESPONDENTS.	:	

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

Upon careful and independent review, the Commissioner determines to affirm in part and reverse in part the recommended decision of the Administrative Law Judge (ALJ).

Initially, for the reasons set forth in the Initial Decision, the Commissioner concurs that the Board herein was obligated to submit to the voters of its District a budget which included a line item accounting for purchase of the land in question. *N.J.S.A.* 18A:22-1 *et seq.*

However, on the question of whether the Board was required to obtain voter approval prior to acquiring the property at issue, the Commissioner does not concur with the ALJ's conclusion that such approval was unnecessary because the Board did not borrow money for the property purchase.

In so concluding, the ALJ accepted the Board's argument that *N.J.S.A.* 18A:20-4.1 was not relevant to the instant matter, since the transaction in question was neither a rental nor an option, and that *N.J.S.A.* 18A:20-4.2(d), which requires voter approval for the borrowing of money, was the controlling provision. (Initial Decision at 13-14, based upon argument at 5-7)

The Commissioner, however, finds that *N.J.S.A.* 18A:20-4.1 cannot be ignored in the present analysis, and that this section must be read in conjunction with *N.J.S.A.* 18A:20-4.2 in order to elicit the meaning and intent of the latter as it pertains to the within dispute. The statutes in question provide as follows:

> 18A:20-4.1 The board of education of any type II school district may without authority first obtained from the voters of the district:
>
> (a) Rent, on a year-to-year basis, or for a term not to exceed 5 years, in case of emergency, buildings to use for school purposes; and
>
> (b) Take an option not to exceed 1 year in duration, at a cost not to exceed the fair market value of such option, on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters to the purchase thereof, but such option may be exercised by the board only after authority to purchase the property covered by such option has been given at an annual or special school election.

> 18A:20-4.2 The board of education of any school district may, for school purposes:
>
> (a) Purchase, take and condemn lands within the district and lands not exceeding 50 acres in extent without the district***;
>
> (b) Grade, drain and landscape lands owned or to be acquired by it and improve the same in like manner;
>
> (c) Erect, lease for a term not exceeding 50 years, enlarge, improve, repair or furnish buildings;
>
> (d) Borrow money therefor, with or without mortgage; in the case of a type II district without a board of school estimate, when authorized so to do at any annual or special school election;***;
>
> ***

Considering first the plain language of the statutes, the provision of 18A:20-4.1(b) limiting the availability of options to *only* those pieces of land which the board *could* purchase *after securing voter approval* and permitting the actual exercise of the option *only* after *authority for the purchase* has been given *at an annual or special school election* clearly makes no sense without

a concomitant requirement that land purchases must generally be authorized by the voters of the district. Such a requirement may be inferred from the immediately following *N.J.S.A.* 18A:20-4.2, related both by codification and history; otherwise, the segregation of actions which boards of education may undertake with respect to property into two sections of statute, one expressly dedicated to actions not requiring voter approval, would serve no purpose. That section (d) of *N.J.S.A.* 18A:20-4.2 expressly requires voter approval for the borrowing of money for the purchase of property does not imply that such approval is *not* required when no money is borrowed, or that none of the actions previously enumerated requires voter approval. Rather, the focus of this provision is on the act of *borrowing*, not on the transaction for which the money is borrowed; its purpose is plainly to provide an affirmative authorization for boards *to borrow money* for lawful actions previously enumerated, provided that the voters have expressly authorized the borrowing.

Such interpretation is not only consistent with the facial language and structure of the statutes; it is, more significantly, fully supported by the legislative history of their enactment. As noted by the ALJ, *N.J.S.A.* 18A:20-4.2 originated as *R.S.* 18:7-73. What the Initial Decision fails to take into account, however, is that the history of 18A:20-4.2 may not be considered apart from that of 18A:20-4.1, which *also* originates in *R.S.* 18:7-73. The latter provision, prior to its amendment in 1945, read as follows:

> 18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase, sell and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage.

In 1945, the section was amended to read:

> 18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase [, sell] and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage. A board of education may sell or dispose of any of its real estate, or rights or interest therein, which cease to be suitable or convenient

for the use for which they were acquired or which are no longer needed for school purposes, in the manner set forth in sections 18:5-25 to 18:5-29, both inclusive, of this Title.

The stated intent, and clear effect, of the 1945 amendment was to remove the requirement for voter approval of *sale* of unneeded or unsuitable real estate. (Assembly, No. 348, Introduced March 12, 1945; enacted as *P.L.*1945, *c.* 133) Thus, the statute now differentiated sale of property from purchase, lease and improvement, so that the former no longer required a vote.

In 1948, the statute was amended yet again, to read as follows:

> 18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage. Without such previous authority: (a) a board of education may, in case of emergency, rent, on a year-to-year basis, buildings to use for school purposes; and (b) take an option, not to exceed one year in duration at a cost not to exceed one hundred dollars ($100.00), on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters as required by this section. Such option may be exercised by a board only after authority to purchase the property covered by such option has been given by a vote of the legal voters of the district.
>
> A board of education may sell or dispose of any of its real estate, or rights or interest therein, which cease to be suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes, in the manner set forth in sections 18:5-25 to 18:5-29, both inclusive, of this Title.

The stated intent, and clear effect, of this amendment was to create the ability for a board to take an option on land which it was seeking the authority to purchase as required elsewhere in the section. (Assembly, No. 227, Introduced February 16, 1948; enacted as *P.L.*1948, *c.* 162) Thus, the statute retained the distinction between purchase and sale of property, but now also created a specific, limited exception to the general requirement for voter approval.

R.S. 18:7-73 was not amended again until 1967, when, as noted by the ALJ, the language "with the previous authority of a vote of the legal voters of the district" was omitted from the newly enacted 18A:20-4.2. That amendment, however, did not arise from a deliberate, substantive consideration of the section. Rather, as part of its comprehensive revision of Title

18A, effectuated through *P.L.*1967, *c.* 271, the Legislature recodified *R.S.* 18:7-73 into three distinct sections, each dealing with one of the three aspects of the original statute: 18A:20-4.1, dealing with emergency leasing and option without voter approval, i.e., with the substance of the 1948 amendment; 18A:20-4.2, dealing with the remaining then-legislated aspects of purchase, lease and construction, including those formerly found in *R.S.* 18:7-74 (acquisition of land in adjoining municipalities) and 18:7-75 (condemnation of land) as well as those found in 18:7-73;[1] and 18A:20-5, dealing with sale and disposal, i.e., with the substance of the 1945 amendment to 18:7-73, plus other related sections. (Title 18A, Schedule A, Allocation of Source Material at 334) Indeed, in enacting *P.L.* 1967, *c.* 271, the Legislature expressly stated that the law was "a revision law" and that its provisions "not inconsistent with prior laws, shall be construed as a continuation of such prior laws." (*N.J.S.A.* 18A:76-1) In accordance with this view, the treatment of the source material for *N.J.S.A.* 18A:20-4.1 is identified in the New Jersey Statutes Annotated as "Editorial," and that of 18A:20-4.2 as "Revised to consolidate source sections." (Title 18A, Schedule B, Treatment of Source Material at 381). Clearly, it cannot be said under these circumstances that omission of the words "with the previous authority of a vote of the legal voters of the district" from *N.J.S.A.* 18A:20-4.2 may be construed as a deliberate legislative action intended to alter a statutory requirement dating to at least the turn of the century; rather, such omission is clearly nothing more than a consequence, unfortunate in hindsight, of revisory legislative drafting that left implicit through the structuring of sections a distinction which had previously been explicitly stated. The confusion inherent in this situation has been compounded over the years by the addition of discrete sections to *N.J.S.A.* 18A: 20-4.2, dealing with board actions for which the Legislature clearly did not intend to require separate voter authorization.

[1]Significant in this context, *R.S.* 18:7-75 expressly requires voter approval prior to initiating condemnation proceedings, while 18:7-74 states that all proceedings to acquire land in adjoining municipalities "shall be in accordance with the provisions of this Title."

The fact remains, however, that at no time did the Legislature take specific action to remove the requirement for purchase of land to be authorized by the voters of the district; therefore, the Board in this instance acted outside the scope of its lawful authority in effectuating the purchase of the Buckshutem Road tract without such approval.

Notwithstanding the holding above, however, the Commissioner declines on the present record to void the transaction at issue, as requested by the Board in the event of a finding that applicable statutory provisions were not followed. Because he found that the Board's action was in substantive compliance with law, the ALJ did not reach, nor did the parties have an opportunity to fully argue, the question of what the effect of a holding to the contrary would be. This is particularly significant herein, where petitioner's request for judgment specifically sought, if the Board's action were found to be *ultra vires*, a directive from the Commissioner for reconveyance of land to the sellers, return of the purchase price to the Board, and reimbursement of costs from the respondent attorney and title insurance company.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and reversed in part, as set forth herein, and is, moreover, remanded to the OAL for further proceedings on the question of whether the transaction at issue should be voided as a result of the Commissioner's holding. Additionally, the Commissioner directs the petitioning Board and all boards to henceforth comply with the requirement that express voter approval be obtained prior to the purchase of any land.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 17 2004
Date of Mailing: FEB 17 2004

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

64-00

EDU #10887-98
C # 64-00
SB # 19-00

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,

PETITIONER-RESPONDENT,

V.

ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS TRADING AS BENCH REALTY, FEDERICK A. JACOB, AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 17, 2000

For the Petitioner-Respondent, Frank D. Domenico, Esq.

For the Respondent-Appellant Frederick A. Jacob, Jacob & Ferrigno (Frederick A. Jacob, Esq., of Counsel)

For the Respondent-Appellant Bench Realty, Davidow, Sherman, Eddowes & Geiger (David J. Eddowes, Esq., of Counsel)

This matter arises from the purchase of vacant land in 1996 by the Board of Education of the Township of Fairfield (hereinafter "Board"). The Board funded the purchase entirely from its budget surplus with the intent of building a new school on the site.[1]

Because the Board was not going to borrow any money to fund the purchase, its solicitor at that time, Frederick A. Jacob, Esq., advised the Board that it was not

[1] A referendum to authorize the construction of a new school was defeated by the voters in April 1997.

Aug. 2, 2000

required to place the question before the voters pursuant to N.J.S.A. 18A:20-4.2. The Board followed Jacob's advice and did not place the issue before the voters as a ballot question. However, it also did not include its appropriation of surplus as a line item in the budget it developed for 1996-97 pursuant to N.J.S.A. 18A:22-1 et seq.

On September 16, 1997, a resident of Fairfield (hereinafter "resident") wrote to Commissioner of Education Leo Klagholz, bringing to his attention the fact that the Board had purchased land for a new school without a referendum. She requested that the Commissioner investigate the situation and that he advise her of what could be done to correct it. She also expressed her understanding that a line item would have to be included in the budget approved by the voters if no money was borrowed. However, there is no indication in the letter whether she was aware that the Board had not borrowed any money to make the purchase in this case.

The Commissioner asked Michael Azzara, then Assistant Commissioner for the Division of Finance, to respond to the letter because the Commissioner believed that he might be called upon to adjudicate the matter as a contested case. In a letter dated October 20, 1997, Azzara responded that:

> It has generally been the department's position that voter approval is required whether by outright purchase or through exercising an option in accordance with N.J.S.A. 18A:20-4.1(b), except where acquisition is exempt from voter approval by statutory authority such as lease purchase or gift. This could be accomplished by a separate question at a special election or as part of the advertised school budget as you have indicated in your letter. (Emphasis added.)

Azzara also advised the resident that the general legal questions raised by her letter had not been formally adjudicated and that the appropriate mechanism to obtain a formal ruling was by filing a petition with the Commissioner.

The resident did not file a petition of appeal with the Commissioner. However, because the validity of its purchase had been questioned, the Board filed a petition for declaratory judgment with the Commissioner in October 1998, seeking a declaration that the acquisition of land without submitting the question to voters was valid in this case. In the alternative, the Board sought a determination that the purchase was void, along with an order directing that the sellers return the purchase price to the Board and other relief.

The Board named three respondents in its petition. First, it named the sellers, Robert Ench and Sanderina R. Kasper, Executrix of the Estate of Benjamin Kasper, Partners Trading as Bench Realty, seeking the return of the purchase price in the event that the purchase was declared illegal. Second, it named its former solicitor, Frederick A. Jacob, Esq., as a respondent, alleging legal malpractice. Third, the Board named Old Republic National Title Insurance Company, which had issued the Board title insurance guaranteeing clear title to the property.

Although the petition requested a declaratory judgment, the Director of the Office of Controversies and Disputes in the Department of Education advised the Board by letter dated December 15, 1998 that the matter would be considered as a contested case and would be transmitted to the Office of Administrative Law ("OAL") for appropriate proceedings.

Following transmittal to OAL, two pre-hearing conferences were held during which it was agreed that there were no material facts in dispute. Accordingly, the Administrative Law Judge ("ALJ") granted the parties leave to file motions for summary decision pursuant to N.J.A.C. 1:1-12.5. The record closed on September 27, 1999,

following receipt of a motion for summary decision filed by the Board and responses from the sellers and the Board's former solicitor, both supporting the Board's motion and agreeing with the relief sought.[2]

On November 10, 1999, the ALJ, citing N.J.S.A. 18A:20-4.1 and 18A:20-4.2, determined that voter authorization was not required in this case since the Board had not borrowed any money for the purchase. Thus, the ALJ concluded that, under the facts and circumstances of this matter, the Board had not violated the school laws when it purchased the property without submitting the proposal to voters.

The ALJ further found that the Board had improperly failed to provide a line item including the proposed expenditure in its annual school budget that had been presented to the voters. However, he concluded that this procedural defect was not sufficient grounds to warrant overturning the purchase. The ALJ therefore recommended that the Board's acquisition of the property be sustained.

None of the parties filed any exceptions to the ALJ's decision.

On February 17, 2000, the Commissioner adopted in part and rejected in part the ALJ's recommended decision. The Commissioner concurred with the ALJ that the Board had erred in not including a line item appropriation for purchase of the property in the annual school budget submitted to the voters. However, the Commissioner disagreed that the Board had not been required to obtain authorization from the voters before purchasing the land, concluding that N.J.S.A. 18A:20-4.1, when read in conjunction with 18A:20-4.2, did not permit district boards to purchase property without

[2] The title company did not respond to the Board's motion. Rather, in a letter dated December 8, 1998 to the Director of the Office of Controversies and Disputes, the title company took the position that the Commissioner did not have the jurisdiction to decide any questions relating to its responsibilities to the Board and, therefore, that it had elected not to become involved in the process before the Commissioner.

prior approval of the district's voters, regardless of whether money was being borrowed for that purpose.

The Commissioner, however, declined to void the transaction or order any of the relief sought by the Board, finding that the effect of a holding that the Board was not in compliance with law had not been fully argued or considered during the proceedings at OAL. The Commissioner found this particularly significant since the Board sought a directive, in the event the purchase was invalidated, for reconveyance of the land to the sellers, return of the purchase price to the Board and reimbursement of its costs. The Commissioner therefore remanded this matter to OAL for further proceedings on that issue.

Frederick A. Jacob, Esq., the Board's former solicitor, and the sellers, Robert Ench and Sanderina R. Kasper, Executrix of the Estate of Benjamin Kasper, Partners Trading as Bench Realty, filed appeals to the State Board from the decision of the Commissioner.[3] In support of his appeal, Jacob argues that the Commissioner's decision should be reversed because his interpretation of N.J.S.A. 18A:20-4.1 and 18A:20-4.2 ignored the plain and unambiguous language of those statutes. Jacob further argues that the legislative history supports the ALJ's analysis.

The brief filed by the Board in response to the appeal incorporates the procedural history and material facts as set forth in Mr. Jacob's brief. Like its former solicitor, the Board argues for reversal of the Commissioner's decision, contending that the Commissioner ignored the plain meaning of the applicable statutes.

[3] We note that only Jacobs filed a brief in support of the appeal.

After careful review of the record and consideration of the arguments of the parties, we reverse the Commissioner's determination that the purchase at issue was in violation of the education laws because there had not been a voter referendum on the purchase conducted pursuant to N.J.S.A. 18A:20-4.2. We affirm the ALJ's determination, which was adopted by the Commissioner, that the Board failed to comply with the education laws because it did not include a line item reflecting the appropriation in the budget submitted to the voters. However, as set forth herein, we find that this failure is significant and remand the matter for further proceedings and a determination by the Commissioner as to the impact of such failure.

Initially, we find that the statutes governing the acquisition of property by district boards of education did not require the Board to seek voter approval in this instance by placing the question on the ballot prior to purchasing the property in question. As both appellant and respondent argue in their briefs, well-established principles of statutory construction direct that we look first to the statute's plain language to derive its meaning. E.g., Town of Morristown v. Woman's Club, 124 N.J. 605 (1991); Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987). Accordingly, if the meaning of the statute is plain on its face, that meaning will ordinarily govern. E.g., Lammers v. Board of Education of Point Pleasant, 134 N.J. 264 (1993). Hence, as part of an administrative agency, we may not interpret the statute to give it greater effect than the statutory language permits. New Jersey Turnpike Authority v. American Federation of State County and Municipal Employees, Council 73, 150 N.J. 331 (1997).

In his decision, the Commissioner focused on one provision, N.J.S.A. 18A:20-4.1(b). He concluded that "the provision of 18A:20-4.1(b) limiting the availability

of options to only those pieces of land which the board could purchase after securing voter approval and permitting the actual exercise of the option only after authority for the purchase has been given at any annual or special school election clearly makes no sense without a concomitant requirement that land purchases must generally be authorized by the voters of the district." Commissioner's decision, slip op. at 18-19 (emphasis in original). On the basis of this conclusion, the Commissioner inferred in N.J.S.A. 18A:20-4.2(d), which expressly requires prior voter approval when the funds are to be borrowed, a requirement that all land purchases must be approved by voter referendum whether or not funds to make the purchase are to be borrowed. The Commissioner found this to be supported by the legislative history. In this respect, he concluded that no significance should be placed on the fact that the Legislature had eliminated the express statutory requirement for voter approval for all purchases when it enacted N.J.S.A. 18A:20-4.2 in 1967. The Commissioner reasoned that the amendment was enacted as part of the Legislature's comprehensive revision of Title 18A rather than as the result of consideration of the pertinent section alone. Id. at 20.

We find that careful examination of N.J.S.A. 18A:20-4.1 and N.J.S.A. 18A:20-4.2 yields a different result. In essence, the language of the statutes is clear and unambiguous and, therefore, it is inappropriate for this agency to infer additional requirements beyond those that have been included in them by the Legislature. In re Jamesburg High School Closing, 169 N.J. Super. 328, aff'd as modified, 83 N.J. 540 (1980) (the duty is to construe and apply the statute as enacted). See e.g., Munoz v. New Jersey Auto. Full Ins. Underwriting Ass'n, 145 N.J. 377 (1996) (when the words of a statute are clear, that meaning is to be given effect absent legislative intent to the

contrary); Unsatisfied Claim and Judgment Fund Bd. v. New Jersey Mfrs. Ins. Co., 270 N.J. Super. 31, aff'd, 138 N.J. 185 (1994) (the duty is to construe the statute as written, not to effect an unexpressed legislative intent).

N.J.S.A. 18A:20-4.1 provides the authority to district boards to act "without authority first obtained from the voters of the district" in two specific ways:

> (a) Rent, on a year-to-year basis, or for a term not to exceed 5 years, in case of emergency, buildings to use for school purposes; and
> (b) Take an option not to exceed 1 year in duration, at a cost not to exceed the fair market value of such option, on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters to the purchase thereof, but such option may be exercised by the board only after authority to purchase the property covered by such option has been given at an annual or special school election.

N.J.S.A. 18A:20-4.2 provides that:

> The board of education of any school district may, for school purposes:
>
> (a) Purchase, take and condemn lands within the district lands not exceeding 50 acres in extent without the district but situate in a municipality or municipalities adjoining the district, but no more than 25 acres may be so acquired in any one such municipality, without the district, except with the consent, by ordinance, of such municipality;
> (b) Grade, drain and landscape lands owned or to be acquired by it and improve the same in like manner;
> (c) Erect, lease for a term not exceeding 50 years, enlarge, improve, repair or furnish buildings;
> (d) Borrow money therefor, with or without mortgage, in the case of a type II district without a board of school estimate, when authorized so to do at any annual or special school election...;
> (e) Construct, purchase, lease or otherwise acquire a building with the federal government, the State, a political subdivision thereof or any other individual or entity properly authorized to do business in the State...;

(f) Acquire by lease purchase agreement a site and school building...;
(g) Establish with an individual or entity authorized to do business in the State a tenancy in common, condominium, horizontal property regime or other joint ownership arrangement on a site contributed by the school district....

By the clear and express terms of the statute, prior voter approval at an annual or special school election is required when a board of education in a Type I district borrows money to purchase land. Nothing in the language of the statutes even suggests that prior voter approval is required if the district does not borrow money to make the purchase. We find that the words of the statute are clear and unambiguous. We also assume that in including the words "borrow money therefor" in N.J.S.A. 18A:20-4.2(d), the Legislature intended that those words would have meaning and not be superfluous. E.g., Phillips v. Curiale, 128 N.J. 608 (1992).

Because the language of the statute can be read sensibly without any absurd or anomalous result, it is that language which must be implemented. E.g., Dixon v. Gassert, 26 N.J. 1 (1958). See, e.g., City of Clifton v. Passaic County Bd. Of Taxation, 28 N.J. 411 (1959). In this respect, we reject the Commissioner's view that N.J.S.A. 18A:20-4.1(b) makes no sense unless a requirement is inferred in N.J.S.A. 18A:20-4.2(d) that all purchases of land must be the subject of a voter referendum. N.J.S.A. 18A:20-4.1(b) specifies that a district board does not need prior voter approval to take an option, but does require such approval in order to exercise that option. It was reasonable for the Legislature to distinguish between purchases resulting from the exercise of an option and those that do not. The language of N.J.S.A. 18A:20-4.1(b) makes it clear that prior voter approval is not required to take an option, but that it is

required to exercise the option whether or not the funds are to be borrowed. If no option is involved, N.J.S.A. 18A:20-4.2 controls, and prior voter approval is required only if the funds are to be borrowed.

Our conclusion that the words of the statute are both clear and expressive of the Legislature's intent is reinforced by the fact that in addition to the requirement for prior voter approval to borrow money to purchase land, the language of N.J.S.A. 18A:20-4.2 specifies particular conditions that must be met to acquire a building with the federal government or the State, N.J.S.A. 18A:20-4.2(e), to acquire a site and building by lease purchase agreement, N.J.S.A. 18A:20-4.2(f), and to establish a tenancy in common, N.J.S.A. 18A:20-4.2(g). Each condition is detailed and each is tailored for the transaction to which it applies. If the Legislature had intended to make prior voter approval a condition for purchasing land without borrowing, it would have included it in the statute.

As set forth in the ALJ's initial decision, the legislative history supports this interpretation. Most significantly, the language of the predecessor statute, R.S. 18:7-73, expressly required that purchases be "with a previous authority of vote of the legal voters of the district." This language, which had been included for one hundred years, was eliminated by the Legislature in 1967. The fact that the change was made as part of a comprehensive recodification process does not alter the fact that the statute was changed through legislative action.

Moreover, as described in the decisions of both the ALJ and the Commissioner, the Legislature has amended N.J.S.A. 18A:20-4.2 numerous times since 1967 to include other transactions that do not require prior voter approval, such as the lease

purchase provisions of N.J.S.A. 18A:20-4.2(e) and (f). During the same period, the Legislature chose to leave the language of N.J.S.A. 18A:20-4.2(d) unchanged.

In sum, in these circumstances, we are compelled to implement the statute as the Legislature has enacted it. However, in reviewing the transaction involved here, we cannot ignore the other applicable requirements that are included in the education laws. Hence, the fact that N.J.S.A. 18A:20-4.2 does not require prior voter approval does not mean that the transaction involved here should have escaped review by the voters.

As stipulated, the Board did not include a line item appropriation for purchase of the property in the annual school budget submitted to the voters. As found by the ALJ:

> ...petitioner was required to detail the anticipated expenditures for the properly [sic] acquisition in its school budget. N.J.S.A. 18A:22-8(a)(1). Petitioner was also required to account for its surplus funds, as well as any anticipated use of such funds in the ensuing school year. N.J.S.A. 18A:22-8(a)(2). See, Bd. of Educ. of Branchburg Tpw. [sic], Somerset County v. Branchburg Twp. Committee, 187 N.J. Super. 540, 545 (App. Div. 1983), cert. denied 94 N.J. 506 (1983) ("It is clear that a board [of education] has an obligation to account for surplus funds and investment income in planning its budget for the ensuing year.") Additionally, petitioner was required to hold public hearing on its proposal budget, inclusive of these specific line items. N.J.S.A. 18A:22-13. Finally, petitioner was required to submit its proposed budget, inclusive of these specific line items, to the district's voters at the annual school election. N.J.S.A. 18A:22-33. In the instant case, petitioner concedes that it did not meet any of these budget requirements, when it stipulates:
>
> > It this case, the purchase price of the land acquired was obtained from surplus monies, was never a line item of any budget submitted to the voters and was never placed as a public question on any ballot at any regular or special school election.
> >
> > (Petitioner's brief at 6)

> Accordingly, petitioner's failure to meet the statutory budget requirements regarding the acquisition of the property, as well as the accounting of surplus funds, constitute clear violations of the school laws.

Initial Decision, slip op. at 12-13.

The statutory requirements applicable to the budget process are not merely technical. In this instance, given that N.J.S.A. 18A:20-4.2 did not require a referendum specifically on the question of the purchase, inclusion of the appropriation in the budget presented to the voters was the only opportunity the voters would have to pass on the purchase.[4] Furthermore, the ability of the public to assess a district's use of surplus is critical to its ability to evaluate the district's financial condition so as to make the necessary judgments concerning the board's proposed budget. Because the ALJ did not find this defect to be significant, the record is not sufficient to permit us to evaluate its impact on the validity of the transaction at issue. We therefore remand this matter to the Commissioner for his determination of this question and for the development of a sufficient record upon which to base that determination.

We retain jurisdiction.

August 2, 2000

Date of mailing AUG 04 2000

[4] We note that if the Board had included the purchase as a line item in its budget, its actions would have been in conformity with the Department of Education's general position as articulated in Michael Azzara's letter of October 20, 1997.

IN THE MATTER OF THE DISSOLUTION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning Boards that are constituents of the Lower Camden County Regional High School District No. 1 (Regional District), which is being dissolved, sought reconsideration of that portion of the January 27, 1999 Assistant Commissioner decision denying petitioners' request for declaratory judgment barring the Regional District from passing any resolution regarding funding capital improvements at the present apportionment rate per constituent District with benefit beyond the dissolution period. The Commissioner granted petitioners' reconsideration request, solely with respect to the $2.75 million lease purchase agreement approved by the Regional District referenced in Count VII of the amended petition.

Although the ALJ found that the subject of the lease purchase agreement is a capital project, he determined that, pursuant to *N.J.A.C.* 6:22A-1.2(k) and *N.J.S.A.* 18A:7F-26, the $2.75 million lease purchase agreement does not constitute indebtedness as that word is used in *N.J.A.C.* 6:3-7.2(b). Accordingly, the ALJ granted respondents' motion for summary decision and dismissed the petition.

The Commissioner affirmed the recommended decision of the ALJ for the reasons stated therein.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4210-99

AGENCY DKT. NO. 377-8/98

IN THE MATTER OF THE DISSOLUTION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1

Anat Gordon, Esq., for petitioners Chesilhurst Board of Education, Borough of Chesilhurst, Waterford Township Board of Education and Township of Waterford

Vito A. Gagliardi, Jr., Esq., for respondents Berlin Township Board of Education, Township of Berlin, Clementon Borough Board of Education, Borough of Clementon, Lindenwold Borough Board of Education, Borough of Lindenwold, Pine Hill Borough Board of Education, Borough of Pine Hill, Winslow Township Board of Education and Township of Winslow (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Joseph M. Weinberg, Esq., and **Barry Chatzinoff**, Esq., for respondent Lower Camden County Regional High School District No. 1 (Weinberg, McCormick, Chatzinoff & Zoll, attorneys)

Record Closed: December 22, 1999 Decided: January 10, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The petitioners in this matter, the boards of education and governing bodies of two municipalities that are constituents of a regional high school district which is being dissolved, seek reconsideration of a January 27, 1999 Assistant Commissioner's decision concerning

funding of capital improvements in the Regional District at the present apportionment rate. Although the dissolution date has not been set, it is agreed that the capital improvements would have benefit after the dissolution date.

The matter was opened before the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through 13. After notice, a prehearing conference was held on October 4, 1999. Among other things, a schedule for submission of summary motions was set.

On November 9, 1999, the petitioners filed a motion to amend their petition of appeal. The respondents' counsel timely filed papers in opposition to the motion. The petitioners would have added to their petition two additional capital improvement matters they believe to be at least ill-advised. The respondents argue that until such time as a date of dissolution is set, the Regional District must continue to operate and to meet its statutory, regulatory and contractual requirements. They also point out, to the extent the petitioners seek a form of declaratory judgment to fix and apportion the equities, the request would run afoul of *N.J.S.A.* 18A:13-61.

By order dated December 22, 1999, I denied the motion to amend the pleadings. The matter is now ripe for summary judgment.

PROCEDURAL HISTORY

In October 1997, a majority of the constituent districts of the Lower Camden County Regional High School District No. 1 (Regional District) submitted an application to the Commissioner of Education requesting that the board of review convene to authorize a public referendum to consider dissolution of the Regional District. The board of review granted the application and, in a subsequent public referendum on May 12, 1998, the dissolution was approved by the requisite majority of constituent districts as well as the majority of overall votes cast, pursuant to *N.J.S.A.* 18A:13-59. No date for dissolution has been set. The constituent districts that sought the referendum advocate a date of July 1, 2001.

Also in 1998, the Regional District proposed a multi-million dollar capital project to upgrade the communications infrastructure in its school buildings. The project would be financed through a ten-year lease purchase agreement. The items and costs are as follows:

Building cabling and equipment for Data, voice and video	$1,613,481
Large (32") screen video display terminals and NTSB Converter Boxes for video signal to Computer terminals – 250 @ $850	212,500
Mounting equipment for large screen terminals 250 @ $250	62,500
Computer upgrades	
Teacher classroom computers – balance due for TECH 2000 Freeholder Program – 125 @ $1400 each	175,000
Printers – 250 @ $750	185,500
Carts for computer/printer equipment – 250 @ $200	50,000
Upgrade of electrical systems in four buildings Overlook Junior - $7,920 Overbrook Senior - $11,880 Edgewood Senior - $7,920	39,960
Work includes short circuit analysis; rating of Each electrical panel; confirmation of wiring sizes; Breaks and fuses; main distribution panel and Sub distribution boards.	
Architectural Fee/Costs	50,000
Costs of issuance associated with lease purchase	85,000
10% reserve fund	277,059
	TOTAL $2,750,000

On February 9, 1999, the Commissioner of Education issued an endorsement approving the lease purchase agreement and certifying his opinion that the agreement was in the best

interest of the Regional District and, further, that it met with requirements of the Comprehensive Educational Improvement and Financing Act of 1996, *N.J.S.A.* 18A:7F-1 through -34.

On August 11, 1998, the districts of Chesilhurst and Waterford filed a petition of appeal to invalidate the results of the May 12, 1998 referendum authorizing dissolution of the Regional District. As part of their alternate requests for relief, the petitioners sought a declaratory judgment to apportion the equities of the districts withdrawing from the Regional School District to recognize and compensate the petitioners for their contributions made since 1939 to the value of buildings and properties of the Lower Camden County Regional School District No. 1. They argued that principles of equity, as well as the New Jersey Constitution and the history of the controlling statute entitled them to such recoupment.

The Assistant Commissioner denied their request. Pursuant to *N.J.S.A.* 18A:4-34(c), the Assistant Commissioner may hear and determine controversies and disputes arising under the school laws. The Assistant Commissioner found that "the liquid assets of the Regional District are, generally, to be distributed pursuant to the statutory plan set forth in *N.J.S.A.* 18A:13-62 and *N.J.S.A.* 18A:8-24." The Assistant Commissioner noted that the Appellate Division in *In re Union County Dissolution*, 298 *N.J. Super.* 1 (App. Div. 1997) rejected a similar inequitable apportionment argument as baseless.

In addition to a declaratory judgment for equitable apportionment, the petitioners sought a declaratory judgment to bar the Regional District from passing any resolutions regarding funding capital improvements at the present apportionment rate per constituent district with benefit beyond the dissolution period or, alternatively, for a declaratory judgment to apportion the equities for each improvement attributed to each withdrawing district in accordance with a study petitioners suggest be conducted for each new improvement to the Regional District.

The Assistant Commissioner characterized this request as an "extraordinary restraint which would, undoubtedly, serve to impede [the regional] District in the satisfaction of its statutory responsibilities," and he ruled that the Regional District "cannot be restrained from expending those budgeted funds deemed necessary to fulfill its obligations."

> The capital projects which may be undertaken by a board of education, for any lawful purposes, the cost whereof may be provided for from taxes, or by the issuance of bonds, as provided by this chapter, as follows:
>
> 1. The acquisition by purchase or condemnation of lands;
>
> 2. The grading, draining and landscaping of lands owned or to be acquired by the board and the improvement thereof in any like manner;
>
> 3. The acquisition, construction, reconstruction, remodeling, alteration, enlargement or major repair of buildings; and
>
> 4. The purchase of the original furniture, equipment and apparatus, or of major renewals of furniture, equipment and apparatus, for any building used or to be used for such purposes.

Thus, a capital project includes the acquisition of lands, the grading, draining, and landscaping of lands, any physical alteration of school buildings other than minor repairs, and the purchase of furniture, equipment and apparatus for school buildings. The subject of the $2.75 million lease purchase agreement can be characterized as a reconstruction or remodeling under *N.J.S.A.* 18A:21-1(3), as well as a purchase of original equipment under *N.J.S.A.* 18A:21-1(4). Therefore, the subject of the agreement is a capital project for purposes of *N.J.A.C.* 6:3-7.2(b). Further, the improvements to roofing, outdoor tracks and gymnasium floors appear to fall within the definition of capital projects, presuming these improvements are more than minor repairs. *N.J.S.A.* 18A:21-1(3).

Indebtedness

Indebtedness is an old legal term, not an accounting term. *Black's Law Dictionary* (5th *Ed.* 1979) defines it as the "owing of a sum of money upon a certain and express agreement. . . . And in a broad sense and in common understanding the word may mean anything that is due and owing."

According to the dictionary of *Model Legal Usage*, by Bryan A. Garner, indebtedness is often a needless variant of "debt," although in some contexts it is difficult to discern whether it is the state of being indebted or the actual debt that is referred to.

The petitioners assert that indebtedness should be interpreted broadly to mean an obligation to pay and the respondents assert that it should be interpreted narrowly as debt incurred by school bonds. The term can be interpreted either way:

> Although the common meaning of "indebtedness" as an unconditional promise to pay a sum certain at a definite future time may be helpful as a general guide, the meaning of indebtedness is not uniform among the states. Furthermore, within a given state, the meaning of indebtedness for purposes of a constitutional or statutory debt limit may differ as among various types of government entities. Thus, a careful analysis of the law of the particular state in which one is interested is necessary in order to conclude whether a certain obligation should be included in a computation of indebtedness subject to that state's debt limit for school districts.
>
> [1 James A. Rapp, *Education Law*, §5.05[5][c] (1999).]

Although indebtedness is an imprecise term, a lease purchase agreement does not constitute debt and, therefore, the $2.75 million lease purchase agreement does not constitute indebtedness as that term is used in *N.J.A.C.* 6:3-7.2(b).

A lease purchase agreement has been defined by the Legislature as "any agreement which gives the board of education as lessee the option of purchasing the leased premises during or upon termination of the lease, with credit toward the purchase price of all or part of rental payments which have been made by the board of education in accordance with the lease." *N.J.S.A.* 18A:20-4.2(f).

The State Board of Education proposed the corresponding regulations on lease purchase agreements in 1988. 20 *N.J.R.* 2127. According to the proposal summary:

> The lease purchase agreement does not constitute debt since the rental payments are subject to the annual appropriation of funds sufficient to meet the required payments. The rental payments are appropriated annually by the district board of education as part of the current expense budget.

During the period for comment on the proposed regulation, a commenter suggested that the rules as proposed provided authority to circumvent the statutory election process. 20 *N.J.R.* 3127. The State Board of Education responded that the statute on lease purchase agreements does not require a referendum. *Ibid.*

The lease purchase agreement regulations require a district to include rental payments in its annual general fund budget instead of treating the payments as debt service. *N.J.A.C.* 6:22A-1.2(k); *see also N.J.S.A.* 18A:7F-26, distinguishing state aid used for debt services payments and lease purchase payments. The financial obligation of a lease purchase agreement is not debt according to the State Board of Education. There is no evidence or law to indicate that "indebtedness" as that term is used in *N.J.A.C.* 6:3-7.2(b) has any special meaning other than its plain meaning, that is, "debt." *See Stevenson v. Keene Corp.*, 254 *N.J. Super.* 310, 317 (App. Div. 1992). (A particular term must be construed within context and given its generally accepted meaning unless inconsistent with legislative intent or a different meaning is expressly indicated.) Therefore, a lease purchase agreement does not constitute indebtedness.

There is instructive law from other jurisdictions concerning the treatment of a lease purchase agreement as a financial obligation other than indebtedness. In *Dieck v. Unified School Dist. of Antigo*, 477 *N.W.* 2d 613 (Wis. 1991), the Wisconsin Supreme Court held that a lease purchase agreement with a non-appropriation option (that is, a contractual clause allowing the school district to terminate the agreement by refusing to appropriate funds) was not "indebtedness" for state constitutional and statutory purposes. *See also Caddell v. Lexington County School Dist. No. 1*, 373 *S.E.* 2d 598 (S.C. 1988). (South Carolina Supreme Court held that a lease purchase agreement was not indebtedness because of the non-appropriation clause.)

Inasmuch as the State Board of Education intended that lease purchase agreements be treated as financial obligations other than "debt," and the plain meaning of "indebtedness" is

"debt," the $2.75 million lease purchase agreement does not constitute indebtedness as that term is used in *N.J.A.C.* 6:3-7.2(b).

ORDER

The phrase "indebtedness for capital projects" as used in *N.J.A.C.* 6:3-7.2(b) means "debt" incurred by a district for (1) the acquisition of lands, (2) grating, draining, and landscaping of lands, (3) any physical alteration of buildings other than minor repairs, and (4) the purchase of furniture, equipment and apparatus for school buildings, pursuant to *N.J.S.A.* 18A:21-1, I **CONCLUDE** that the $2.75 million lease purchase agreement does not constitute indebtedness as that word is used in *N.J.A.C.* 6:3-7.2(b).

Accordingly, the motion for summary decision by the respondents Berlin Township Board Education, Township of Berlin, Clementon Borough Board of Education, Borough of Clementon, Lindenwold Borough Board of Education, Borough of Lindenwold, Pine Hill Borough Board of Education, Borough of Pine Hill, Winslow Township Board of Education, Township of Winslow and the Lower Camden County Regional High School District No. 1 is **GRANTED**. It is so **ORDRED**. In accord with this decision it is further **ORDERED** that the petition of appeal by the Chesilhurst Board of Education, Borough of Chesilhurst, Waterford Township Board of Education and Township of Waterford be and is hereby **DISMISSED**.

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

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

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

January 10, 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Jan. 13, 2000
DATE

D. N. Centanaitis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jh

OAL DKT. NO. EDU 4210-99
AGENCY DKT. NO. 377-8/98

IN THE MATTER OF THE DISSOLUTION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.[1]

Upon his careful and independent review of the record, the Commissioner determines to affirm the recommended decision of the Administrative Law Judge for the reasons stated therein.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Summary decision is granted to respondents and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 25 2000

Date of Mailing: FEB 28 2000

[1]On February 3, 2000 a letter was received from Anat Gordon, Esq., requesting an extension of time in which to file exceptions on behalf of petitioners. *N.J.A.C.* 1:1-18.8 provides that requests for extensions of time limits for filings must be made no later than the day on which that time period is to expire. The expiration of the 13-day time period in which to file exceptions in this matter was January 27, 2000. Moreover, Ms. Gordon provided no basis for waiving this rule by reason of "emergency or other unforseeable circumstances," as required by *N.J.A.C.* 1:1-18.8(b). Therefore, the extension request was denied.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

68-00

EDU #3767-98
C # 344-00
SB # 68-00

LUCY SHERIDAN, :

PETITIONER/APPELLANT, :

V. :

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

RESPONDENT/RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 16, 2000

For the Petitioner/Appellant, Oxfeld, Cohen, LLC (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent/Respondent, Nirenberg & Varano (Howard M. Nirenberg, Esq., of Counsel)

In August 1991, Lucy Sheridan (hereinafter "petitioner"), a school nurse in Paterson, filed a claim for benefits with the Division of Workers' Compensation as the result of a medical condition which allegedly had arisen from an incident which occurred at school in January 1991. As a result of such condition, the petitioner was unable to work from April until September 1991. In November 1997, the parties agreed to settle the petitioner's workers' compensation claim for $10,000 pursuant to N.J.S.A. 34:15-20.[1] The petitioner thereafter made a request to the State-operated District of the

[1] N.J.S.A. 34:15-20 provides, in pertinent part, that a settlement of a workers' compensation claim "shall have the force and effect of a dismissal of the claim petition and shall be final and conclusive upon the

City of Paterson (hereinafter "State-operated District") to have the 55 sick leave days used between April and September 1991 restored to her accumulated sick leave. On February 17, 1998, after such request was denied, the petitioner filed a petition with the Commissioner of Education seeking sick leave benefits under N.J.S.A. 18A:30-2.1 from the State-operated District.[2]

On August 30, 2000, an Administrative Law Judge ("ALJ") recommended dismissing the petition, concluding that the settlement of the petitioner's workers' compensation claim "evidenced an unambiguous waiver of any rights petitioner may have had under N.J.S.A. 18A:30-2.1." Initial Decision, slip op. at 7. The ALJ observed that "[a]t no time during the workers' compensation hearing, or at the time of the Section 20 settlement, did petitioner indicate that she was not waiving any entitlement she may have to sick leave benefits under N.J.S.A. 18A:30-2.1. In fact, she indicated that the amount of her settlement was compensation for the sick leave days for which she believed she had been charged." Id. at 6-7. The ALJ distinguished this case from Marino v. Willingboro Township Board of Education, decided by the State Board of

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employee and the employee's dependents, and shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute."

[2] N.J.S.A. 18A:30-2.1 provides, in pertinent part:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

Education, March 1, 2000, by pointing out that "[u]nlike in Marino, where the petitioner stated that he was not waving any entitlement he might have to sick leave benefits under N.J.S.A. 18A:30-2.1, petitioner has made no such reservations expressly agreeing instead, to waive 'all [her] rights arising out of this/these claim(s)' under the Section 20 Settlement." Id. at 7.

On October 16, 2000, the Commissioner adopted the ALJ's recommended findings and conclusions, agreeing that "petitioner knowingly relinquished any claim she may have had pursuant to N.J.S.A. 18A:30-2.1 when she accepted her 'Section 20' settlement before the Division of Workers' Compensation." Commissioner's Decision, slip op. at 9. The Commissioner therefore dismissed the petition.

The petitioner filed the instant appeal to the State Board, arguing that she had not waived her right to pursue a claim for sick leave benefits under N.J.S.A. 18A:30-2.1 when she settled her workers' compensation claim.

After a careful review of the record, we reverse the decision of the Commissioner. Under the particular circumstances presented herein, we conclude that the petitioner's settlement of her workers' compensation claim did not include a waiver of any rights she may have under N.J.S.A. 18A:30-2.1, and, consequently, did not preclude her from pursuing a claim for benefits under that statute.

As we observed in Marino, supra, slip op. at 6:

> ...the parties to a workers' compensation case are free to agree in settling such a claim that the claimant is thereby waiving his statutory right to benefits under N.J.S.A. 18A:30-2.1. In order to be valid, such a waiver must be "the intentional relinquishment of a known right." West Jersey Title & Guar. Co. v. Industrial Trust Co., 27 N.J. 144, 152 (1958).

There is no indication in the instant matter that the petitioner, in settling her workers' compensation claim, knowingly relinquished any rights she might have to sick leave benefits under N.J.S.A. 18A:30-2.1. In West Jersey Title & Guar. Co., supra at 153, the Court stressed that "'[w]aiver' presupposes a full knowledge of the right and an intentional surrender." In this case, there is nothing in the record that would suggest that the petitioner had any knowledge of her rights under N.J.S.A. 18A:30-2.1 of the education laws when she agreed to settle her claim for benefits under the Workers' Compensation Act.

This case differs in that regard from Coleman v. Fiore Bros., Inc., 113 N.J. 594 (1989), which was relied upon by the ALJ. In Coleman, four homeowners who had entered into home improvement contracts sought protection from the Passaic Legal Aid Society to avoid losing their homes through foreclosure of their installment loans. The relief sought by the complainants included statutory attorney's fees. The complainants ultimately settled their claims, agreeing in a written settlement that "all claims for damages–actual, punitive and statutory, of the Complaint, and Counterclaim are hereby settled...." Although the settlement agreement made no reference to the statutory legal fees sought by the complainants, the Court concluded that, under the circumstances, such claims were encompassed within the settlement and stipulation of dismissal. In so doing, the Court observed that the complainants had made no attempt to expressly reserve their claim for attorney's fees and that the stipulation of dismissal contained no reference to any such exclusion.

Unlike the scenario in Coleman, the petitioner in the instant matter had not yet filed a claim for sick leave benefits under N.J.S.A. 18A:30-2.1 when she settled her

workers' compensation claim.[3] We emphasize in that regard that a claim under N.J.S.A. 18A:30-2.1 would not properly have been before the Division of Workers' Compensation. While the question of whether an injury arose "out of and in the course of" employment within the meaning of N.J.S.A. 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act, the ultimate determination of a claim for sick leave benefits under N.J.S.A. 18A:30-2.1 lies within the jurisdiction of the Commissioner of Education since it arises under the school laws. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 412-13 (App. Div. 1982).

Nor, under these circumstances, is it of any moment that the petitioner did not expressly reserve her claim to sick leave benefits under N.J.S.A. 18A:30-2.1 when she settled her workers' compensation case, as had the petitioner in Marino. We recognize that an intention to waive need not be manifested expressly but may be spelled out from a state of facts exhibiting full knowledge of the circumstances producing a right and continuing indifference to exercise of that right. Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962). However, under the particular circumstances presented by this case, there is no basis for us to conclude that the petitioner intentionally relinquished a known right. As previously stated, there is

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[3] We note that the petitioner's claim for workers' compensation benefits was filed prior to our decision in Verneret v. Board of Education of the City of Elizabeth, 95 N.J.A.R.2d (EDU) 134, in which the State Board cleared up the confusion surrounding the filing requirements for petitions under N.J.S.A. 18A:30-2.1. In Verneret, we held that a petition seeking benefits under N.J.S.A. 18A:30-2.1 was required to be filed with the Commissioner of Education within 90 days of the district board's action which had the effect of denying such benefits. We directed that the decision be applied on a prospective basis only. Thus, under the circumstances, we would not have applied Verneret to determine the timeliness of the instant petition.

In addition, we note that "[t]o the extent this matter might be considered untimely...the District failed to raise this claim, and the parties did not specifically brief this issue." Commissioner's Decision, slip op. at 9, n.1. The Commissioner therefore reached the merits of the matter. The State-operated District has not raised the timeliness issue on appeal and, in any event, did not file a cross-appeal from the Commissioner's decision.

no indication in the record that the petitioner was even aware that she might have any rights under N.J.S.A. 18A:30-2.1 at the time she agreed to settle her workers' compensation claim, and she had not yet filed such a claim with the Commissioner of Education.[4]

We find, in addition, that the express language of N.J.S.A. 34:15-20 supports this result. That statute provides that a settlement of a workers' compensation claim "shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute." (Emphasis added.) In the absence of any evidence that the petitioner had knowingly relinquished her rights under N.J.S.A. 18A:30-2.1, the settlement in this instance acted as a surrender only of those rights she might have had under the workers' compensation laws.

Consequently, we conclude that the petitioner's settlement of her workers' compensation case did not preclude her from pursuing a claim for sick leave benefits under N.J.S.A. 18A:30-2.1. In so doing, we reject the State-operated District's contention that the petitioner is collaterally estopped from seeking relief under the education laws. The issue of whether the petitioner was entitled to sick leave benefits under N.J.S.A. 18A:30-2.1 was not before the Division of Workers' Compensation. Nor was such issue or the awarding of relief under that statute within the jurisdiction of that body. Moreover, relief awarded pursuant to N.J.S.A. 18A:30-2.1 is in addition to any benefits received under the Workers' Compensation Act,[5] and we reiterate that the

[4] We note in that regard that the petitioner's claim for benefits under N.J.S.A. 18A:30-2.1 in Marino was filed subsequent to our decision in Verneret, supra, and was pending before the Commissioner of Education at the time that he settled his workers' compensation claim.

[5] Pursuant to N.J.S.A. 18A:30-2.1, any amounts awarded to the petitioner by the Commissioner would be reduced by the amount of workers' compensation benefits received by the petitioner as a result of her settlement.

parties to a workers' compensation case are free to agree in settling such a claim that the claimant is thereby waiving his or her statutory right to benefits under N.J.S.A. 18A:30-2.1. Marino, supra, slip op. at 6.

We therefore reverse the decision of the Commissioner to dismiss the petition and remand this matter to him for such further proceedings as are necessary to determine the petitioner's claim for sick leave benefits under N.J.S.A. 18A:30-2.1.[6]

June 6, 2001

Date of mailing JUN 08 2001

[6] Since a decision on remand would require such proceedings as are necessary to permit the Commissioner to determine whether the petitioner's injuries arose out of and in the course of her employment, we do not address the State-operated District's contention that her injuries did not arise out of her employment. Inasmuch as the Division of Workers' Compensation did not make such a determination in this instance, the Commissioner may properly exercise his jurisdiction to resolve this issue as part of the proceedings on remand. Marino, supra, slip op. at 5.

JOANNE GROMPONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning former teaching staff member sought to invalidate a 1990 settlement agreement, approved by the Commissioner, concerning the District's withholding of petitioner's 1989-90 school year salary increment and filing of tenure charges of inefficiency.

The ALJ concluded that petitioner's claims were barred as untimely filed pursuant to *N.J.A.C.* 6:24-1.2(c) and granted respondent's motion for summary decision dismissing the petition.

The Commissioner affirmed the recommended decision for the reasons expressed therein.

February 28, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ORDER ON MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 7376-99

AGENCY DKT. NO. 155-6/99

JOANNE GROMPONE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent

Joanne Grompone, petitioner, *pro se*

Cheryl U. Brown, Esq., for respondents
(Murray, Murray & Corrigan, attorneys)

Record Closed: December 20, 1999 Decided: January 11, 1999

BEFORE **ARNOLD SAMUELS**, ALJ:

On June 11, 1999, the petitioner, Joanne Grompone, filed a Verified Petition with the Commissioner of Education, seeking to invalidate a settlement agreement entered into between petitioner and respondent in May 1990.

PROCEDURAL AND FACTUAL HISTORY

Prior to the beginning of the 1989-90 school year, the respondent notified petitioner that it intended to withhold her salary increments for the 1989-90 school year.

In November 1989 the petitioner filed a Verified Petition with the Commissioner of Education contesting the withholding of her employment increments and also denying a request from her for a leave of absence for the 1989-90 school year.

In December 1989 the respondent (Board) filed tenure charges against the petitioner, seeking to remove her from her tenured position as a teacher, based on inefficiency.

After expiration of the ninety-day remedial period required by regulation, petitioner was notified, in March 1990, that she was suspended, with pay, pending a psychiatric examination.

In December 1989, after petitioner filed an appeal with the Commissioner of Education, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. The petitioner was represented by counsel, a Connecticut attorney, who did not fulfill requirements for admission *pro hac vice* in New Jersey. However, he continued to represent the petitioner in attempting settlement.

The matter was settled in May 1990. The agreement was signed by the petitioner, the Superintendent of the State Operated School District for the City of Jersey City, and the attorneys for both parties, including the petitioner's attorney, who still had not been admitted in New Jersey *pro hac vice*. An Initial Decision-Settlement, which incorporated the settlement agreement, was completed and filed with the Commissioner of Education at the end of June 1990. The decision recognized that petitioner was represented by her attorney prior to and at the time of settlement, but that he had not been admitted in New Jersey *pro hac vice*.

On August 14, 1990, the Commissioner of Education adopted the Initial Decision/settlement as the Final Decision in the matter. The Commissioner dismissed

the case, subject to compliance with the terms of settlement, which were to be completed by the end of the 1990-91 school year. Petitioner's resignation, in accordance with the agreement, was tendered and accepted in March 1991, and it became effective at the end of the 1990-91 school year.

Approximately five years later, in late May 1996, the petitioner filed a complaint in the Superior Court of New Jersey, seeking to invalidate the 1990 settlement agreement, claiming that the respondent had prematurely ceased payments due to her under the agreement. The Board asserted that the early cessation of payments, in February 1991, resulted from a payroll processing error whereby petitioner had received more money than she was entitled to under the agreement.

Petitioner also detailed a wide variety of reasons why the 1990 settlement agreement should be invalidated, and she also argued the merits of the underlying tenure case that led to the settlement. The petitioner demanded relief that included damages and restoration of her teaching position.

On February 21, 1997 the Superior Court granted respondent's motion for summary judgment and dismissed plaintiff Grompone's complaint "except as to claims regarding expiration of contract claims." The petitioner then filed several applications with the Superior Court for reconsideration, all of which were denied. As a result of one of these motions, the court, by Order dated June 20, 1997, dismissed the plaintiff's application as moot, noting "this matter having been transferred to the Commissioner of Education."

Approximately two years later, in January 1999 the petitioner again moved for reconsideration of the Order granting summary judgment. The petitioner was represented by counsel in this application. The resulting Order, dated February 23, 1999 again denied reconsideration of the prior summary judgment "as to all claims except claims regarding expiration of contract claims, and transferring the above-captioned matter to the Commissioner of Education (as to all claims involving defendant Jersey City Board of Education)". It was further ordered that "all remaining claims of plaintiff, including contract claims, are dismissed without prejudice;". . .

On May 24, 1999 the Director of the Bureau of Controversies and Disputes in the Department of Education wrote to Ms. Grompone and informed her that recent correspondence forwarded to the director's office was the first indication that the matter may have been transferred to the Commissioner of Education. The Director stated that she then contacted the Superior Court, which provided a copy of the February 3, 1999 Order, and it seemed apparent that some part of the petitioner's claim had been transferred to the Commissioner. However, the Director stated that this was not sufficient for the initiation of a contested case in accordance with *N.J.A.C.* 6:24-1.1 *et seq.* The Director advised Ms. Grompone that if she wished to proceed it was necessary to file a duly served petition of appeal with the Jersey City School District, which would then be directed to answer, without prejudice to any affirmative defenses it might wish to raise. The Director further stated that upon review of the pleading, further proceedings would be determined in accordance with the applicable rules for the hearing of contested cases.

A verified petition was filed by Ms. Grompone with the Commissioner of Education on June 17, 1999. The petition challenges the validity and many other aspects of the settlement agreement she entered into in June 1990. Petitioner also charges the respondent with failure to properly perform its obligations under the agreement.

Most particularly, the petitioner charged that the respondent wrongfully ceased making bimonthly salary payments before the end of the 1990-91 school year, as stated in the agreement, and that her work assignments during the balance of that year did not conform to the agreement.

The petitioner demanded reinstatement to her position (as if the tenure charges had never been certified), back pay and benefits, plus punitive damages.

Approximately one week before the petition was filed, Ms. Grompone wrote to the Commissioner of Education stating her belief that the Superior Court lacked foundation in law to transfer the matter to the Commissioner and challenging the Commissioner's authority to hear and determine the issues she raised, such as breach of contract.

In its answer, filed on June 15, 1999, the respondent denied the petitioner's charges and allegations and conceded that the Commissioner of Education had jurisdiction in the matter. Among other affirmative defenses, the respondent claimed that the petition was barred by all applicable statutes of limitations, including *N.J.A.C.* 6:24-1.2, the ninety-day filing requirement.

On July 9, 1999 this matter was transmitted to the Office of Administrative Law by the Commissioner of Education for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

In papers filed subsequently, the respondent stated that, because of an administrative and payroll processing error in 1990-91, the school district had neglected to reduce petitioner's salary in accordance with the settlement agreement and that the prior higher salary was continued until the error was discovered in February 1991. At that time, petitioner was notified that she had received more money than she was entitled to under the settlement agreement, and salary payments were stopped. The respondent also denied that the petitioner's part-time work assignments for the balance of the 1990-91 year, up to the time of her retirement, did not conform to the terms of the settlement agreement.

In August 1999, the respondent filed a motion for summary decision, based on the ninety-day filing limitations in *N.J.A.C.* 1:24-1.2(c). The petitioner opposed the motion and cross moved for summary decision in her favor, for a change of venue, and for discovery relating to the factual allegations in her petition. Ms. Grompone seemingly added to the charges in her petition by alleging that the respondent was guilty of committing a wide variety of torts against her. Among her arguments are the following:

1. Respondent's Motion for Summary Decision is a sham

2. Respondent's reliance on the tolling of time for an appeal is a meritless sham/hoax, because this matter before the Commissioner of Education is not an appeal.

3. Without discovery having taken place no motion for summary decision can proceed.

4. Compelling circumstances deemed the settlement agreement, which is a contract, to be null and void from the time of its conception; that the agreement was unilaterally created by the respondent, signed by her under duress, and violated public policy and the laws of New Jersey. These statements refer to a wide variety of torts committed against her by the respondent.

5. The settlement agreement violated the petitioner's rights under a collective bargaining agreement and is therefore null and void.

6. A settlement agreement was created by respondent with the specific intent not to perform as promised; a breach of contract.

7. Teachers are entitled to retain a salary overpayment made through a school board's error.

8. *N.J.A.C.* 6:24-1.2 makes no provision for the filing of an Order from the Superior Court as to the tolling of time, and respondent's argument regarding the tolling of time is a sham.

9. The petitioner's filing with the Commissioner of Education is not an appeal, and many material issues remain which should properly be decided in the Superior Court; such as the variety of torts charged against the respondent.

10. The petitioner's cross-motion for summary decision should be granted because the respondent's claim is time barred, since the respondent's application to transfer the matter to the Commissioner of Education was granted by the Superior Court by Order dated February 23, 1999.

On September 27, 1999 the respondent filed papers in response to the petitioners opposition and cross motion. The respondent emphasized that the petitioner seemed to be attempting to address the merits of her charges directed to performance of the 1990 settlement agreement by the parties. The Board repeated its argument that the petition was filed much too late and is therefore time-barred under *N.J.A.C.* 6:24-1.2. The Superior Court's transfer of "claims regarding expiration of contract claims" to the Commissioner referred solely to a claim raised by the petitioner for the first time in her opposition papers: that the Board had violated the settlement agreement by assigning duties to her which were inconsistent with her tenure. However, if that was done, it occurred in the 1990-91 school year.

The filing of papers continued. On November 12, 1999 the respondent replied to the petitioner's claim that the instant matter is not an "appeal." Respondent again repeated its sole and primary allegation: that petitioner's claims were barred by the ninety-day filing limitation in *N.J.A.C.* 1:24-1.2(c).

Oral argument on the motion was held in the Office of Administrative Law (OAL) on November 16, 1999. Additional papers were filed by the petitioner that day, 10 minutes before the record opened. The petitioner continued her argument relating to the performance of the 1990 settlement agreement. She also continued charging the commission of a variety of torts by the respondent, and particularly emphasized her argument that the matter is not properly before the OAL, but belongs in the Law Division of the Superior Court.

In oral argument, the petitioner did not address the ninety-day time limit in *N.J.A.C.* 1:24-1.2(c). Instead she insisted that the matter should be subject to the six year contract statute of limitation, and she persisted in denying that this matter was an "appeal" from the Board's actions in 1990 and 91. Ms. Grompone continued to insist that the only cause of action she has is based on a contract that was fraudulent and illegal.

In response to the petitioner's continued argument that the OAL and the Commissioner of Education do not have jurisdiction, which she insisted resided in the Superior Court, the petitioner was asked if she cared to withdraw the petition from this forum, in order that she might pursue any actions or remedies that she felt to be appropriate in the Superior Court. Ms. Grompone indicated that she would consider doing that. The petitioner requested and was given thirty days in which to decide, and the record was held open for that period of time, until December 17, 1999. Ms. Grompone was informed that after that date the instant motion would be decided, if she chose not to withdraw. She was further advised that if the respondent's motion for summary decision, a jurisdictional question, was granted, the matter would be ended in this forum; but if that motion was denied then the completion of discovery would be ordered, and a plenary hearing date would be selected.

Approximately two weeks later, on December 2, 1999, respondent filed another letter brief summarizing the Board's arguments in support of its motion for summary decision, and emphasizing that the only issue to be decided at this time is whether the petitioner timely filed her petition of appeal with the Commissioner of Education, referring to *N.J.A.C.* 1:24-1.2. On the same day, December 2, 1999, another letter was filed by the petitioner, essentially repeating her arguments, denying that this matter is an "appeal" and again asserting that this dispute correctly belongs in the Law Division of the Superior Court for application of the law of contracts. She did not however withdraw her petition.

DISCUSSION

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. *N.J.A.C.* 6:24-1.2(c).

It is clear that the language of the regulation is mandatory, and that the time begins to run when notice is received of the action taken. The uncontested facts indicate that the petitioner signed the settlement agreement on May 18, 1990, on which date she stated that she had reviewed the terms of the agreement, discussed them with her attorney, and had voluntarily and without coercion entered into the agreement. The document was also signed, shortly thereafter, by the petitioner's attorney, the State District Superintendent and counsel for the district. The settlement was accepted by the Commissioner of Education on August 14, 1990, and dismissal of the contested case was subject to compliance with the terms of the settlement. (Although petitioner's attorney had not been authorized to practice law in New Jersey, he nevertheless represented the petitioner in the negotiation and conclusion of the settlement agreement.)

The uncontested facts show that the agreement was to be performed by the parties during the balance of the 1990-91 school year. The terms included a description of the petitioner's work schedule and assignments plus the salary to be paid her for the balance of the year. Her resignation would become effective at the end of

the 1990-91 school year, at which time the parties' obligations to each other would be concluded.

The record and papers filed by the parties are totally devoid of any claim by the petitioner, in 1991 and for four years thereafter, that her work assignments during the balance of the 1990-91 school year were not consistent with her status as a tenured teaching staff member. However, the record does indicate that in February 1991 respondent stopped salary payments because by that time she had been inadvertently overpaid at a rate that by that date totaled more than the agreed upon $15,000 annual salary for the 1990-91 academic year. The district notified petitioner of that overpayment in February 1991, when salary payments ceased. Then, petitioner submitted her resignation three months later, in May 1991, and it became effective, as agreed, at the end of the school year, presumably in June 1991.

It is most important to note that during the balance of the 1990-91 school year the petitioner never filed a complaint or petition challenging or seeking to rescind the settlement agreement; nor did she do so within ninety days of any alleged violation of the agreement by the district or from the end of the school year. No such petition of appeal or complaint was filed with the Commissioner of Education or with any other forum until almost five years later, in May 1996, when petitioner filed a Complaint in the New Jersey Superior Court, which she amended in September 1996.

The proceedings in the Superior Court proceeded until February 1997, when the Complaint was dismissed by the Superior Court "except claims regarding expiration of contract claims," and the matter was ordered to be transferred to the Commissioner of Education. The actual transfer did not take place until after February 1999, upon conclusion of a series of unsuccessful motions for reconsideration in the Superior Court.

The instant petition was filed in June 1999, approximately nine years after the settlement.

Certainly, if the petitioner desired to file a petition or complaint relating to the performance of the settlement agreement, such action should have been taken within

ninety days from the conclusion of the 1990-91 school year, in June 1991, even though, giving her the benefit of the doubt, she was notified of the cessation of salary payments in February 1991. Therefore, the ninety-day period of limitations would have expired, at the latest, at the end of September 1991. There is no visible reason why the ninety-day period of limitations did not or should not have commenced to run immediately upon the end of the 1991 school year; and by the end of September 1991, her claim, relating to performance of the settlement agreement, was barred, pursuant to *N.J.A.C.* 6:24-1.2(c).

Petitioner filed her Complaint with the Superior Court of New Jersey in May 1996, almost five years after expiration of the ninety-day period of limitations discussed above. No authority exists that would justify restoration of the petitioner's barred right to file a petition simply because she filed a Complaint in the Superior Court five years later. There is no reason to believe that in 1997 and in 1999, when the Superior Court dismissed the matter and ordered it transferred to the Commissioner of Education as to "claims regarding expiration of contract claims," the Superior Court intended to cause the ninety-day requirement in *N.J.A.C.* 6:24-1.2 to be vacated and to cause revival of a claim that had been barred for almost five years.

On the contrary, it is likely that the Superior Court indicated that the matter should be returned to the Commissioner of Education for application by him of the laws, rules and regulations over which he had jurisdiction.

The ninety-day bar of *N.J.A.C.* 6:24-1.2 has been traditionally and strictly applied, *Kallimanis v. Bd. of Ed. of Carlstadt,* OAL DKT. NO. EDU 868-80 (August 8, 1980) aff'd Commissioner of Education (September 26, 1980), aff'd State Board (March 4, 1981). The rule will only be relaxed where there is some compelling reason such as the presence of substantial constitutional or other issues of fundamental public interest beyond that of concern only to the parties themselves. *Bogart v. East Orange Bd. of Ed.*, OAL DKT. NO. EDU 6245-82 (January 26, 1983), aff'd Commissioner of Education (March 14, 1983). It has also been noted that relaxation is appropriate when strict adherence would possibly result in an injustice.

In Dreher v. Jersey City Bd. of. Ed., OAL DKT. NO. EDU 2777-87 (December 18, 1987), aff'd Commissioner of Education (February 2, 1988), aff'd State Board (July 8,

1988), filing of the petition was delayed while the petitioner investigated an appropriate grievance procedure. The ninety-day rule was not relaxed even though petition was filed only two days after the time expired. *See also Cwierk v. Jersey City Bd. of Ed.*, OAL DKT. NO. EDU 4795-87 (January 6, 1988), aff'd Commissioner of Education, (February 10, 1988); *Weir v. Bd. of Ed. of Northern Valley Regional High School District*, OAL DKT. NO. EDU 8609-83 (June 7, 1984), aff'd Commissioner of Education (July 20, 1984), aff'd State Board of Education (March 6, 1985), aff'd A.-3520-8426T6 (App. Div. April 9, 1986).

In *Kaprow v. Bd. of Ed. of Berkley Twp.*, 131 *NJ* 572, 1993, the New Jersey Supreme Court held that an unofficial and informal notice from a secretary, employed by the local Board of Education to the plaintiff, stating that two positions have been created and filled by other persons, suffices to trigger the ninety-day period to begin to run against his assertion of tenure rights. That conduct by the local Board combined with the actual unofficial notice, was in fact considered to be the type of "other action" that provides adequate notice to the aggrieved party that legal action should be taken within the prescribed period.

There is no question in the instant matter that respondent's decision to cease salary payments because of prior overpayment and notice given to the petitioner of that action in February 1991 provided adequate notice to her that legal action should be taken with the prescribed period. Of course, if her work assignments in the balance of the 1990-91 school year were improper she knew that at the time it happened.

As set forth above, relaxation of the ninety-day limitation has been reserved for limited situation wherein a compelling reason can be demonstrated for expanding the time limitation. The petitioner has not demonstrated any circumstances that might warrant such a relaxation. No compelling reason was asserted, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties; nor did she demonstrate that strict adherence to the time limitations would possibly result in an injustice, except for the loss of her claim.

A Superior Court complaint is not ordinarily the petition that is contemplated by the regulation, and it was not until February 1999, that the Superior Court ordered the

transfer to the Commissioner of Education. That was approximately eight years after closure of the matter in the administrative process. Even in the unlikely event that the Superior Court order of transfer on February 23, 1999 is used for the commencement of the ninety-day filing period, the petition would still have been out of time, having been filed on June 11, 1999. The ninety-days from the Superior Court order of February 23, 1999 expired on May 24, 1999.

CONCLUSIONS

For purposes of emphasis, it must be repeated that this decision is based upon respondent's motion for summary decision because petitioner's filing was untimely pursuant to *N.J.A.C.* 6:24-1.2, a jurisdictional issue. Therefore, this matter is limited to the underlying facts related to dates actions were taken and documents were filed. These facts and dates, as stated above in the factual history, are all uncontroverted. Therefore, no genuine issues of material fact remain to be decided in connection with the untimely filing issue, and the matter is ripe for summary decision. *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995).

Certainly, nothing outside of the issue decided here affects any rights or remedies the petitioner may wish to raise in the Law Division of the Superior Court.

It is therefore **CONCLUDED** that the ninety-day period of limitations in *N.J.A.C.* 6:24-1.2(c) had expired long before the petitioner had filed any claim, either in the Superior Court or with the Commissioner of Education. It is further **CONCLUDED** that even if the Superior Court filing date or the Superior Court order of transfer is used to commence the running of the ninety-day time period, the petitioner still filed her Verified Petition with the Commissioner beyond the ninety-day limitation. Furthermore, petitioner has demonstrated no reason why the Commissioner should exercise his discretion to relax application of the time bar in accordance with *N.J.A.C.* 6:24-1.15.

ADDENDUM

On December 30, 1999, after the record closed for purposes of the instant motion and after this decision was written, the petitioner filed yet another motion, asking for a wide variety of relief, some of which had been urged before and some of which is new.

Petitioner continues to insist that this entire matter should be dismissed for lack of jurisdiction in the Commissioner of Education, and she asks to have it transferred back to the Law Division of the Superior Court, which she claims is the proper forum for resolution of her so-called contract claim, with a six year statute of limitation. The Superior Court did not retain jurisdiction when it granted a motion by the District for summary judgment, dismissing petitioner's claims as moot and preserving only matters cognizable by the Commissioner of Education. This decision addresses those matters, by applying the regulations applicable to the Commissioners jurisdiction. It is assumed that when the Superior Court referred to "contract claims" it meant a determination as to whether the petitioner could abrogate her 1990 settlement agreement.

A new application by the petitioner asks for this judge to be recused and disqualified because of bias on several grounds. First, petitioner states that she was harassed when this judge asked her to refrain from inappropriate invective directed towards respondent's attorney, who has been repeatedly accused of filing sham, fraudulent and bogus applications and for committing a hoax against her. There is no question that the petitioner needed to be cautioned and asked to refrain from such personal attacks. In addition. Ms. Grompone's latest submission also accuses the New Jersey Education Association, the Jersey City Education Association, her prior attorney, the Superior Court judge who dismissed her case and a former Commissioner of Education of also acting wrongfully against her.

An additional reason presented by petitioner along with her request for recusal criticizes the opportunity given to her at oral argument to decide if she wished to proceed with a decision on the subject motion or allow her to withdraw, without prejudice. At the time petitioner thanked this judge for the 30 days given her to decide.

Since no advice was received within the 30 day period of time, the record was closed for purposes of this decision. Without the need for further exposition, the petitioner's application for recusal of this judge is denied for lack of sufficient grounds. Her application for summary decision is also denied for lack of factual support and for a complete lack of justification.

For further emphasis, there is no question but that jurisdiction over the issue of whether the petition was timely filed pursuant to N.J.A.C. 6:24-1.2(c) is within the jurisdiction of the Commissioner of Education, and it is the only question decided here. To repeat, any other causes of action petitioner cares to pursue in the Superior Court may be addressed by her in that forum.

ORDER

It is therefore **ORDERED** that the respondent's application for summary decision be **GRANTED**; and this matter is **DISMISSED** because of untimely filing pursuant to *N.J.A.C.* 6:24-1.2(c). The petitioner's motions are **DENIED**.

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

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

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

January 11, 2000
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

1/14/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 7376-99
AGENCY DKT NO. 155-6/99

JOANNE GROMPONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his independent and careful review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge dismissing this matter for untimely filing, and denying the related motions.

Accordingly, the recommended decision of the OAL is affirmed for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: FEB 28 2000

Date of Mailing: MAR 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

69-00

EDU #7376-99
C # 69-00
SB # 25-00

JOANNE GROMPONE,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 28, 2000

For the Petitioner-Appellant, Joanne Grompone, pro se

For the Respondent-Respondent, Murray, Murray & Corrigan (Cheryl V. Brown, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 2, 2000

Date of mailing AUG 04 2000

ALISON HENDERSHOT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured teaching staff member alleged that the Board reduced her position and salary while it employed nontenured teachers within her area of certification in violation of her tenure rights.

The ALJ determined that petitioner's assertion that a reduction in force occurred when her salary was reduced is without merit. The ALJ concluded that petitioner's salary for the 1998-99 school year was improperly reduced.

The Commissioner affirmed the Initial Decision of the ALJ, finding no evidence to support petitioner's contention that she was subjected to a RIF in the 1998-99 school year since the facts do not indicate that the Board reduced her salary for reasons of economy. The Commissioner further noted that, although the record leads to the inevitable conclusion that the Board adjusted petitioner's salary for the 1998-99 school year to eliminate a disparity in salaries between petitioner and her part-time colleagues, it did so in violation of her statutory protections of tenure. The Commissioner directed the Board to reimburse petitioner $1,413.77 representing the difference in salary petitioner received for the 1997-98 and 1998-99 school years and to freeze petitioner's salary at its 1997-98 amount ($18,013) until such time as a 4/9 position at petitioner's step on the salary guide meets or exceeds $18,013.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11669-98

AGENCY DKT. NO. 497-11/98

ALLISON HENDERSHOT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE,

Respondent.

Louis P. Bucceri, Esq., for Petitioner (Bucceri & Pincus, attorneys)

Craig U. Dana, Esq., for Respondent (Morris, Downing & Sherred, attorneys)

Record Closed: January 10, 2000 Decided: January 12, 2000

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

STATEMENT OF THE CASE

Petitioner Alison Hendershot asserts that Respondent Board of Education of Montague, Sussex County, has reduced her position and salary while it employs non-tenured teachers within her area of certification in violation of her tenure rights.

The matter was forwarded to the Office of Administrative Law (OAL) for determination as a contested case on December 18, 1998, in accordance with *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The parties agreed that this matter could be disposed of by cross applications for summary decision. A briefing schedule was established.

FINDINGS OF FACT

A. The following facts were stipulated by the parties and are incorporated herein as findings of fact in this matter.[1]

1. Petitioner was employed by Respondent as a part-time teacher of basic skills under contract beginning on September 1, 1993. Petitioner had previously worked as a substitute teacher for Respondent during the period April through June, 1993.

2. Petitioner has been employed by Respondent as follows:

1993-94	part-time	Basic Skills Teacher
1994-95	part-time	Basic Skills Teacher
1995-96	part-time	Fifth Grade Teacher
1996-February17, 1997	part-time	Sixth Grade Teacher
February 18, 1997 – April 15, 1997	paid maternity disability leave	
April 15, 1997 – June 30, 1997	unpaid child rearing leave	
1997-98	part-time	Basic Skills Teacher
1998-99	part-time	Basic Skills Teacher

3. Petitioner was issued a standard New Jersey certificate endorsed for Elementary School Teacher in June, 1993. (Exhibit J-1). The certificate was issued in petitioner's maiden name, "Hotaling."

4. For the 1997-98 school year, petitioner was paid a salary of $18,013. (Exhibit J-2).

[1] A copy of the Stipulation of Facts and Exhibits is annexed hereto and made a part hereof.

5. Petitioner filed a contractual grievance as to her 1997-98 salary which was submitted to grievance arbitration.

6. An arbitration award issued on September 8, 1998, denying the grievance. (Exhibit J-3).

7. For 1998-99, Petitioner's salary was $16,599.23. (Exhibit J-4).

8. Petitioner's 1997-98 teaching schedule is attached as Exhibit J-5.

9. Respondent's master teacher schedule for 1998-99 is attached as J-6 (A-E).

10. For 1998-99 Respondent employed three (3) full-time non-tenured elementary teachers.

11. Petitioner's salary for 1995-96 was $16,500. (Exhibit J-7).

12. Petitioner's annual salary for 1996-97 would have been $17,373 if she had worked for the entire school year. (Exhibit J-8).

13. During the 1995-96 and 1996-97 (excluding leave time) school years, Petitioner taught fifth and sixth grades during periods one through five (8:30 a.m. to 12:00 noon). During that time, she was paid at 50 percent of her step on the salary guide.

B. The following facts were admitted by Respondent in its answer to the petition.

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

15. For the 1997-98 school year, Petitioner was employed in a part-time teaching position at a prorated salary of $18,013.

DISCUSSION AND CONCLUSION

Petitioner is challenging Respondent's decision to reduce her position and salary, contending that the Board of Education employs non-tenured teachers within her area of certification, in violation of her tenure rights under the statue. Specifically, Petitioner contends that, in 1998-99, the Board was prohibited from reducing her compensation as a part-time teacher while employing non-tenured teachers in her area of certification. *N.J.S.A.* 18A:28-5.

Respondent, on the other hand contends that Petitioner accepted a reduction in hours from half time to four ninths time in 1997-98; at that time, however, according to the Board of Education, Petitioner was paid half time salary in error. The reduction in her salary from half of that of a full-time teacher to four ninths was merely the correction of an error, according to Respondent. Petitioner contends since the Board employs full-time non-tenured teachers in her area of certification, when the reduction in pay occurred, she suffered a reduction in force; as a result, she is entitled to back pay equal to five ninths of full-time for 1998-99 and full-time assignment for 1999-00 as well as retroactive benefits and seniority credit.

Respondent argues that this case is controlled by the appellate decision in *Bassett*, in which the court held that a full-time tenured teacher who took a leave of absence and subsequently returned to a part-time position in the same instructional area should be compensated proportionately to full-time salary and not a substantially lesser hourly rate. *Bassett v. Board of Educ.,* 223 *N.J. Super.* 136 (App. Div. 1988) citations omitted.

The facts in this case, however, do not support Respondent's position that *Bassett* is determinative. The parties have agreed and stipulated that Hendershot is a part-time teacher and was compensated at a prorated share of the full-time compensation of her step on the salary guide.

I **CONCLUDE,** therefore, that provisions of the holding in Bassett have not been violated; accordingly, *Bassett* is not determinative.

Turning now to the assertion of Petitioner that the only explanation for the reduction in compensation is that her position had been subject to a reduction in force (RIF), I **FIND** this assertion is equally without merit, based on the history and circumstances of this case.

Petitioner had taught four periods out of nine for several years prior to the institution of this action. She had been compensated, during prior years, at 50 percent of the appropriate compensation for her job level. In 1997-98, while being so compensated, Petitioner grieved non-payment for a preparation period which would have raised her compensation to five ninths of the appropriate compensation.[2]

Although a reduction in hours is considered a reduction in force under the statute if done for reasons of economy, there has been no showing from either side that such was the reason for the reduction in pay. See *Klinger v. Cranbury Tp. Bd. of Ed.,* 190 *N.J. Super.* 354 (App. Div. 1982). Moreover, Petitioner has offered no legal authority for her assertion that the RIF occurred when her salary was reduced.[3]

Since, according to the statute, the Respondent has the right to reduce the number of hours, notwithstanding the tenure law, a RIF would have occurred when the Petitioner's hours were reduced. *N.J.S.A.* 18A:28-5; *N.J.S.A.* 18A:28-12. That occurred, at the latest, during the 1997-98 school year. Accordingly, because the regulations require that a party aggrieved by an action of a Board file a petition with the Department of Education within 90 days and more than 90 days have passed since the Petitioner's hours were reduced, the limitation period expired long before this petition was filed.

---

[2] The grievance was denied (J-3).

[3] The record is unclear as to when the reduction in hours took place. Apparently, according to Respondent's Reply, Petitioner had employed at 50 percent full-time and paid accordingly. Upon her return from maternity leave, she was employed for four ninths of full-time but paid at 50 percent.

The only issue, therefore, that this petition can be predicated on is whether Respondent is in violation of Petitioner's tenure rights by reducing her salary. The language of the tenure statute is clear: the compensation of a tenured teacher may not be reduced except for inefficiency, incapacity or conduct unbecoming a teacher. *Id.* The payment of 50 percent of full-time in 1998-99 was an administrative error. There is no exception in the statute clerical or administrative error.

It is clear that there have been no charges of inefficiency, incapacity or unbecoming conduct alleged against Petitioner.

I am mindful of the fact that Petitioner signed a contract agreeing to the reduction. The right to unreduced compensation except for cause is the essence of the tenure statute and it is well established that contracts between teachers and boards are subject to such statutes. *Spievak v. Board of Educ. of Rutherford*, 90 *N.J.* 63, 76, 447 A 2d 140 (1982). I **CONCLUDE**, therefore, that Petitioner's contract for the 1998-99 school year is subject to the provisions of the tenure laws.

Accordingly, I further **CONCLUDE** that Respondent's reduction of Petitioner's salary for the 1998-99 school year should be **REVERSED**; I further **CONCLUDE** Petitioner should be paid the difference between four ninths of her salary and 50 percent.

It is so **ORDERED**.

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

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

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

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

January 12, 2000
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

1/14/00
DATE

Debbi Antamitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 2000
DATE

Barbara A Harris
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 11669-98
AGENCY DKT. NO. 497-11/98

ALISON HENDERSHOT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Since the Board's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a),[1] they were not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge (ALJ). Like the ALJ, the Commissioner finds no evidence on the record to support petitioner's contention that she was subjected to a RIF in the 1998-99 school year, since the facts herein do not indicate that the Board reduced her salary for reasons of economy.[2] Instead, the sole issue is whether the Board improperly reduced petitioner's salary in the 1998-99 school year in violation of her tenure rights. In this connection, although the record leads to the inevitable conclusion that the Board adjusted petitioner's salary for the 1998-99 school year to eliminate a disparity in salaries between petitioner and her part-time colleagues, it did so in violation of her statutory

[1] The Initial Decision was mailed to the parties on January 21, 2000 and the exceptions were filed on February 4, 2000.

protections of tenure. *N.J.S.A.* 18A:28-5. The proper means of redress, although less immediate in its result, is to freeze petitioner's salary at its 1997-98 amount. *See DeLyon v. Borough of Old Tappan*, 97 *N.J.A.R.* 2d (EDU) 499, *aff'd in part, rev'd in part,* State Board February 2, 2000.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Board is directed to reimburse petitioner the amount of $1,413.77, representing the difference in salary she received in the 1998-99 school year ($16,599.23) and her salary for the 1997-98 school year ($18,013), and to freeze petitioner's salary at this level until such time as a 4/9 position at petitioner's step on the salary guide meets or exceeds $18,013.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: FEB 28 2000

Date of Mailing: MAR 01 2000

[2] Petitioner does *not* assert that her reduction in hours beginning with the 1997-98 school year constituted a RIF. (Petition of Appeal)

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

EAST ORANGE COMMUNITY CHARTER SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

February 28, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EAST ORANGE COMMUNITY CHARTER SCHOOL,
Petitioner,
v.
EAST ORANGE BOARD OF EDUCATION,
Respondent.

CONSENT ORDER AND INITIAL DECISION
OAL DOCKET NO. EDU 1346-00
AGENCY DOCKET NO. 32-1/00

Robert Taylor, Esq., for Petitioner

Marvin L. Commick, Esq., for Respondent (Love & Randall, attorneys)

Record Closed: February 2, 2000 Decided: February 2, 2000

BEFORE **THOMAS R. VENA,** ALJ:

This matter, having been opened to the Office of Administrative Law, on transmission from the Bureau of Controversies and Disputes, Department of Education, the Honorable Thomas R. Vena presiding, Robert Taylor, Esq., appearing on behalf of Petitioner, East Orange Community Charter School, and Marvin L. Commick, Esq., appearing on behalf of Respondent, East Orange Board of Education (Love & Randall, attorneys), and the Court having conducted an informal conference, and upon consent of the parties, and good cause appearing,

IT IS on this 2nd day of February, 2000, **ORDERED** as follows:

1. That Respondent pay to Petitioner all sums due and owing to it by Respondent pursuant to the provisions of the New Jersey Charter School Program Act, *N.J.S.A.* 18A:36A-1, *et seq.*, including all sums due and owing through February 8, 2000.

2. That said sums shall be paid by Respondent to Petitioner at or before the conclusion of Respondent's meeting on February 8, 2000, and in no event later than 11:59 p.m. on February 8, 2000.

3. The petition is dismissed upon payment of the sums set forth above.

I hereby consent to the form
And entry of the within Order.

Feb 2, 2000

ROBERT TAYLOR, ESQ.
Attorney for Petitioner

Feb 2, 2000

MARVIN L. COMMICK, ESQ.
Attorney for Respondent

This **ORDER** is an initial decision and I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

Feb. 2, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

Feb. 4, 2000
DATE

D. N. Centanni/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 1346-00
AGENCY DKT. NO. 32-1/00

EAST ORANGE COMMUNITY CHARTER SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Consent Order and Initial Decision of the Office of Administrative Law have been reviewed. It appears that the parties have reached an agreement in this matter. Upon his review, the Commissioner approves the Consent Order terms and adopts such order as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the Consent Order.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: FEB 28 2000

Date of Mailing: MAR 01 2000

~~349-00~~
71-00

EDU # 9576-99
C # 349-00
SB # 71-00

DONNA CUSTODE,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 30, 2000

For the Respondent-Appellant, Apruzzese, McDermott, Mastro & Murphy (David A. Wallace, Esq., of Counsel)

For the Petitioner-Respondent, Bucceri and Pincus (Sheldon H. Pincus, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Margaret F. Bartlett abstained.

April 4, 2001

Date of mailing APR 06 2001

71-00

EDU #9576-99
C # 349-00
SB # 71-00

DONNA CUSTODE,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the State Board of Education, April 4, 2001

Decided by the Commissioner of Education, October 30, 2000

For the Respondent-Appellant, Apruzzese, McDermott, Mastro & Murphy (David A. Wallace, Esq., of Counsel)

For the Petitioner-Respondent, Bucceri and Pincus (Sheldon H. Pincus, Esq., of Counsel)

On April 4, 2001, the State Board of Education affirmed the decision of the Commissioner of Education in this matter for the reasons expressed in his decision. The Commissioner, in turn, had adopted the initial decision of the Administrative Law Judge ("ALJ"). In his decision, the ALJ had concluded that the Board of Education of the Town of Hackettstown (hereinafter "Board") had violated the tenure rights of Donna Custode (hereinafter "petitioner") by compensating her at a lower salary for the 1998-99

school year than the salary it had established for her when it approved her movement on the then applicable salary guide on May 13, 1998.

In the proceedings before the ALJ, the Board had argued that its actions were not in violation of petitioner's tenure rights because on June 10, 1998, it had reassigned her from a 12-month secretarial position compensated under one salary guide to another 12-month secretarial position compensated pursuant to a lower paying guide. The Board argued that any salary loss was justified because it was merely the consequence of a demotion to a lower paying position as the result of a reduction in force. The Board also maintained that because it had resolved to fix petitioner's salary at the amount she was actually paid during 1997-98, and because petitioner had been reassigned before she had begun receiving the increased salary amount established by the Board on May 13, 1998, it had not reduced petitioner's salary in violation of her tenure rights.

As stated, the ALJ rejected the Board's arguments, and, based on the undisputed facts, found that the Board's action of June 10, 1998 constituted an impermissible reduction in compensation. The ALJ therefore directed the Board to reinstate petitioner's salary in the amount it had established by its May 13, 1998 action and to pay petitioner within thirty days of the final administrative decision in the matter the difference between that amount and the amount she had received for 1998-99 and 1999-2000.

As noted previously, the Commissioner adopted the ALJ's initial decision and directed the Board to compensate petitioner within 60 days of his decision. In doing so, he concurred with the ALJ that the Board's action of June 10, 1998 was without effect

given its action the previous month approving her advancement on the then applicable salary guide. He also stressed that as a secretary, the petitioner was serving in the same tenurable position in which she had served prior to the reduction in force that had resulted in her reassignment. Commissioner's Decision, slip op. at 10.

We agreed with both the ALJ's initial decision and the Commissioner's decision adopting that decision. Consequently, we affirmed the Commissioner's decision for the reasons expressed therein.

On April 19, 2001, the Board moved for reconsideration of our decision pursuant to N.J.A.C. 6A:4-2.7. In its brief in support of the motion, the Board renews its argument that its actions did not constitute a reduction of petitioner's salary, but rather a permissible "freezing" of her salary. The Board argues that reconsideration is required because its legal arguments "have not yet been addressed at any level in this proceeding." Brief in support of motion, at 2.

We disagree. The record reflects that the Board's legal argument was considered by the ALJ and the Commissioner, both of whom rejected it. On appeal to the State Board, the Board's argument was again considered with the same result. Given that its arguments have been considered at three levels of administrative review, and based on our review of the papers submitted by counsel in support of the motion, the State Board of Education denies the Board's motion for reconsideration. In so doing, we note that, pursuant to the Commissioner's decision and in the absence of a stay, the Board was required to compensate the petitioner by December 29, 2000. The State Board reaffirms that the petitioner was entitled to receive the additional compensation which she was due under the Commissioner's decision within 60 days of

the date of the Commissioner's decision, and directs that any amounts still owing to the petitioner be paid immediately.

June 6, 2001

Date of mailing JUN 08 2001

71-00

EDU # 4006-00
C # 383-00
SB # 71-00

DOUGLAS E. WICKS,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET, COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 20, 2000

For the Petitioner-Appellant, Douglas E. Wicks, pro se

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Philip E. Stern, of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Margaret F. Bartlett and Maud Dahme abstained.

April 4, 2001

Date of mailing APR 06 2001

IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE HENDRICKS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF BRIDGETON, CUMBERLAND	:	DECISION
COUNTY.	:	

February 28, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2911-99

AGENCY DKT. NO. 82-4/99

IN THE MATTER OF THE TENURE HEARING OF WAYNE HENDRICKS, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY

Robert Schwartz, Esq., for petitioner

A. Paul Kienzle, Jr., Esq., for respondent (Casarow, Kienzle & Raczenbek, attorneys)

Record Closed: January 3, 2000 Decided: January 19, 2000

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 14, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

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

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

19 January 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Jan 24, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 25 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

lmh

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE CENTRE AT FORSGATE
12 CENTRE DRIVE
JAMESBURG, NJ 08831
(609) 860-9100
ATTORNEY FOR WAYNE HENDRICKS

FILED
JAN 3 9 11 AM '00
STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF WAYNE HENDRICKS, SCHOOL DISTRICT OF THE CITY, OF BRIDGETON, CUMBERLAND COUNTY	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
	OAL DOCKET NO. EDU 2911-99
	AGENCY REF. NO. 82-4/99
	SETTLEMENT AGREEMENT

THIS AGREEMENT made this day of August, 1999 by and between the Bridgeton Board of Education, which maintains principle offices at Bank Street Administration Building, Bridgeton, NJ 08302 -2001 (hereinafter referred to as the "Board") and Wayne Hendricks, (hereinafter referred to as "Mr. Hendricks").

WITNESSETH

WHEREAS, Mr. Hendricks is the Respondant in a tenure matter filed by the Board, having OAL Docket No. EDU 2911-99 and Agency Docket No. 82-4/99; and

WHEREAS, the parties have engaged in litigation which resulted in having the matter assigned to the Honorable Lillard law, ALJ; and

WHEREAS, the continued litigation of this matter would have resulted in great expense and disruption to the Bridgeton School District; and

WHEREAS, the parties have determined that resolving this matter would be in their mutual best interests; and

WHEREAS, the nature of the charges brought against Mr. Hendricks by the Board are limited to his performance as a supervisor; and

WHEREAS, the Board is desirous of filling a vacancy in the position of teacher of the handicapped; and

WHEREAS, Mr. Hendricks is certified as a teacher of the handicapped;

NOW, THEREFORE, in consideration of the mutual provisions of the parties, and in exchange for the consideration more particularly noted herein, it is agreed as follows:

1. Mr. Hendricks shall submit his resignation from the position of department head now known as curriculum content supervisor, said resignation to be made effective July 1, 1999.
2. In consideration therefore, the Board voluntarily dismisses the tenure charges brought against Mr. Hendricks that are related to his performance as supervisor, recognizing that the dismissal is subject to the approval of the Commissioner of Education
3. In further consideration, the Board shall compensate Mr. Hendricks in the sum of $5,246.58, representing the salary for the period between April 15, 1999 and June 30, 1999. Mr. Hendricks shall not be entitled to payment of any additional salary as part of this Agreement.
4. Further, the Board shall assign Mr. Hendricks to the position of teacher of the handicapped effective September 1, 1999 and place Mr. Hendricks at the appropriate step of the teacher salary guide based on his years of experience in the Bridgeton School District.

5. Further, Mr. Hendricks shall be entitled to apply, and the Board shall be obligated to consider any application by Mr. Hendricks for the summer positions of coordinator of JTPA and /or teacher of JTPA, or any other position to which Mr. Hendricks applies. It is understood that this in no way obligates the Board to appoint Mr. Hendricks to the position of coordinator of JTPA and/or teacher of JTPA or for any other position to which he may apply.

6. As further consideration of this Agreement, Mr. Hendricks and the Board agree to mutually release and forever discharge each other, including members of the Board, or any of its directors, trustees, officers, employees, agents, attorneys, successors, heirs, executors and assigns from any and all claims which was or could have been asserted which relate to the matter now pending before the Commissioner having OAL Docket No. EDU 2911-99 and Agency Docket No. 82-4/99. This Release also covers any claims of discrimination relating to the matter having OAL Docket No EDU 2911-99 and Agency Docket No. 82-4/99, directly or indirectly, including, but not limited to, the New Jersey Law Against Discrimination, Federal Laws against discrimination, and the Americans With Disabilities Act, and any claims for back pay.

7. Mr. Hendricks expressly acknowledges, represents and warrants that he has agreed to each and every term of this Agreement which was placed on the record before the Honorable Lillard Law, ALJ, on August 10, 1999, that he fully understands the terms, conditions and significance of this Agreement, and that he is satisfied with the representation he has

received from his attorney, and that he has executed this Agreement voluntarily, knowingly and with the advice of counsel.

8. All of the terms of this Agreement are deemed material. This Agreement is the entire Agreement between the parties and incorporates the complete obligation of both parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

Claire Brillon

Witness to Board signature

Paul Kern

Wayne Hendricks

WAYNE. HENDRICKS

BRIDGETON BOARD OF EDUCATION

By Jere Branch, President

3 of

OAL DKT. NO. EDU 2911-99
AGENCY DKT NO. 82-4/99

IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE HENDRICKS,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF BRIDGETON, CUMBERLAND	:	DECISION
COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: FEB 28 2000

Date of Mailing: MAR 01 2000

~~391-00~~
72a

EDU #4737-99, 6019-99, 6125-99, 6126-99, 8009-99 and 10943-99 (consolidated)
C # 391-00
SB # 72-00

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

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

S.C.S. AND K.L.R., on behalf of minor child, M.R.S.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

STATE BOARD OF EDUCATION

DECISION

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

E.M.W. AND L.F.W., on behalf of minor child, M.W.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

L.F., on behalf of minor child, J.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT,

AND :

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT MONMOUTH COUNTY, :

RESPONDENT, :

AND :

M.G. AND A.G., on behalf of minor child, N.M.G., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENT-RESPONDENT, :

AND :

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENTS/CROSS-CLAIMANT–APPELLANT, :

AND :

R.L.H. AND J.M.H., on behalf of minor child, J.K.H., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENT, :

AND :

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENT.[1] :

Decided by the Commissioner of Education, November 28, 2000

Decision on motion by the State Board of Education, March 7, 2001

For the Petitioners-Appellants D.M., S.C.S. and E.M.W., Robert P. Martinez, Esq.

For the Petitioners-Appellants M.G. and A.G., pro se

For the Respondent/Cross-Claimant–Appellant Board of Education of Red Bank Regional High School District, James P. Granello, Esq.

For the Respondent-Respondent Board of Education of the City of Long Branch, McOmber & McOmber (R. Armen McOmber, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Middletown, Kenney, Gross & Kovats (Malachi J. Kenney, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Rumson-Fair Haven Regional High School District, Reusille, Mausner, Carotenuto, Barger & Steel (Martin W. Barger, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Shore Regional High School District, Tucci & Collins (Gregory W. Vella, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, we grant the motion to supplement the record on

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[1] Petitioners L.F. and R.L.H. did not file a notice of appeal to the State Board from the Commissioner's decision. Hence, they are not parties to the instant appeal.

appeal filed by the Red Bank Regional High School District, and, in considering this matter, have reviewed the record as supplemented.

July 10, 2001

Date of mailing JUL 12 2001

73-00

BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board contested the Department's determination (resulting from an audit) that petitioner exceeded its authority in purchasing materials for the construction of a sidewalk on property not owned by the school district and in waiving the Borough's obligation to pay contaminated soil removal costs in return for labor which was supplied for such sidewalk construction.

The ALJ found that the legislative scheme permits a school district to improve its own property but not that of the municipality. Therefore, the ALJ found that a school district may not expend public funds to construct a sidewalk improvement on property which is not owned by the board but is municipally-owned in order to jointly develop and construct a recreational field. Thus, the ALJ concluded that there is no statutory authority that would permit the Board to make the sidewalk improvement in question at its expense. The ALJ found no merit to the Board's argument that *N.J.S.A.* 18A:20-22 and 33-1 may be read *in pari materia.* Moreover, the ALJ noted that the requirement of "convenience of access" in *N.J.S.A.* 18A:33-1 was not applicable in this instance. The ALJ affirmed the Department's determination made in a Notice of Determination that the Board exceeded its authority. Petition was dismissed.

Commissioner adopted findings and determination in Initial Decision and directed the Department's Division of Finance to recover from the Board all State aid received on the amounts inappropriately disbursed.

FEB 28 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DENYING PETITIONER'S MOTION FOR SUMMARY DECISION AND GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 6662-98
AGENCY DKT. NO. 223-7/98

BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

John R. Armstrong, Esq., for petitioner (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 29, 1999 Decided: January 12, 2000

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner contests respondent's determination made in a Notice of Determination dated April 3, 1998 (J-2) and in a prior Special Examination Report (J-1) resulting from a limited scope special audit, to the effect that petitioner exceeded its authority in purchasing materials for the construction of a sidewalk on property not owned by the School District and in waiving the Borough's obligation to pay contaminated soil removal costs in return for labor which was supplied for such sidewalk construction. The matter was transmitted to the Office of Administrative Law (OAL) on August 10, 1998, for hearing as a contested case. The matter was assigned to the undersigned administrative law judge and scheduled for a telephone prehearing conference to be held on October 14, 1998. On that date, a telephone prehearing conference was held and continued to October 28, 1998.

It should be noted that on August 12, 1998, Thomas J. Fitzgerald sought leave to intervene in this matter, and by letter order dated October 14, 1998, this motion was denied. On motion for interlocutory review, the Commissioner of Education affirmed this denial by order dated October 23, 1998.

Subsequently, a schedule was entered requiring the submission of a motion for summary decision on the part of petitioner and a cross-motion by respondent. Upon receiving these documents from petitioner (P-1, P-2 and P-3) and from respondent (R-1 and R-2), the motion was to have been decided. Because of the press of other matters and through inadvertence, the record with respect to this matter was not closed until November 29, 1999.

FACTUAL DISCUSSION

From the motion papers, it does not appear that the essential facts in this matter are disputed. Petitioner submitted two certifications in support of its motion and respondent did not challenge or otherwise dispute the factual assertions set forth in these certifications.

The first certification is that of Gregory S. Rohrman, Business Administrator and Board Secretary of petitioner (Exhibit P-1, Exhibit A). In that certification, Mr. Rohrman states that in

April 1995, petitioner and the Borough of Wildwood Crest (Borough) entered into an agreement whereby petitioner agreed to transfer to the Borough unneeded land in return for a parcel of land owned by the Borough. The agreement was entered into so that the petitioner and the Borough might cooperate jointly in constructing a recreational facility upon the land which petitioner received from the Borough. In order to provide "convenience of access" to that recreational facility, petitioner committed to construct a sidewalk within the Borough right of way, along a portion of Newark Avenue and an unimproved path located behind the Borough's Public Works facility and which runs from Newark Avenue to Jefferson Avenue.

Petitioner subsequently discovered that the site of the proposed recreational facility contained contaminated soil which required removal. Therefore, on May 15, 1995, petitioner and the Borough entered into an addendum to their agreement whereby the Borough agreed to contract for the removal of the contaminated soil, petitioner committed to advance to the Borough the entire cost of the soil removal in an amount not to exceed $15,200, and the Borough agreed to reimburse petitioner for one-half of the actual cost of soil removal.

Petitioner then paid over to the Borough $13,440 as the actual cost of soil removal. However, the Borough did not have sufficient funds available to reimburse the petitioner for its share of that cost and as a result, it was agreed that the Borough would provide the labor necessary to construct the sidewalk in lieu of its payment of $6,720 and petitioner agreed to purchase the materials necessary for such construction.

Mr. Rohrman indicates that all actions taken by petitioner with regard to the exchange of land, soil remediation, construction of recreational facility and construction of the sidewalk were previously authorized by formal action or subsequently ratified by resolution of petitioner on September 16, 1997.

In August 1997, respondent conducted a limited scope audit of petitioner and issued a Report of Examination (J-1) which concluded that petitioner's expenditure of $4,166 for payment of the sidewalk construction materials and the waiver of the Borough's obligation to pay petitioner $6,720 as the Borough's share of soil removal costs, in return for the Borough's supply

of sidewalk construction labor, were, in each instance, not authorized by *N.J.S.A.* 18A:20-4.2. Respondent recommended that petitioner seek reimbursement from the Borough for these costs.

The certification of Rick Anzelone (Exhibit P-1, Exhibit B) indicates that he is President of the Board of Education and has been a member of the Board for the past five years. He indicates that his home is located across the street from the premises on which improvements were made. He also identified an aerial photograph (Exhibit P-2) which accurately shows the current condition of the premises. The photograph has been marked numerically to identify the following features:

1. Residence of Rick Anzelone
2. Borough Public Works facility
3. Recreational Complex including soccer fields, tennis courts, and playground
4. Crest Memorial School which includes an additional athletic field contiguous to the school
5. Bayview Drive
6. Newark Avenue
7. New Jersey Avenue
8. Jefferson Avenue
9. Unimproved path
10. New sidewalk construction along Newark Avenue
11. New sidewalk construction along unimproved path
12. Entrance to soccer field from Newark Avenue

In his certification, Mr. Anzelone described the pattern of both vehicular and pedestrian traffic and indicated that New Jersey Avenue is a major north-south artery which provides access through the Borough northward toward the City of Wildwood and southward toward the bridge to Lower Township, the mainland and the Garden State Parkway. Bayview Drive runs north-south for several blocks, westward of and parallel to New Jersey Avenue and the improved portion thereof stops at its intersection with Newark Avenue. Many motorists travel south on Bayview Drive, turning left onto Newark Avenue and then right onto New Jersey Avenue in order to travel to the southern part of the Borough, to Lower Township and to the mainland. At

various times, traffic is heavy on Newark Avenue adjacent to the premises, particularly during the summer season, and vehicles are commonly parked on both sides of Newark Avenue.

Mr. Anzelone indicated in his certification that prior to the construction of the recreational complex and adjacent sidewalks, children would commonly walk south on Bayview Drive to Newark Avenue and then travel east to the school, its athletic field or other local destinations. These children would often walk on the sidewalk on the north side of Newark Avenue and then cross at mid-block to the south side where the sidewalk then began or, alternatively, they would cross at the intersection onto the south side of Newark Avenue, walking west within the street between parked cars until they reached the point where the sidewalk began. He asserts that either path for pedestrian traffic was unsafe, placing these children in conflict both with traffic as well as with vehicles accessing the Public Works facility.

Mr. Anzelone further indicated that neighborhood children have also commonly made use of the unimproved path to travel north from its intersection with Jefferson Avenue in order to reach Newark Avenue.

Mr. Anzelone indicated that petitioner determined that it should provide safe and convenient access to children using these routes by extending the existing sidewalk on the south side of Newark Avenue westward for about one-third of the block to the intersection with the terminus of the improved portion of Bayview Drive to the north and the unimproved path to the south and, from there, to continue the sidewalk southward along the unimproved path so as to provide safe and convenient access to children traveling to and from the soccer field along that route.

Mr. Anzelone indicated that petitioner's decision to extend the sidewalk was made for the safety and convenience of both petitioner's students and staff and the general public which would be attracted to the new recreational complex. Petitioner was intent upon providing a recreational complex for school children and the community and, in doing so, it chose to undertake a joint project with the Borough and to commit its resources for sidewalk construction to the extent that Borough resources were unavailable for that improvement. He asserts that having made the

decision to provide a recreational complex, it was incumbent upon petitioner to provide "convenience of access" to it.

It is undisputed that by a Report of Examination forwarded to petitioner on August 28, 1997 (Exhibit J-1), the New Jersey Department of Education, Office of Compliance made the following findings:

> 1. The Wildwood Crest Board of Education expended $4,166 to construct a sidewalk on property owned by the Borough of Wildwood Crest. This action is not authorized by the provisions of *N.J.S.A.* 18A:20-4.2.
>
> 2. The cooperative construction project of the sidewalk undertaken by the Board of Education and the Borough was not specified in writing, not disclosed in the board minutes, and not authorized by the Board of Education.
>
> 3. The Board of Education did not comply with the provisions of *N.J.S.A.* 18A:19-1 through -4, by paying $13,440 to the Borough for soil removal before the work was performed.

Petitioner appealed the recommendations of the special examination report and by letter dated April 3, 1998 (Exhibit J-2), Thomas J. King, Director, Office of Compliance provided a "Notice of Determination" of this appeal upholding two of the findings and recommendations and amending one of the findings and recommendations of the special examination report. In essence, Mr. King upheld recommendation number one concluding that the Board was unable to prove that construction of a sidewalk surrounding a municipal garage, and other non-school property not related to educational or recreational facilities, was necessary for the Board of Education to comply with the provisions of *N.J.S.A.* 18A:33-1. Furthermore, Mr. King concluded that the Board failed to demonstrate that the sidewalk construction was related to "joint acquisition, improving, equipping. . . playgrounds, play fields, etc." with the municipality as referenced in *N.J.S.A.* 18A:20-2. It was indicated that a review of the site plan of the area in question showed that the sidewalk did not provide "convenient access to the site" and that sidewalks previously constructed on the Board-owned recreational site already provided the required access". Mr. King concluded that the responsibility of providing this sidewalk was the municipality's and upheld recommendation number one.

Mr. King also upheld recommendation number two requiring the Board of Education to obtain a refund from the Borough in the amount of $6,720 for the Borough's share of soil removal. He concluded that the Board failed to demonstrate how the amount of $6,720 owed by the Borough to the Board was satisfied by the labor valued at $4,166 associated with a municipal sidewalk, as this should have been paid for solely by the municipality at the outset. The cost of the sidewalk was the sole responsibility of the Borough, and the special examination report finding in recommendation number two was upheld.

With respect to recommendation number three, because the Board represented to the Department that the payment at issue was made pursuant to a contract and that the provisions of *N.J.S.A.* 18A:19-1 through -4, were not violated, it was not necessary for the Board to act on recommendation number three.

LEGAL DISCUSSION AND ANALYSIS

This case may be distilled into two separate issues as follows:

1. Whether the Department of Education, Office of Compliance, has the legal authority to conduct the limited scope special examination that is the subject of this petition?

2. Whether a board of education may expend public funds to construct a sidewalk improvement on property which is not owned by the board but is municipally-owned in connection with a joint effort with the municipality in which the district is located to develop and construct a recreation field?

I will first consider whether the Office of Compliance has the authority to conduct the limited scope special examination audit. The position of petitioner is that in the absence of rulemaking by the State Board of Education, the Commissioner may not lawfully conduct the audit which resulted in the issuance of the recommendations in dispute in this matter. Petitioner relies on *N.J.S.A.* 18A:4-24 which provides that the Commissioner shall, pursuant to rules and

regulations of the State Board, inquire into and ascertain the thoroughness and efficiency of operations of any of the schools of the public school system of the State. Petitioner also relies on *N.J.S.A.* 18A:7A-10 which provides that the Commissioner, with the approval of the State Board, shall develop and administer a uniform, statewide system for evaluating the performance of each school. Petitioner also relies on *N.J.S.A.* 18A:4-32, -34D and -35B wherein the Commissioner is authorized to assign duties to assistant commissioners which include the supervision of business and financial matters and the inspection of accounts.

Petitioner relies on regulations adopted by the State Board under *N.J.S.A.* 18A:7A-10 as establishing the authority for the Commissioner to become involved with supervision of the operations of a school district. In effect, petitioner argues that nowhere in the State Board regulations is there any authority for the Commissioner to conduct the audit undertaken by respondent herein, petitioner being currently certified and therefore not subject to monitoring. The petitioner argues that in the absence of an administrative rule, the Commissioner has no general statutory authority to supervise local districts and does not have the discretionary power to do so in the absence of delegated authority under the State Board rules.

Petitioner further argues that even if the Commissioner has been granted the authority to conduct the audit in this matter he has not lawfully delegated that authority to respondent. Petitioner relies on *N.J.A.C.* 6:8-5A-5(b) in support of its contention that since the State Board has specified the duties of the Office of Compliance, the Commissioner cannot assign additional duties without State Board authorization or it would amount to *de facto* rulemaking in violation of the Administrative Procedure Act.

Respondent relies on the decision in *Bd. of Educ. of the Township of Middle, Cape May County v. New Jersey State Dept. of Educ., Office of Compliance*, OAL Dkt. No. EDU 10755-96. In that matter, the administrative law judge relied on *N.J.S.A.* 18A:4-35 and concluded that the Commissioner's authority to conduct an inspection audit of the Board's business and financial accounts is sufficiently provided for under the present statutory scheme. Respondent also relies on *Pinelands Learning Center, Inc. v. State Board of Educ. of New Jersey*, App. Div. Dkt. No. A-003555-94T1 (June 14, 1996). In that case, it was emphasized that the Department of Education is responsible for assuring the fiscal and operational integrity of private schools

supported in whole or in part by public monies. Thus, respondent indicates that it is the responsibility of the Commissioner to assure the proper use of public funds.

N.J.S.A. 18A:4-35 provides as follows:

> The commissioner may assign an assistant commissioner or, subject to approval of the state board, may appoint and fix the compensation of directors, inspectors and assistants to act as secretary of the state board of examiners and to act in connection with the issuance of qualifying academic certificates and, so far as they relate to the public school system of the state, to perform one or more of the following services:
>
> a. Inspection of buildings;
> b. Inspection of accounts;
> c. Research;
> d. Supervision of health education;
> e. Supervision of adult education;
> f. Supervision of special classes for subnormal, blind, deaf, and physically handicapped children; and
> g. Such other special services as the state board may deem necessary.

The foregoing language of the statute clearly authorizes the Commissioner to delegate and assign the responsibility for the inspection of the accounts of a public school system of the state to an assistant commissioner or to the directors, inspectors and assistants of the Department of Education, which would include the Office of Compliance. As indicated in the *Middle Township* case, in the performance of its duties, the Office of Compliance relied, in part, upon the Board fulfilling its statutory obligations under *N.J.S.A.* 18A:6-4, which requires the Board to file with the Commissioner a report of its expenses and/or finances on or before August 1 of each year. Therefore, this provision grants to the Commissioner the authority to appoint and delegate to the Office of Compliance the ability to inspect the Board's fiscal accounts, and this authorization is sufficiently clear based on *N.J.S.A.* 18A:4-35 so as to preclude the necessity for rulemaking.

I next turn to the question whether the Board of Education may expend public funds to construct a sidewalk improvement on property not owned by the School District, but which is

municipally owned, in connection with a joint effort with the municipality to develop and construct a recreation field?

With respect to this issue, petitioner acknowledges that the sidewalk improvement is not located on land owned by the School District but is within the Borough right of way. Petitioner relies on *N.J.S.A.* 18A:33-1 which requires each school district to provide suitable educational facilities for all children who reside in the district including proper school buildings and furniture and equipment and convenience of access thereto. Petitioner argues that the recreational complex developed jointly by petitioner and the Borough constitutes an "education facility," that Board construction of playgrounds and recreation places is authorized by *N.J.S.A.* 18A:20-17, and that the courts of this state have recognized that educational and recreational purposes and functions are interrelated and mutually contributory. *Township of Winslow v. Board of Ed. of Camden,* 108 *N.J. Super.* 215, 219 (App. Div. 1970).

Petitioner argues that the phrase "convenience of access thereto" should be given its ordinary meaning, citing *Matter of Schedule of Rates for Barnett Memorial Hosp.*, 92 *N.J.* 31 (1983). Petitioner asserts that this necessarily encompasses Board arrangements for such access beyond the geographic confines of the educational facility. It asserts that the term "convenience of access thereto" would be superfluous unless the Legislature intended to extend the authority of the Board for improvements for "convenience of access" beyond the geographic limits of the educational facility. Petitioner also argues that if the respondent's interpretation of *N.J.S.A.* 18A:33-1 were upheld, a board which constructs a new school on its land surrounded by a municipal right of way would be prevented from using board funds to construct a sidewalk along that right of way. In such a case, the board would be dependent upon the use of municipal funds for sidewalk construction or the board would be left to construct a sidewalk on its own land. It argues that a far preferable alternative would be the allowance of the board's construction of the sidewalk along the public right of way such as authorized by the Municipal Land Use Act, *N.J.S.A.* 40:55D-42.

Petitioner acknowledges that there are limits to the authority of the Board, that these limits have been recognized, and that in cases where school children reside within walking distance of schools, administrative decisions have denied relief for free transportation and have

uniformly held that boards are not restricted to improved routes in the calculation of the two-mile distance. Petitioner refers to a series of cases which indicate that a board does not have authority to construct sidewalks, but argues that those decisions confronted radically different legal and factual settings than the present matter. Petitioner argues that there is a distinction between "authority" and an "obligation" to exercise that authority, and petitioner argues that it has the authority to expend the funds to construct the sidewalk along the Borough right of way for "convenience of access" to the new recreational complex even though it may not have an obligation to do so.

Petitioner also relies on *N.J.S.A.* 18A:20-22 which broadly provides the statutory authorization permitting boards and municipalities to join together for the purpose of "acquiring, improving, operating and maintaining playgrounds, playfields,..." and similar recreational facilities.

The position of respondent is that there is no statutory authority that would permit the Board to make this sidewalk improvement at its expense. It points out that a school board is a creation of the State and is capable of exercising only those powers of government granted to it by the Legislature, citing *Bd. of Educ. of Town of Belvidere v. Bosco*, 138 *N.J. Super.* 368 (Law Div. 1975). It asserts that the legislative scheme permits a board of education to improve its own property but not that of the municipality.

Respondent argues that *N.J.S.A.* 18A:20-22 permits school districts to join municipalities in equipping, maintaining and operating recreational facilities as well as acquiring such facilities. However, the statute is concerned only with recreational sites.

Respondent also argues that *N.J.S.A.* 18A:33-1 is directed solely to education matters and that the requirement of "convenience of access" was held to require that school districts transport children who live remote from the school district, citing *Bd. of Ed. of the Tp. of West Amwell v. State Board of Education*, 5 *N.J. Misc.* 152 (Sup. Ct. 1927); accord, *West Morris Regional Bd. of Ed. v. Sills*, 58 *N.J.* 464 (1971); *Bd. of Ed. of Borough of Woodbury Heights v. Gateway Regional High School*, 104 *N.J. Super.* 76 (Law Div. 1968). Respondent argues that the term

"convenience of access" does not authorize creating a sidewalk on municipal property next to a recreational facility.

Finally, respondent argues that *N.J.S.A.* 18A:20-22 and *N.J.S.A.* 18A:33-1 should not be read *in para materia* because they do not pertain to the same subject matter, citing *Williams v. Bd. of Ed. of Deptford Tp., Gloucester County,* 192 *N.J. Super.* 31 (App. Div. 1983).

It has been clearly established that a school district is not the governmental entity upon which the obligation falls to provide safe travel for school children. *Nichols v. Wayne Bd. of Educ.,* 95 *N.J.A.R.*2d (EDU) 1957, aff'd, App. Div. Dkt. No. A-3525-93T5 (March 3, 1995). In the *Nichols* case, the court held that it is not suggested that a local school district has any obligation whatsoever to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel for school children. Its obligation is limited to providing transportation to school children who live remote from the school district in order to comply with the requirement of "convenience of access" to "suitable educational facilities including proper school buildings" as specified by *N.J.S.A.* 18A:33-1. *Bd. of Ed. of the Tp. of West Amwell v. State Board of Education*, 5 *N.J. Misc.* 152 (Sup. Ct. 1927); accord, *West Morris Regional Bd. of Ed. v. Sills*, 58 *N.J.* 464 (1971); *Bd. of Ed. of Borough of Woodbury Heights v. Gateway Regional High School*, 104 *N.J. Super.* 76 (Law Div. 1968).

If there is no obligation or responsibility on the part of a school district to make these expenditures to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses or the like, there clearly is also no authority to do so. In this regard, I agree with the position of respondent that the school district only has limited powers. A school district is a creation of the State and is capable of exercising only those powers of government granted to it by the Legislature. *Bd. of Educ. of Town of Belvidere v. Bosco*, 138 *N.J. Super.* 368 (Law Div. 1975).

I disagree with the petitioner's reliance on *N.J.S.A.* 18A:20-22 and *N.J.S.A.* 18A:33-1 as the authority for the construction of the sidewalk in question. *N.J.S.A.* 18A:20-22 permits school districts to join municipalities in equipping, maintaining and operating recreational facilities as

well as acquiring such facilities. A close reading of *N.J.S.A.* 18A:20-22 makes it clear that it merely authorizes a board of education and the governing body of any municipality in which the district is located to join together in acquiring and developing recreational facilities. However, this provision is concerned only with recreational facilities and has no applicability to educational facilities. There is nothing in the language of *N.J.S.A.* 18A:20-22 which has the effect of causing such a recreational facility to become an educational facility within the meaning of *N.J.S.A.* 18A:33-1 so as to require a school district to provide for convenience of access thereto.

N.J.S.A. 18A:20-22 and *N.J.S.A.* 18A:33-1 should not be read *in para materia* because they do not pertain to the same subject matter. *Williams v. Bd. of Ed. of Deptford Tp., Gloucester County,* 192 *N.J. Super.* 31 (App. Div. 1983). *N.J.S.A.* 18A:33-1 deals solely with educational facilities including school buildings, and the requirement for "convenience of access" does not authorize the construction of a sidewalk on municipal property to provide convenience of access to a recreational facility, even if it is under the partial ownership of the school district.

Finally, I agree with respondent that an unauthorized act is not entitled to deference because only legitimate board actions are so entitled to such deference.

Based on the foregoing, I **FIND** that the legislative scheme permits a school district to improve its own property but not that of the municipality. Therefore, I **FIND** that a school district board of education may not expend public funds to construct a sidewalk improvement on property which is not owned by the board but is municipally-owned in connection with a joint effort with the municipality in which the district is located to develop and construct a recreation field. Therefore, I **CONCLUDE** that there is no statutory authority that would permit the School District of the Borough of Wildwood Crest, Cape May County, to make the sidewalk improvement in question at its expense.

After reaching the foregoing conclusions with respect to the motion in this matter, I reviewed the pleadings in order to determine if there are any other outstanding issues which are required to be addressed by way of hearing or further motion. In the petition of appeal, petitioner asserts that respondent's actions, as contained within its Notice of Determination, are in error

because: a) respondent lacks the legal authority to conduct the limited scope special examination which resulted in its Notice of Determination; b) respondent was incorrect in its interpretation of New Jersey school law relevant to the circumstances which were the subject of its Notice of Determination; c) respondent incorrectly applied New Jersey School Law to the circumstances which were the subject of its Notice of Determination; d) respondent abused its discretion in not considering the factual basis for petitioner's decision to construct the sidewalk in order to fulfill its obligation to provide "convenience of access" to petitioner's recreational complex; and e) respondent's decision is not supported by substantial evidence and constitutes an abuse of agency discretion since respondent has chosen to substitute its judgment for the judgment of petitioner. Accordingly, petitioner sought a judgment determining that the orders of respondent as contained within its Notice of Determination are invalid under New Jersey School Law and are not enforceable by respondent against petitioner.

By reaching the conclusions and determinations which I have made herein, I have concluded that there is no merit to petitioner's contention relative to the foregoing. Accordingly, I **FIND** that by this decision, all matters in dispute between the parties have been adjudicated and determined. and here are no further matters in controversy between the parties. Accordingly, I **CONCLUDE** that this determination shall be issued as an Initial Decision recommending that the Commissioner of the Department of Education issue a final administrative determination with respect to petitioner's petition of appeal.

DECISION AND ORDER

Based on the foregoing it is hereby **ORDERED** that respondent's determination made in a Notice of Determination dated April 3, 1998, to the effect that petitioner exceeded its authority in a sidewalk on property not owned by the school district and in waiving the Borough's obligation to pay contaminated soil removal costs in return for labor which was supplied for such sidewalk construction, is hereby **AFFIRMED** and petitioner's appeal is hereby **DISMISSED**.

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

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

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

January 12, 2000
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

1/14/00
DATE

DNA Dottie Antanaitis/br
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

None

LIST OF EXHIBITS

Joint Exhibits:

J-1 Special Examination Report of New Jersey Department of Education, Office of Compliance, dated August 19, 1997, with cover letter, dated August 28, 1997

J-2 Notice of Determination of Appeal, dated April 3, 1998

For Petitioner:

P-1 Brief in support of petitioner's motion for summary decision with attachments:;

Exhibit A Certification of Gregory S. Rohrman, dated December 18, 1998

Exhibit B Certification of Rick Anzelone, dated December 18, 1998

P-2 Aerial photograph of recreational facility and surrounding area

P-3 Petitioner's reply letter brief, dated January 12, 1999

For Respondent:

R-1 Brief of respondent, dated December 21, 1998, in support of cross-motion for summary decision

R-2 Respondent's letter reply brief, dated January 12, 1999

OAL DKT. NO. EDU 6662-98
AGENCY DKT NO. 223-7/98

BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Both petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering his decision herein.

Petitioner's exceptions express concurrence with the factual findings of the Administrative Law Judge (ALJ), but disagree with his conclusions of law, arguing that the ALJ erred in his interpretation that *N.J.S.A.* 18A:20-22 and *N.J.S.A.* 18A:33-1 are distinct statutes with separate objects, rather than interpreting the two statutes *in pari materia.* (Petitioner's Exceptions at 3)

Petitioner proposes that consideration of *N.J.S.A.* 18A:20-22 and *N.J.S.A.* 18A:33-1 *in para materia* would effect a different conclusion of law as follows:

> 1. *N.J.S.A.* 18A:20-22 authorizes a board of education to join with the governing body of municipality in which the school district is located for the purpose of acquiring land and developing recreational facilities.
> 2. Facilities so developed may constitute recreational facilities or they may constitute educational facilities and school facilities within the meaning of *N.J.S.A.* 18A:33-1, depending on the

> purpose of the construction and the use to which the facilities are put.
> 3. *N.J.S.A.* 18A:20-22 and 18A:33-1 may be read *in para materia.*
> 4. The field in question here, developed jointly with the Borough of Wildwood Crest pursuant to *N.J.S.A.* 18A:20-22, is an educational facility.
> 5. The sidewalk in question here was constructed to provide "convenience of access" to that educational facility within the meaning of *N.J.S.A.* 18A:33-1.
> 6. Petitioner was, therefore, authorized to spend money on the joint development of the sidewalk with the Borough of Wildwood Crest. (Petitioner's Exceptions at 4)

Petitioner further argues that the ALJ's interpretation of *N.J.S.A.* 18A:20-22 is a "narrowly restrictive interpretation" in that it permits the joint development of recreational facilities, but does not take into consideration the involvement of a board of education as developer in determining that facilities jointly developed under *N.J.S.A.* 18A:20-22 are not also educational facilities. Petitioner maintains that *Winslow Twp. v. Camden Board of Ed.,* 108 *N.J. Super.* 215, 219 (App. Div. 1970) mandates that *N.J.S.A.* 18A:20-22 be interpreted liberally, so that the nature of the developed property is determined by the purpose of development of the property and its use. (*Id.* at 5, 6) Because Wildwood Crest students make use of the jointly developed facility both for recreational purposes and for physical education classes[1], petitioner contends, *N.J.S.A.*18A:33-1 obligates the school district to provide "convenience of access" to the facility in question, and therefore grants it the authority to financially contribute to sidewalk construction in this instance. (*Id.* at 7)

Additionally, petitioner argues that under the ALJ's assessment, if the jointly developed facility is solely recreational, then the land exchange entered into by petitioner and the Borough of Wildwood Crest would be invalid under *N.J.S.A.* 18A:20-8, which permits boards of education to exchange lands for school purposes. (Petitioner's Exceptions at 8)

[1] Although petitioner's exceptions reference the school district's use of the jointly developed recreational facility for physical education classes, the record below contains no such reference.

Finally, petitioner reiterates its argument that respondent did not have the authority, absent rulemaking by the State Board, to conduct the limited scope special examination at issue herein. (*Id.* at 10)

In its reply, respondent counters that there is nothing in the record below to indicate that petitioner holds physical education classes at the jointly developed site as petitioner now contends in its exceptions, and that petitioner should therefore be precluded from relying on facts that are not part of the record. Respondent further avers that "[t]he site was developed jointly by the Board and the municipality pursuant to *N.J.S.A.* 18A:20-22, which governs purchase and development of recreational sites only." (Respondent's Reply Exceptions at 2)

Respondent argues that petitioner's reliance on *Winslow, supra,* is misplaced and that petitioner's "[f]inancial contribution to the acquisition does not transform a municipal property into an educational facility." In regard to the exchange of land pursuant to *N.J.S.A.* 18A:20-8, respondent contends that petitioner's receipt of the land at issue did not convert the land acquired into an educational facility, but rather, petitioner donated the property it had received in the exchange to the joint acquisition. (*Id.* at 3)

Petitioner's argument with respect to its obligation to provide "convenience of access" is flawed, respondent reasons, because "access" has clearly been held to refer to remoteness of property within the district for purposes of pupil transportation, not ease of entry as petitioner claims. *Board of Education of the Township of West Amwell v. State Board of Education, S.N.J. Misc.* 152 (Sup Ct. 1927) (*Ibid.*) "[I]t is also settled law that a school district has no obligation regarding the safety of the route on which children travel to school. *Nichols v. Wayne Board of Education,* App. Div. Docket No. A-3525-93T5 (March 3, 1995), 95 *N.J.A.R.* 2d (EDU) 157. Moreover, the new recreation facility was already accessible by sidewalk at the time the Board elected to construct the new sidewalk at issue." (Respondent's Reply Exceptions at 3-4)

Finally, respondent concurs with the ALJ's finding that respondent had the authority to conduct the limited scope special audit.

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner determines to affirm the Initial Decision.

Initially, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:4-35 and *N.J.S.A.* 18A:6-4 grant the Commissioner both the responsibility and the authority to assure the fiscal integrity of school districts and the proper use of public funds, including the authority to delegate inspection of the fiscal accounts of boards of education to the Office of Compliance. (Initial Decision at 9)

Additionally, the Commissioner agrees with the ALJ for the reasons expressed in the Initial Decision that the joint facility at issue is a recreational facility. The Commissioner disagrees with petitioner's argument that the school district's involvement in joint ownership of a recreational facility, in itself, renders that facility an educational facility. Although petitioner asserts that *Winslow Twp., supra,* mandates that *N.J.S.A.* 18A:20-22 be interpreted liberally, so that the nature of the developed property is determined by the purpose of the development and the property's use (Petitioner's Exceptions at 5- 6), petitioner acknowledges in its Petition of Appeal that the purpose of its joint project with the municipality was to construct and maintain a recreational facility.

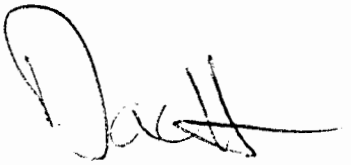
> [i]n the exercise of its powers, including those found in *N.J.S.A.* 18A:20-22 and 18A:33-1, in 1995, Petitioner acquired certain land within the Borough of Wildwood Crest (the "Borough"), known as Blocks 184 and 185 on the Borough Tax Map, and Petitioner then joined with the Borough in developing certain plans to improve that land *for the purpose of constructing and maintaining thereon a recreational complex* (the "Recreational Complex"). (emphasis added) (Petition of Appeal at 2)

Like the ALJ, the Commissioner finds no merit to petitioner's argument that *N.J.S.A.* 18A:20-22 and 18A:33-1 may be read *in pari materia.* The statutes do not pertain to the same subject matter. The Commissioner also agrees that the requirement of "convenience of access" in

N.J.S.A. 18A:33-1 is not applicable in this instance. There is no statutory authority which would enable a school district to expend school funds to make sidewalk improvements, as in this case to municipal property surrounding a municipal garage and other nonschool property, so as to provide convenient access to a recreational facility, notwithstanding that the property is partially owned by the district.

The Commissioner therefore adopts the decision of the ALJ finding that petitioner exceeded its authority in constructing a sidewalk on property owned by the municipality and in waiving the municipality's responsibility to pay contaminated soil removal costs in return for labor provided by the municipality. In so doing, the Commissioner directs the Department's Division of Finance to recover from petitioner all State aid received on the amounts inappropriately disbursed.[2]

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: FEB 28 2000

Date of Mailing: FEB 29 2000

[2] While the Commissioner does not so direct, nothing herein precludes petitioner from seeking reimbursement of the disallowed expenditures from the Borough of Wildwood Crest.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

74-00

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board, a constituent member of a limited purpose (9-12) regional school district, requested that the Commissioner construe the provisions of *N.J.S.A.* 18A:39-1 and determine that no school district which is a constituent of a regional school district shall be required to provide transportation or pay the costs of transporting nonpublic school students where the only transportation presently provided by said constituent district is for pupils transported pursuant to Chapter 46 of Title 18A of the New Jersey Statutes or to a vocational, technical or other public school offering a specialized program.

Having reviewed the applicable statutory provision, interpretive case law and the parties' arguments, the Commissioner found that, on its face, the statute places an obligation on regional school districts to transport *all* students living within the bounds of the regional district to remote nonpublic schools, if *any* student within the regional district is so transported, with the cost of transporting pupils below the grade level for which the regional district is organized to be borne by the constituent members of the regional district on a prorated per pupil basis. Even though the petitioning constituent district does not transport its own K-8 students, nor do any of its resident students require remote transportation to the regional high school, in the context of the present inquiry, "the practices or circumstances of the constituent district are superseded by those of a larger geographical entity – the regional organization." (*Northern Valley Regional* citing *Woodbury Heights*) Commissioner concluded that, pursuant to *N.J.S.A.* 18A:39-1, petitioner is obligated to pay Rancocas Valley Regional High School District its pro rata share of costs incurred for transportation services to eligible nonpublic school students below grade 9 who reside in petitioner's school district.

March 1, 2000

AGENCY DKT. NO. 72-4/99

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Frank P. Cavallo, Jr., Esq. (Parker, McCay & Criscuolo)

For Respondent, Arlene Goldfus Lutz, DAG

This matter comes before the Commissioner of Education by way of a Petition of Appeal for Declaratory Ruling, pursuant to *N.J.A.C.* 6:24-2.1, filed by petitioner, Board of Education of the Township of Mount Holly, on April 13, 1999. Petitioner requests that the Commissioner construe the provisions of *N.J.S.A.* 18A:39-1 and determine that no school district which is a constituent of a regional school district shall be required to provide transportation or pay for the costs of transporting nonpublic school students where the only transportation presently provided by said constituent district is for school children transported pursuant to Chapter 46 of Title 18A of the New Jersey Statutes or to a vocational, technical or other public school offering a specialized program.

Respondent, New Jersey State Department of Education, filed its Answer on May 13, 1999. On May 14, 1999, the parties were notified that the Commissioner had

determined to entertain petitioner's Declaratory Ruling request. Petitioner was directed to submit a memorandum of law in support of its position, and respondent was accorded an opportunity to submit a reply to petitioner's filing.

BACKGROUND

Petitioner's submission reports that it operates a K-8 public school district, and it avers that all of the students attending these schools walk to their respective school buildings from home. Prior to 1995, courtesy busing was provided to nonpublic school students who were residents of Mount Holly, but this service was eliminated in late 1995. Petitioner further reports that it sends its pupils in grades 9-12 to Rancocas Valley Regional High School, which also educates pupils from Eastampton, Westampton, Hainesport and Lumberton. All of petitioner's pupils at Rancocas Valley Regional walk to school, and no busing is provided for any Mount Holly student to attend this school. It advises that the Rancocas Valley Regional High School District does, however, provide transportation, as required by *N.J.S.A.* 18A:39-1 *et seq.*, to public and nonpublic school students from the other constituent districts who reside remote from their schools of attendance. (Petition for Declaratory Judgment at pp. 1-2)

POSITIONS OF THE PARTIES

Petitioner advances that this matter was precipitated by a letter received from Dr. John Sherry, Assistant Commissioner, Division of Field Services, on December 11, 1998, dealing with transportation for nonpublic school students, wherein he stated:

> Based upon ***[*N.J.S.A.* 18A:39-1] when any eligible nonpublic school student, who lives within a school district that is a constituent of a regional school district, receives transportation services from the regional district, all eligible nonpublic students living within any of the regional's constituent districts must receive those same services. (Petitioner's Memorandum of Law at p. 1)

Petitioner argues that this interpretation of *N.J.S.A.* 18A:39-1 is incorrect in that it specifically ignores the express terms of this statute. Petitioner advances that *N.J.S.A.* 18A:39-1 in pertinent part provides as follows:

> Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation for all such pupils and the costs of such transportation for pupils below the grade level for which the regional district was organized shall be prorated by the regional district among the constituent districts on a per pupil basis, after approval of such costs by the county superintendent. *This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of title 18A of the New Jersey Statutes or to a vocational, technical or other public school offering a specialized program* (*Emphasis added*). (Petitioner's Memorandum of Law at p. 3)

In interpreting this statute, petitioner advances, prescribed rules of statutory construction must be followed. Petitioner cites New Jersey Supreme Court cases for the propositions that "[a] statute should be read as a whole and not in separate sections"; "every requirement of the act must have the full effect the language imports unless such interpretation of the words will lead to great inconvenience or subversion of some important object of the act or would lead to an absurdity"; and "there is a presumption that the word 'shall' ***is used in an imperative and not directory sense***." (Petitioner's Memorandum of Law at p. 4) (citations omitted) When considering these precepts and the fact that the statute is clear on its face, petitioner contends, only one interpretation can reasonably be made, that is, "a constituent school district of a regional school district not providing any transportation cannot be compelled to provide transportation to non-public pupils merely because the regional district transports pupils from another constituent school district." (*Id.* at p. 5) Petitioner states that the contrary interpretation espoused by

Assistant Commissioner Sherry is "in derogation of the clear statements of the Legislature," and would require a legislative modification of the statute. (*Id.*) Petitioner contends that, since its original adoption in 1967, the Legislature has made a number of amendments to this provision, but the above-referenced highlighted language has remained unaltered. Additionally, it posits, although there is case law interpreting the "validity" of *N.J.S.A.* 18A:39-1, *Board of Education of Woodbury Heights v. Gateway Regional H.S.*, 104 *N.J. Super.* 76 (Law Div. 1968) and *Board of Education of Northern Valley Regional High School District v. Boards of Education of Old Tappan and Northvale*, 1971 *S.L.D.* 6, neither of these cases ever "specifically addressed the interplay between the portion of the statute requiring the regional district to provide the transportation and the highlighted portion of the statute which state[s] that no school district will be compelled to provide transportation to non-public school pupils," and, therefore, this "significant issue" and the resultant effect for petitioner and similarly situated districts must be resolved. (*Id.* at pp. 3-4)

In reply, respondent argues that the law is settled "that *N.J.S.A.* 18A:39-1 requires all constituent members of a regional school district to provide transportation to nonpublic schools if the regional school provides such transportation, notwithstanding that the board of education may not provide transportation to its own residents." (Respondent's Reply Memorandum of Law at p. 1) It observes that the court in *Woodbury Heights, supra*, dealing with a district with "identical circumstances" as those existing in this matter, extensively reviewed and analyzed the legislation and case law construing this transportation dictate. Viewing the regional district as a single entity, it cited that portion of *N.J.S.A.* 18A:39-1 which states:

> Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to

> this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized shall be prorated by the regional district among the constituent districts on a per pupil basis, after approval of such costs by the county superintendent,

and concluded that if the regional district transported *any* students residing in the district it was required to transport *all* qualified students residing in the district. Transportation policies of the individual constituent districts were of no moment in this determination, since the court found the policy of the regional school district controlling. (Respondent's Reply Memorandum of Law at p. 3) Likewise, respondent observes, the court in *Northern Valley Regional, supra,* also noted that, pursuant to *Woodbury,* "it is apparent that a child acquires the right to transportation to a private school by virtue of residence in the total area of the regional school, if any student within the regional school is transported to private school." (*Id.*)

Respondent further avers that petitioner's reliance on that portion of the statute which specifies that school districts are not required to provide transportation for nonpublic school students if they presently provide such transportation only for special education students or vocational, technical or specialized program students, is misplaced. (*Id.* at p. 4) What petitioner fails to recognize, it advances, is that the "district" referred to in this portion of the statute, in cases such as the one existing here, does not refer to individual constituent districts comprising a regional district, but to the regional district itself. Obviously, pursuant to this provision, it posits, if Rancocas did not provide remote transportation to any public students in the district, it would have no obligation to transport nonpublic school students. (*Id.*) Since this is, admittedly, not the case in the present matter, *N.J.S.A.* 18A:39-1 mandates that Rancocas provide transportation for all nonpublic school students residing within the district and compels petitioner to pay its pro rata cost of transporting such students. (*Id.* at p. 5)

DETERMINATION

The Commissioner has reviewed the applicable statutory provision, interpretative case law, and the arguments advanced by the parties in this matter. Upon such review, the Commissioner finds and determines, notwithstanding petitioner's assertions to the contrary, that pursuant to the clear language of *N.J.S.A.* 18A:39-1, and the holdings of *Woodbury Heights, supra,* and *Northern Valley, supra*, which interpreted this statute in light of a situation analogous to that of petitioner, the law in this area is settled. On its face, the statute places an obligation on a *regional school district* to transport *all* students living within the bounds of the regional district to remote nonpublic schools, if *any* student within the regional district is so transported pursuant to law. The statute also unmistakably directs that the expense incurred by a regional district in providing for transportation of students below the grade level of the regional district is to be borne by the constituent districts comprising the regional district, prorated on a per pupil basis. Consequently, as a constituent member of a regional district which is required by law to transport nonpublic school students, petitioner is indisputably responsible for payment of that share of the regional district's transportation costs associated with those pupils attending nonpublic schools below grade 9 who reside in petitioner's local district. The question of whether petitioner's obligation is altered because petitioner *itself*, as a *local district*, does not transport remote public students, or because none of petitioner's 9-12 students require remote transportation to the regional high school, has been addressed and resolved in case law. As was clearly stated in *Northern Valley Regional, supra,* in reviewing the court's holding in *Woodbury Heights, supra:*

> [I]t is apparent that a child acquires the right to transportation to a private school pursuant to *N.J.S.A.* 18A:39-1, *supra,* by virtue of residence in the total area of the regional district, if any student within the regional district is transported to private schools. *It matters not whether a constituent district of the regional district transports students to public schools or whether it doesn't. The*

> *practices or circumstances of the constituent district are superseded by those of a larger geographical entity – the regional organization.* (emphasis added) (1971 *S.L.D.* at 9)

The responsibilities of petitioner, in its capacity as a constituent member of a regional district which provides student transportation, are explicitly established by *N.J.S.A.* 18A:39-1. The Commissioner cannot concur with petitioner's contention that one sentence in that statute, inapplicable to local constituent districts within the overall context of the law, acts to obviate or limit petitioner's clearly established obligation to the regional district.

Accordingly, the Commissioner concludes that, pursuant to *N.J.S.A.* 18A:39-1, petitioner is obligated to pay Rancocas Valley Regional High School District its pro rata share of costs incurred for providing transportation services to eligible nonpublic school students below grade 9 who reside within petitioner's school district.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 01 2000

Date of Mailing: MAR 01 2000

[1] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Winfield Board sought termination of its sending-receiving relationship with respondent Rahway Board to send its secondary students to David Brearley High School located in the Borough of Kenilworth's District.

The ALJ concluded that it was uncontested that severance would not have a substantial negative financial impact. He further found that severance would not have a negative impact on educational quality or the racial composition of the affected districts and ordered that Winfield is authorized to terminate its existing sending-receiving relationship with Rahway and to enter into a new sending-receiving relationship with Kenilworth for a minimum duration of five years.

The Commissioner affirmed the conclusion of the ALJ that termination of the sending-receiving relationship between Winfield and Rahway will not result in any substantial negative financial, educational or racial impact and, therefore, determined that severance must be granted pursuant to *N.J.S.A.* 18A:38-13. In so determining, the Commissioner concurred with the ALJ that it is uncontested in the record that severance of the sending-receiving relationship would have no substantial financial impact. Similarly, the Commissioner was persuaded, for the reasons outlined by the ALJ in his decision, that the requested severance will not have a substantial negative impact on educational quality for either Rahway or Winfield students, nor result in a negative racial impact. As such, the Commissioner granted the requested severance, subject to Winfield's entering into a new sending-receiving relationship with Kenilworth for a minimum duration of five years. Withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September 2000.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7138-98

AGENCY DKT. NO. 109-4/98

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF RAHWAY,

Respondent.

Mark A. Tabakin, Esq., for petitioner (Weiner Lesniak, attorneys)

Alan J. Schnirman, Esq., for respondent

Record Closed: December 3, 1999 Decided: January 18, 2000

BEFORE **THOMAS R. VENA,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This action was brought by petition filed on June 20, 1998, pursuant to the provisions of *N.J.S.A.* 18A:38-13, which require that any school district that lacks high school facilities and seeks a change in the high school designated pursuant to *N.J.S.A.* 18A:38-11 do so only upon application made to and approval by the Commissioner of Education. Petitioner, Board of Education of the Township of Winfield, Union County, (hereinafter "Winfield") does not have high school facilities and seeks to sever the *N.J.S.A.* 18A:38-11 relationship (commonly known as a "send-receive relationship") it has

with respondent, Board of Education of the City of Rahway, Union County, (hereinafter "Rahway") pursuant to which it has sent its high school students to Rahway High School for approximately forty years, and enter into such a relationship with the Board of Education of the Borough of Kenilworth, Union County, (hereinafter "Kenilworth") whereby it would send its high school students to David Brearley High School in Kenilworth (hereinafter "Brearley"). Rahway opposes the severance and filed its Answer on July 16, 1998. On July 27, 1998, the matter was transmitted as a contested case by the Commissioner of Education pursuant to *N.J.S.A.* 52:14F-1 to -13.

A pre-hearing conference pursuant to *N.J.A.C.* 1:1-13.1 *et seq.* was held on December 16, 1998, and a discovery schedule was established with a second pre-hearing conference scheduled for March 23, 1999. Plenary hearing dates in June 1999 were set and the issues to be resolved were described as follows:

> Whether good and sufficient reasons exist for termination of the sending-relationship between Winfield and Rahway, based upon a consideration of all the circumstances, including the educational and financial implications for the districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil populations of the districts.
>
> Whether such termination would have a substantial negative impact on the Rahway district's (a) quality of education; (b) financial condition or (c) racial composition.

The second pre-hearing conference was held on March 23, 1999, and certain discovery issues were resolved via amended pre-hearing orders dated April 15, 1999, and May 7, 1999.

The hearing was conducted on June 17 and 18, July 16 and 21, and August 19, 1999, at which time the parties presented documents and questioned witnesses. Winfield presented three witnesses: (1) Dr. Robert Savitt of Guidelines, Inc., Winfield's expert in the area of assessing the viability of severing send-receive relationships; (2) Vincent Yaniro of Guidelines, Inc., Winfield's expert in the area of public school finance; and (3) Dr. Lloyd Leschuk, superintendent of Kenilworth Public Schools. Winfield also presented the following documents that were entered into evidence in this matter:

Exhibit P-1 – Résumé of Vincent D. Yaniro;

Exhibit P-2 – A Study of the Feasibility of Withdrawing Winfield Township Pupils from Rahway High School;

Exhibit P-3 – Update: A Study of the Feasibility of Withdrawing Winfield Township Pupils From Rahway High School;

Exhibit P-4 – Financial Impact if Winfield Student Population Remains Constant;

Exhibit P-5 – Résumé of Dr. Robert F. Savitt;

Exhibit P-6 – Winfield, Kenilworth and Rahway Statistics and Test Results;

Exhibit P-7 – Rahway-Winfield Sending-Receiving Contract dated July 1, 1964;

Exhibit P-8 – Kenilworth Public Schools-Winfield Township School Sending-Receiving Agreement, dated June 15, 1999;

Exhibit P-9 – Research Related to High School Size;

Exhibit P-10 – Excerpt from New Jersey Municipal Data Book for Rahway City;

Exhibit P-11 – Rahway Annual District Report of Vandalism, Violence and Substance Abuse 1996/1997;

Exhibit P-12 – Co-curricular Participation of Winfield Students in Rahway 1998-1999;

Exhibit P-13 – David Brearley High School 1997-1998 New Jersey School Report Card;

Exhibit P-14 – Rahway High School 1997-1998 New Jersey School Report Card;

Exhibit P-15 – Résumé of Lloyd Leschuk.

Rahway offered one witness, expert Dr. Judith A. Ferguson, and offered the following documents:

Exhibit R-1 – Expert's Report;

Exhibit R-2 – Map of Union County;[1]

Exhibit R-3 – March 18, 1999, memorandum from Adam E. Drapczuk to Dr. Savitt;

[1]Marked for identification only, not offered in evidence.

Exhibit R-4 – Current Enrollment Data as of October 15, 1997;

Exhibit R-5 – Public School Enrollment by Grade, Race and Sex as of October 13, 1995;

Exhibit R-6 – Public School Enrollment by Grade, Race and Sex as of October 11, 1996;

Exhibit R-7 – Analysis of Racial Composition of Rahway;

Exhibit R-8 – Analysis of Racial Composition of Rahway;

Exhibit R-9 – Winfield's Diversity Experience at Rahway v. Kenilworth.

At the conclusion of testimony on August 19, 1999, Winfield was offered the opportunity to submit affidavits identifying or clarifying minority group membership of Winfield students attending Rahway High School as of October 15, 1998. Three parental affidavits were supplied and were not challenged by Rahway.

Upon receipt of post-hearing briefs on December 3, 1999, the record closed.

FINDINGS OF FACT

Background Characteristics of Rahway, Winfield and Kenilworth and Their Public Schools

Rahway is a city near Winfield Township in the southern part of Union County. It is a diverse community covering approximately 4.1 square miles whose population includes (according to the 1990 census) 19,092 whites (75.4%), 5,119 African-Americans (20.2%), 38 Native Americans (.15%), 606 Asians (2.4%) and 470 others (1.86%). It has four elementary schools (pre-K through grade five), one intermediate school (grades six through eight) and Rahway High School (grades nine through twelve) to serve 3,721 school-age children. The city has various businesses and industries and is home to the manufacturing operations of international pharmaceutical giant Merck. Merck has been a corporate benefactor of the school district, and Rahway's high school lists such nationally known graduates as former CEO of Merck P. Ray Vagelos, M.D., the late astronomer Carl Sagan, professional musician Warren Vache, Jr., Nobel prize

winning economist Milton Friedman and Harvard University psychologist Jerome Kagen.

Winfield Township's history dates back to August 1, 1941, when it was incorporated from land annexed from Linden, Cranford and Clark. The homes in Winfield were built pursuant to an act of Congress to provide housing for defense workers.

Until 1951, when the Winfield Mutual Housing Corporation (hereinafter "WMHC") purchased Winfield from the federal government, the residents of the approximately 700 dwellings paid rent to the federal government. Since the date of the purchase, the residents who are members of the WMHC pay a monthly fee averaging $330 to the WMHC. Taxes are paid by the WMHC, with the taxes being split evenly among each dwelling unit. The present annual tax allocation is less than $1,800 per unit.

Winfield is located on .17 square mile in Union County, just off Exit 136 of the Garden State Parkway, and has a population of 1,576. The generally uniform housing consists mainly of multi-family units, with one or two bedrooms, but there are several single-family homes as well.

Winfield residents may stay in their homes for the extent of their lives. They may transfer this right to an heir upon death. There is a waiting list for available units with priority given to the current members' relatives as follows: (1) sons and daughters; (2) parents; and (3) siblings. The allocation of housing rights has led to generation after generation of many families remaining in Winfield.

Winfield has a handful of commercial businesses, including a liquor/deli store, a beauty salon and an attorney's office.

The Winfield school system consists of a single building, constructed in 1998 after a 1995 fire destroyed the previous school building. The school had a pre-K through eighth grade enrollment of 147 in school year 1998-1999. Winfield students in grades ten through twelve have attended Rahway High School since 1958, and ninth-grade students have attended Rahway High School since 1967.

Kenilworth, a borough located in north central Union County, covers 2.0 square miles and has a population of 7,574. It is primarily a residential community of single-family homes, but also has over 200 diversified commercial and manufacturing establishments, including pharmaceutical giant Schering-Plough.

Kenilworth had been part of the Union County Regional High School District (hereinafter "UCRHSD") since its inception in the 1930s, but after the UCRHSD decided to close Brearley, Kenilworth led a successful movement to dissolve the UCRHSD. Kenilworth then opened, in one building, David Brearley Middle and David Brearley High School (grades seven through twelve) in September 1997. Kenilworth's total high school student population is approximately 280 students, of which approximately 20% are members of a minority group.

HISTORICAL OVERVIEW

History of Sending-Receiving Relationship

Winfield high school students have attended Rahway High School on a send-receive basis since at least 1958. The present sending-receiving contract between Winfield and Rahway was executed in 1964 and deals primarily with tuition costs (P-7). From the beginning of the relationship, Rahway has charged the maximum tuition permitted under the State formula and over the last several years Winfield has tried unsuccessfully to negotiate a lower rate and other changes.

In 1992 Winfield hired consultants to explore options and possible alternatives to its existing sending-receiving relationship with Rahway.

In May 1995 Winfield sought consultant services to "determine potential options in regionalization and new sending-receiving partnerships."

In December 1996, Guidelines, Inc., headed by Dr. Robert Savitt, was authorized to develop a comparative study for Winfield relating to a possible alternative receiving

relationship with Clark High School (Clark, New Jersey) and Kenilworth's high school instead of continuing the existing sending-receiving agreement with Rahway.

The following spring, Winfield residents were invited to meet with their board of education and Dr. Savitt to discuss the send-receive relationship with Rahway. At the meeting, the parents voiced their concerns about low SAT scores and the high drop-out rate at Rahway. The parents believed that Rahway focused too heavily on problem students and let the "average kids" fall through the cracks. The parents also expressed concern that there were communication problems between the school and the parents. They felt that the educational standards at Rahway were low and that the school focused on control rather than on students. Winfield parents also felt that given the relative size of the two communities (as well as other factors), other districts might offer their students an education more compatible with their needs, in a more academics-oriented environment.

The Winfield board also expressed its displeasure with the send-receive relationship. While Rahway charged the maximum tuition permitted, Winfield was given a very limited voice in the education of its children. Winfield was aware of recent trends in send-receive contracts that provided the sender with increased involvement in the educational process at the receiving district. These provisions include non-voting membership on the receiving board; involvement in budget development and setting of annual goals, orientation expectations and program articulation; and involvement in selection of key personnel, class size, pupil progress reports and special education child study team arrangements. The existing agreement between Rahway and Winfield does not address these concerns.

Winfield authorized the preparation of a report determining the feasibility of severing the district's sending-receiving relationship with Rahway and the establishment of a sending-receiving relationship with Kenilworth. In August 1997 the Guidelines Incorporated Feasibility Study was issued, which concluded that "There is justification for Winfield officials to consider withdrawing high school pupils from Rahway High School based on present and continuing concerns," and further concluded that "Kenilworth (David Brearley High School) could be a desirable receiving school." The

study further concluded that "There will be no substantial negative educational, financial or racial balance impact on Rahway High School, David Brearley High School or Winfield School if Winfield pupils are phased out of Rahway High School and assigned to David Brearley High School." P-2 at 79.

In September 1997, David Brearley High School opened and in April 1998 Winfield filed its petition to sever its sending-receiving relationship with Rahway.

Enrollment of Winfield Students at Rahway

The number of Winfield students at Rahway since the 1995-1996 school year compared to the number of Winfield elementary school graduates is as follows:

School Year	No. of Graduates	No. Enrolled at R.H.S.	Percentage
1995-1996	22	14	63.7
1996-1997	9	5	55.6
1997-1998	14	5	35.7
1998-1999	15	8	53.3
1999-2000	14	8	57.1
AVERAGE	74	40	54.1

QUALITY OF EDUCATION

School Philosophies

The premise underlying the philosophy of Rahway High School is that the school exists to serve young people of different ages, abilities, interests, races, creeds and national and socioeconomic backgrounds. The primary purpose of the school is to help each individual learn how to live in such a way that he/she makes the most of himself/herself as an individual and offers his/her finest contribution to society.

The Kenilworth School District aims to provide an education that identifies and addresses individual needs by planning and implementing a stimulating and balanced

curriculum which maximizes the utilization of all available resources to develop productive citizens who think analytically, communicate effectively and demonstrate high self-esteem, moral integrity and a commitment of continuous growth and development in preparation for meeting the demands of their future.

Both districts are dedicated to providing a meaningful education to all their students.

Average Class Size

As Brearley is newly reinstituted, there is no history of average class size for a period of more than one year. The average class size for Brearley in school year 1997-1998 was twenty-two and the state average was twenty-one. Rahway's average class size that year was seventeen, down from twenty to twenty-one during the previous two years.

Staffing

In the 1998-1999 school year, Rahway High School had a total of ninety-four staff members serving 924 students (four administrators, seventy-seven classroom teachers, six guidance counselors, one psychologist, one nurse, one librarian, one social worker and three classified as "other"). During the same period, David Brearley High School had a total of thirty-seven staff members serving 265 students (one administrator, thirty-one classroom teachers, two guidance counselors, one psychologist, one nurse and one librarian).

Curriculum Offerings

Number of courses offered at Rahway and Brearley during the 1998-1999 school year:

	Rahway		Brearley	
	Full Year	Part Year	Full Year	Part Year
English	22	0	8	2
Math	15	0	9	1
Science	11	3	8	0
Social Studies	10	2	7	4
Foreign Language	12	0	10	0
Business	6	1	1	4
Art	2	7	1	2
Music	8	2	2	2
Technical Education	10	1	Union County Vo-Tech	
Home Economics	6	2	0	3
Phys. Ed./Health	4	4	4	4
Career Education	1	0	1	0
Computer Education	2	0	0	6
Special Education	19	0	As needed	
State-Mandated Programs	2	2	As needed	

Curriculum offerings for 1998-1999 based on credit hours offered (semester courses are 2.5 credits, full year courses are 5 credits):

	Rahway	Brearley
Art Electives	20	10
Computer/Technology	62.5	15
Spanish	20	20
Italian	20	20
French	20	-
Health and Phys. Ed.	20	20
Home Economics	35	7.5
Gifted and Talented	-	5
English	20	20
English Electives	31.2	12.5
English Lab	10	2.5
Math	-	10
Algebra	15	10
Geometry	5	-
Calculus	10	10
Trigonometry	5	-
Probability/Statistics	5	-
SAT Math Preparation	1.25	-
Math Lab	10	5
Band/Instrumental	15	5
Vocal	10	10

Business Electives	30	20
Earth Science	10	5
Science Electives	7.5	-
Biology	6	6
Chemistry	7	6
Physics	6	6
World History/Cultures	5	5
US History	10	10
Social Studies Electives	15	20
ESL	10	As needed
LEP US History	5	-
LEP Pre-Algebra	5	-
Alternative Program	Yes	-
Summer Enrichment	Yes	-
Special Ed. – In Class Support	Yes	Yes
Special Ed. – Resource Center	Yes	Yes
Special Ed. – Self-Contained	Yes	Yes
College Credits Recognized	Yes	Yes
Vo-Tech Programs	Yes	Yes

Rahway's expert, Dr. Ferguson, offers the foregoing as evidence that ". . . it is apparent that Rahway High School offers more breadth and depth of curriculum." The only obvious conclusion from the evidence offered is that Rahway offers *more*. A school must, in order to effectively use limited resources to provide a meaningful education, expand and contract its curriculum offerings as its size changes.

The evidence as to optimum school size was inconclusive. However, to suggest that "bigger is better" is as erroneous as suggesting that a school cannot be too small. If a district can offer a meaningful education, size becomes relevant only as a matter of personal choice if a meaningful choice is available.

Graduation Requirements

	Total Credits	English	History	World Culture	PE	Science	Math	Arts	Career Dev.	Word Processing
Rahway	110	4 yrs	2 yrs	1 yr	4 yrs	2 yrs	3 yrs	1yr	-	-
Kenilworth	120	4 yrs	2 yrs	1 yr	4 yrs	2 yrs	3 yrs	1yr	½ yr	½ yr

These requirements, supplied by Winfield, do not identify a substantial difference between the schools. Any slight difference is not meaningful in the comparison .

Extracurricular Programs

Rahway High School offers the following extracurricular programs: Student Government, Broadcasting, Theatrical Arts, Senior Club, School Publications, Diversity 2000, Multicultural Club, Latin American Club, DECA, National Honor Society, Key Club, Blue Tri, Outdoors Club, Pep Group, Peer Connection, Wrestling Club, Thespian Society, French Club, Art Club, Practical Politics, Italian Club, Chorus, Madrigals, Marching Band, Instrumental, Piano Lab, National Art Society, French Honor Club, Intramural Athletics, Cheerleading, Environmental Club, JROTC and TR-3 Challenge. Additionally, Rahway offers the following interscholastic athletic programs: soccer, freshman, JV and varsity football, softball, basketball, swimming, cheerleading, spring track, cross country, volleyball, wrestling, bowling, winter track and spring tennis.

Extracurricular activities at David Brearley High School include: Marching Band, Mixed Concert Choir, Newspaper, Writers Club, Environmental Club, Yearbook, Renaissance Program, Peer Leadership, Peer Mediation, Interact Club, Spanish Club, Italian Club and Cheerleading. David Brearley High School also has its own interscholastic sports program for boys' soccer, baseball, football, coed golf, girls' volleyball, boys' basketball, softball, girls' basketball and coed spring track. David Brearley has a co-op sports program with Jonathan Dayton High School in Springfield in girls' soccer, girls' tennis, indoor track, swimming, bowling, cross country, wrestling, girls' gymnastics, boys' tennis and ice hockey.

Again, the size of Rahway High School allows it to provide *more* extracurricular activities than Brearley. Perhaps, however, the analysis prepared by Winfield of Winfield student participation in Rahway High School activities and the availability of those activities at Brearley is, at least, instructive.

RAHWAY ACTIVITY	WINFIELD PARTICIPANTS	AVAILABLE AT KENILWORTH
National Honor Society	4	Yes
Peer Leadership Program	1	Yes
Chorus	4	Yes
Student Government	2	Yes
ROTC	2	Yes
Instrumental Music	4	Yes
Key Club	2	Called Interact Club
Theater	3	Yes
Baseball (men)	2	Yes
Bowling (coed)	1	Yes
Soccer (men)	1	Yes
Football (men)	1	Yes
Track (women)	1	Yes
Tennis (women)	1	Yes

Special Education and Support Services

The Rahway School District meets special education needs through self-contained programs, resource centers and out-of-district programs. Kenilworth high-school-age children rely on out-of-district placement, again, primarily due to the size of Brearley. Kenilworth is committed, however, to providing in-district programs should the number of special needs students increase to the extent that such programs are justified.

Gifted and Talented

The following chart sets forth the applicable advanced placement and honors classes available at Rahway and Brearley. Unless noted otherwise, all classes are honors level.

SUBJECT	RAHWAY	BREARLEY
English I	x	x
English II	x	x
English III	x	x
English IV	x	x
Algebra	x	x

Geometry	x	x
American History I	x	x
American History II	x	-
World Culture	x	No
Chemistry	No	x
AP English	x	x
AP Calculus	x	x
AP Biology	x	x
AP History	x	x
World History	No	x
AP Spanish	No	x
Physics	No	x
Italian	No	x
Contemporary America	No	x
Advanced Art	No	x

The gifted and talented programs at Rahway and Brearley are comparable. Despite the fact that the enrollment in Rahway advanced placement courses is significantly greater than enrollment in like programs at Brearley (due to Rahway High School's larger population), the schools' offerings are very similar. In fact, Brearley offers six additional advanced courses unavailable at Rahway. Rahway, in turn, operates a well-respected program called the Carl Sagan House, and due to the school's size, is likely to continue its ability to maintain advanced programs.

Drop-outs

The drop-out rate at Rahway High School was 6.7% for the 1997-1998 school year. The drop-out rate at Kenilworth was 1.0% for the 1997-1998 school year. The state average was 3.8%.

Attendance

The student attendance rate was 92% at Rahway High School for the 1997-1998 school year. The student attendance rate was 94.72% at Kenilworth for the 1997-1998 school year. The state average was 92.6%.

Student/Faculty Ratio

The student/faculty ratio was 10.2:1 at Rahway High School for the 1997-1998 school year. The ratio was 9:1 at David Brearley High School for the 1997-1998 school year. The state average was 11.7:1.

Student/Administration Ratio

The student/administration ratio was 222:1 at Rahway High School for the 1997-1998 school year. The ratio was 216.1:1 at David Brearley High School for the 1997-1998 school year. The state average was 181:1.

Instructional Time

Daily instructional time at Rahway High School was six hours, ten minutes, for the 1997-1998 school year. Instructional time at David Brearley High School was five hours, thirty-three minutes, for the 1997-1998 school year. The state average was five hours, twenty-nine minutes.

Test Results

The Early Warning Test is administered to eighth graders to predict student success in reading, mathematics and writing. The results for 1996 were as follows:

Early Warning Test	**Reading**	**Mathematics**	**Writing**
Rahway	134.8	126.9	148.0
Kenilworth	147.4	143.3	171.0
Winfield	161.3	138.8	171.6

The High School Proficiency Test is administered to eleventh graders. The results for 1997-1998 were as follows:

High School Proficiency Test	Reading	Mathematics	Writing	Overall
Kenilworth	91.1	95.6	95.6	82.6
State Average	84.0	85.9	87.9	75.3
Rahway	73.7	72.9	80.5	56.3

On the Scholastic Assessment Test (SAT), 65% of eligible Rahway High School students took the test in 1995 and averaged 468 on the verbal section and 461 on the mathematics section. Eighty-seven percent of eligible David Brearley students took the SAT in 1995 and averaged 514 on the verbal section and 523 on the mathematics section. For 1997-1998, SAT results were as follows:

Scholastic Assessment Test	Average Verbal	Average Mathematics	Average Overall
Kenilworth	492	504	996
Rahway	438	471	908

Post-High School Plans for Graduates

Of the Rahway High School class of 1998, 46% planned to attend a four-year college, 18% planned to attend a two-year college, 15% planned to attend post-secondary schools, 15% planned to work full time and 6% were undecided.

Of the Kenilworth class of 1998, 58% of students planned to attend a four-year college or university, 20% planned to attend a two-year college, 6% planned to attend other post-secondary schools, 1% planned to work full time and 15% were undecided.

Staff Development

Kenilworth staff development opportunities include: test-taking strategies, cooperative learning, math/science technology, integrated curriculum, reading literacy, expanded middle school program, development of high school course of study and strategic planning involving staff regarding mission statement, beliefs and objectives. The record contains no information on staff development opportunities at Rahway.

Parent Involvement Activities

Rahway High School parents have opportunities for regular involvement in monthly PTO meetings. Rahway parents may also participate in the Rahway School Action Team, designed to facilitate interaction by parents with teachers and administrators.

Kenilworth parents are like partners in the educational process and their participation and assistance is encouraged. Specific examples of parental involvement include: parent volunteers in the library and classroom, family math and family science evening programs, Reading is Fundamental program, PTO and community survey regarding educational programs. A special education parent support group meets on a monthly basis.

Orientation of New Students

Rahway High School holds several orientation meetings during the early spring with eighth graders and their parents. These meetings include an overview of curriculum and extra-curricular activities. Rahway's orientation activities also include small group meetings to build schedules, evening high school tours, a half day attending high school classes and a summer orientation picnic.

Kenilworth is developing an orientation process for Winfield parents and students if Winfield pupils are to attend. This program would be similar to the present orientation program for Kenilworth pupils entering the high school.

Articulation

Winfield acknowledges that Rahway has sought its assistance in curriculum planning and has invited Winfield staff to participate in in-service programs.

Kenilworth plans to meet with Winfield professionals to plan effective articulation between the two elementary programs.

Special Features

Rahway High School also provides: participation in Middle States Association, noteworthy programs in athletics, music, theatre and ROTC, and computer laboratories. Rahway also enjoys the corporate sponsorship of Merck.

Kenilworth has an Educational Foundation dedicated to enhancing social educational programs. In addition, Schering-Plough has taken an active role in enhancing the resources available to the students at the Brearley School.

RACIAL COMPOSITION

The parties and their experts agreed that a reasonable approach to measure the impact that severing the sending-receiving relationship between Winfield and Rahway might have is to use the actual enrollment on a particular day, or a "freeze frame" or "snapshot" approach. In this case, the parties agreed for purposes of their analyses that October 15, 1998, would be used as the "snapshot" enrollment date to calculate the racial composition of Rahway and the subsequent impact arising from severance.

Over the five days of hearing, it was clear that the parties not only disagreed with regard to the negative racial impact any severance would have, but also with regard to the actual number of Winfield students at Rahway on October 15, 1998, and/or their racial makeup. That factual issue was resolved upon receipt of the previously discussed parental affidavits.

It has now been established that on October 15, 1998, there were thirty-seven Winfield students in Rahway, thirty-three white and four minority.

Examining the record in its entirety and comparing the racial composition of Rahway High School as it existed on October 15, 1998, with what the racial composition would have been if Winfield had not been sending its high-school-age children to Rahway, I **FIND** as follows:

Enrollment at Rahway

(a) with Winfield students	924.5
(b) without Winfield students	887.5

Number and Percentage of Minorities at Rahway

(a) with Winfield students	506 (54.7%)
(b) without Winfield students	502 (56.6%)

Number and Percentage of Non-Minorities at Rahway

(a) with Winfield students	418.5 (45.3%)
(b) without Winfield students	385.5 (43.4%)

Decrease in the Number and Percentage of Non-Minority Students at Rahway

(a) decrease in number	33
(b) decrease in percentage	7.9%
(c) decrease in proportion	1.9%

Increase/Decrease Projected in the Number and Percentage of Minority Students at Rahway

(a) The number of minority students would decrease by 4.
(b) The minority population at Rahway would rise from 54.7% to 56.6%, or a proportional change of 1.9%.

FINANCIAL IMPACT

Winfield states, and Rahway does not contest, that the existence and possible dissolution of the send-receive relationship has no substantial financial impact.

Rahway would suffer a loss of $820,302 in tuition over a four-year phase-in period, slightly offset by an estimated $24,000 in cost savings, resulting in a tax

increase (if not recouped by other means) of between $5 and $24 per $100,000 in evaluation over the four years.

Winfield will benefit financially. However, the tuition savings (a $108,038 reduction of tuition payments) will be offset partially by an increase in transportation costs ($26,722 anticipated) and an anticipated increase in enrollment.

ANALYSIS

N.J.S.A. 18A:38-11 mandates that any school district that lacks high school facilities, like Winfield, must designate a high school for its pupils. *N.J.S.A.* 18A:38-13 then provides, in pertinent part:

> No such designation of a high school . . . shall be changed or withdrawn . . . except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving district, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation . . . if no substantial negative impact will result therefrom.

It is incumbent upon the Commissioner, then, and the undersigned initially, to determine from the above-found facts whether there will be a substantial negative educational or financial impact on the districts involved and/or whether severance will have a substantial negative impact on the racial composition of the pupil populations of the districts.

IMPACT ON EDUCATIONAL QUALITY

At Rahway

The Rahway school district is justly proud of its long history and tradition of quality education in a community richly diverse, both racially and culturally. Its hard-working staff of dedicated professionals with parental support enriches its children with quality curriculum choices and a variety of ways in which students can be part of its high school culture. An analysis of the foregoing factors considered by the undersigned reveals Rahway High School to be an institution where children learn to and do succeed. Significantly, both Winfield and Rahway agree, and I **CONCLUDE**, that the quality of education received by Rahway students would not suffer any negative impact should the Winfield students withdraw.

At Kenilworth

Rahway only half-heartedly suggests that the children at Brearley will suffer should the Winfield students transfer there. It did not seriously contest the quality of education secured at Brearley or the success of its students in and out of school. Its suggestion that Brearley may be "too small" is intended more to rebut Winfield's *sub silentio* claim that Rahway is "too big" than to attack the quality of a Brearley education.

Brearley, while going through growing pains, is clearly ready to embark on the next step of its growth. Dedicated professionals, lead by its energetic superintendent, Dr. Lloyd Leschuk, have already made good on their promise to deliver quality and can be expected to continue to do so.

For Winfield

Notwithstanding what Rahway is urging here, it is clear that Brearley would, absent the suggestion that an alleged lack of diversity would have an adverse impact, offer at least as good an education as is offered by Rahway. I agree that Brearley is

small, but I am not convinced that it is "too small." (Conversely, not only is Rahway High not "too big," I do not even agree that it is any bigger than the average sized high school.)

That having been said, however, Rahway urges that the proposed departure from a school populated with an almost 1:1 ratio of minority to white students to a school with a 1:6 ratio is *per se* a substantial negative impact on the quality of the education to be provided to Winfield students.

The State Board of Education addressed that issue (in dicta) in *Merchantville Board of Education v. Pennsauken Board of Education*, State Bd. of Educ. #48-92 (Jan. 7, 1998) at 13-15, when it said:

> . . . the educational benefits of a heterogeneous student population accrue not only to minority students, but to all children who attend school in an integrated educational environment. . . .
>
> Although there is no one statistical balance which is ideal from an educational perspective, a truly integrated setting offers the best opportunity for meaningful exposure of different races in the educational context. . . .
>
> [A racially diversified school affords] students the educational opportunity to learn to live with and respect people from a variety of racial and ethnic backgrounds by attending school with such individuals. While alternative methods for achieving this educational objective must be instituted in school districts with homogeneous student populations, there is no substitute for the educational benefits afforded by the opportunities for interaction both in and out of the classroom where the student population is diverse.
>
> [Footnote omitted.]

What distinguishes the proposed move of Merchantville students from Pennsauken to Haddonfield in *Merchantville* from the situation in the extant case is that here the proposed new receiving district is diverse, just not as diverse as the current receiving district. In *Merchantville*, the proposed receiving district was not at all diverse

(described as "virtually all white" by the State Board [at 15]), and the current receiving district had a minority high school population of 25%.

Thus, the facts are clearly distinguishable on the educational impact issue. What *Merchantville* stands for is the proposition that a racially diverse environment is the preferred environment and I agree. The mere reduction in the degree of diversity may or may not be a negative impact in a vacuum, but there was no evidence before me that when the new receiving district is also diverse (and apparently more diverse than the Winfield community) the negative impact is substantial.

I agree that severing a send-receive relationship with a diverse educational community to enter a relationship with a non-diverse educational community would result in a substantial negative impact on educational quality. I cannot, however, from the evidence before me, conclude that the proposed severance here would result in such a substantial negative impact. I, therefore, **CONCLUDE** that petitioner has met its burden of proof in showing that there will be no substantial negative impact on the quality of the education of the Winfield students.

FINANCIAL IMPACT

As noted above, Winfield contends that the dissolution of the send-receive relationship would have no substantial financial impact and that conclusion was not challenged. I so **CONCLUDE**.

RACIAL COMPOSITION

One reported Appellate Division case, *Englewood Cliffs Board of Education v. Englewood Board of Education*, 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd*, 132 *N.J.* 327, *cert. den.*, 510 *U.S.* 991, 114 *S. Ct.* 547, 126 *L. Ed.* 2d 449 (1993), and two State Board of Education cases, *Merchantville, supra*, State Bd. of Educ. #48-92 (Jan. 7, 1998), and *Belmar v. Asbury Park*, State Bd. of Educ. #42-89 (June 7, 1996) (affirmed in an unreported decision on May 26, 1998, A-6681-95T3), are offered as authority by the parties. In all three cases, applications for severance pursuant to *N.J.S.A.* 18A:38-

13 were denied on the grounds that severance would result in a substantial negative impact on the racial composition of the respective schools.

Englewood

Englewood, the seminal case interpreting the statute, involved a petition filed with the Commissioner by the Board of Education of Englewood Cliffs (Cliffs) to sever its sending-receiving relationship with the Board of Education of Englewood (Englewood), established in 1965, which would terminate the attendance of Cliffs' high school students at Dwight Morrow High School (DMHS) in Englewood. Englewood opposed the petition. Englewood also filed a cross-petition which sought to enjoin the Board of Education of Tenafly (Tenafly) from accepting high school students from Cliffs and Englewood and requested that the Commissioner regionalize the three municipalities into one high school district.

Administrative Law Judge (ALJ) Ken Springer heard the matter in 1987 over ninety-nine days of hearing and issued an initial decision denying severance on April 18, 1988. *Englewood, supra*, 257 *N.J. Super.* at 423. Englewood's request for regionalization was also denied, however, the ALJ recommended granting Englewood's request that Tenafly be restrained from accepting students from Cliffs or Englewood. *Ibid.* The Commissioner adopted the initial decision on July 11, 1988, but modified it to the extent that eighth graders enrolled in Tenafly as of April 18, 1988, be allowed to attend Tenafly High School (THS) should they so desire. *Ibid.*

On April 4, 1990, the State Board of Education affirmed the Commissioner's decision with modifications. *Id.* at 424. Two modifications, recommended by the Legal Committee of the State Board, required the Commissioner to monitor the racial composition of DMHS and report his findings periodically to the State Board and, second, extended the injunction against Tenafly accepting Cliffs and Englewood students to all public school boards in the state. *Ibid.* The State Board ordered three additional modifications. It directed Cliffs and Englewood to develop a plan, in consultation with the Commissioner and subject to his approval, to encourage their students to attend DMHS. *Ibid.* The Commissioner was required to monitor the plan

and racial composition of DMHS for five years and annually report to the State Board the plan's effect on that racial composition. *Ibid.* Finally, the State Board exempted from its decision all students from Cliffs and Englewood attending THS or other public schools as of April 18, 1988. *Id.* at 424-25.

In the appeal to the Appellate Division, Cliffs challenged the denial of the petition for severance, the denial of a dual sending-receiving relationship and the injunction. Englewood cross-appealed the State Board's failure to order regionalization. The court affirmed the determination of the Board. *Id.* at 457.

The court's findings of fact[2] indicated that the boroughs of Englewood Cliffs and Tenafly were primarily white communities with growing Asian populations. According to the 1980 census, 85% of the population of Englewood Cliffs and 91% of Tenafly were white. The same census showed that Englewood was a more heterogeneous community, comprised of 44.6% white, 40.6% black, 8.8% Hispanic and 2.8% Asian residents. All three districts were considered affluent compared to other communities in the state. They shared common borders and significant community ties such as common cultural, recreational and medical facilities.

The statistics further indicated that 799 students attended DMHS in 1987-1988, of whom only twenty-one were from Cliffs. In that school year, 11.8% of DMHS students were white, 66.2% were black, 17.8% were Hispanic and 3.9% were Asian. The number of Cliffs students attending DMHS had dropped from 119 for the 1982-1983 school year to twenty-one for the 1987-1988 school year. The drop coincided with the non-resident tuition program in Tenafly instituted in 1982, during which the enrollment of Cliffs students at THS increased from eleven for the 1982-1983 school year to seventy-six for the 1987-1988 school year.[3]

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[2]The facts were derived from the initial decision of the ALJ, because as the court pointed out, the record in the case was voluminous and the Commissioner and State Board had each essentially adopted the ALJ's fact-finding. *Id.* at 425.

[3]Private school attendance by Cliffs and Englewood students had also increased over the years.

The total student population of Cliffs in 1987-1988 was 486, of which 50.8% were white, 42.2% Asian, 5.5% Hispanic and 1.5% black. Of the twenty-one Cliffs students who attended DMHS that year, fifteen were white, four were Asian and two were Hispanic. The court noted that if Cliffs had sent those twenty-one students to THS, "it would have altered the composition of DMHS to 10.2% white, 68.0% black, 18.0% Hispanic and 3.5% Asian. Such an alteration would have been a 16.0% loss in the DMHS white student body but would have resulted in only a 1.6% decrease in the proportion of white students at DMHS." *Id.* at 434.

Cliffs' reasons for seeking severance and establishing a new relationship with Tenafly were found to be based on its determination that THS offered a more suitable academic program for its college-bound students; there was less need for emphasis on discipline and more opportunity for student independence and self-reliance at THS; the school facilities at THS were nicer and newer; the library was better stocked; there was past administrative instability at DMHS; and there was past failure by the Englewood Board to correct deficiencies over a period of years, *i.e.*, the need to decrease class size and the Englewood Board's failure to adequately consult Cliffs about an important matter affecting Cliffs' students, specifically, Englewood's decision to move the eighth grade into the high school. *Id.* at 439. Englewood argued that the issue was race and not school quality as asserted by Cliffs. *Id.* at 435.

The ALJ found that Cliffs' "request for relief [was] made in good faith, for what it conceive[d] to be the best educational interests of its students," nonetheless, he determined that severance should be denied. *Id.* at 439-41. The primary reason for the denial of severance was the substantial negative impact on the racial composition and educational quality of DMHS that had already occurred and continued to be far-reaching. *Ibid.* While statistically the loss of twenty-one students seemed small, the ALJ determined that the impact must be regarded as substantial where DMHS was so "precariously" short of white and Asian students. *Id.* at 439. More importantly, the ALJ found:

> [S]everance would have a substantial negative impact on the quality of education at DMHS, much greater than any material loss caused by the withdrawal of 21 Cliffs students.

> In effect, any material losses would be greatly magnified by symbolic losses.
>
> Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. . . . Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the negative implications severance would have for future race relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.
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> [*Id.* at 440-41.]

The ALJ also concluded that while THS has a diverse enrollment in the areas of culture, religion and native language, exposure to blacks and Hispanics or to persons of different socioeconomic status is severely limited.

Tenafly's tuition policy was also condemned. *Id.* at 442. The policy effectively enticed white and Asian students away from DMHS and contributed to its racial imbalance and polarized situation. *Ibid.* The ALJ found that selective admissions requirements were instituted by the Tenafly board, "including what is tantamount to an income test since only those who can afford to pay are eligible for admission. In what could accurately be called 'cream-skimming,' the Tenafly tuition policy achieves its intended purpose by attracting more highly motivated and academically competent students from its neighboring school district, at the expense of educational quality at DMHS." *Ibid.* Approving severance would legitimize Tenafly's policy and would put the official State imprimatur on what Tenafly had done, which the ALJ characterized as "repugnant" and "against the law." *Id.* at 443.

In his adoption of the ALJ's fact-finding and legal conclusions, the Commissioner "reaffirmed the issue of racial balance as one of 'utmost importance to the State.'" *Ibid.* He recognized that while the loss of fifteen white students from Cliffs may seem small,

approving severance would nonetheless have a significant negative impact on racial composition because the loss would constitute a 15% reduction of white students and by the 1990-1991 school year a 25% reduction. *Id.* at 443-44. Moreover, the Commissioner pointed out that the enrollment in DMHS for previous years was considered in the determination because the decline in the enrollment of Cliffs' students was dramatic and "attributed in large part to . . . 'white flight.'" *Id.* at 444. These circumstances elicited the same concern from the Commissioner as was expressed by the ALJ, that is, "to grant severance [of the] sending-receiving relationship as a matter of public policy would place an imprimatur of acceptance by the State to this flight." *Ibid.*

The Commissioner, again in agreement with the ALJ, concluded that severance would cause a substantial negative educational impact. *Ibid.* The Commissioner explained:

> One need look no further than the . . . decision in *Brown v. Topeka* [347 *U.S.* 483, 74 *S. Ct.* 686, 98 *L. Ed.* 873 (1954)] to support the ALJ's reliance upon evidence dealing not only with "material loss," . . . but also an assessment of impact on the psychosocial dimension of education referred to in this case as "symbolic loss." Notwithstanding the fact that DMHS is not all minority, it is, as previously stated, substantially imbalanced racially; thus, the following passage from the U.S. Supreme Court in *Brown* has no less bearing in this matter than if DMHS were all minority. It states:
>
> > Segregation . . . in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.
>
> [*Id.* at 444-45.]

The State Board affirmed the denial of the petition for severance.[4] *Id.* at 448. In reaching that decision the Board found that *N.J.S.A.* 18A:38-13 requires consideration of all circumstances when determining a request for severance. *Id.* at 447. The Board, therefore, approached "the issue from a broader perspective than the ALJ and the Commissioner," examining the additional factors of the effect of the THS tuition program and the migration of Cliffs students over the years as part of the determination process. *Ibid.* While noting "that 'there [was] no fixed balance between racial and national origin groupings that, from an educational perspective, [could] be considered ideal for all communities,'" the State Board concluded, as quoted here by the Appellate Division, that:

> [T]o sanction termination of the sending-receiving relationship between Englewood and Englewood Cliffs, we would be condoning a concentration of blacks and Hispanics that is sharply out of balance with the composition of the society in which those students must function. *See Booker v. Bd. of Educ. of Plainfield*, 45 *N.J.* 161 (1965). Further, the concentration of minority students would be at such level as to allow Dwight Morrow to be characterized as a minority school with the attendant "sense of stigma and resulting feeling of inferiority" cited by the Court in *Booker* and upon which the *Brown* decision rests. . . .
>
> [A]s a matter of educational policy, we could not condone the level of concentration of minority students attending Dwight Morrow by sanctioning the change in designation sought here.
>
> [*Id.* at 448.]

The racial imbalance and the negative educational implications that would result at DMHS if the sending-receiving relationship were terminated warranted denial of the petition for severance. *Ibid.* In further support for its decision, the Board also emphasized the educational policy of the State, which provided that "[e]ducational considerations are primary in eliminating school segregation. The elimination of racial

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[4]The Board also determined that the request to establish a dual sending-receiving relationship be denied; that the injunctions prohibiting Tenafly and other public schools from accepting Cliffs or Englewood high schoolers were required to reverse the trend of accelerating the imbalance at DMHS; and that a regionalization study should be implemented. *Id.* at 449-52.

imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all." *Id.* at 449.

The Appellate Division affirmed the Board's decision. *Id.* at 457. The court held that *N.J.S.A.* 18A:38-13 is not a traditional balancing statute because there is no place in the analysis for the weighing of positive impacts once a potential substantial negative impact is found. *Id.* at 457, 461-62. Specifically, the court determined:

> The act lays out a series of factors to be considered by the Commissioner as part of a feasibility study including: the educational (offerings) and financial (budgetary) implications for *both* districts, the impact on the quality of education in *both* districts, and the effect on the racial composition of the pupil population in *both* districts. The Commissioner's responsibility is to reach an "equitable" determination--one that is fair to both districts--keeping in mind his responsibility as the ultimate educational authority in the State. . . . To be sure, the Commissioner may engage in weighing and balancing within each of the stated categories. For example, he may assess whether financial losses outweigh financial gains in a proposed move or whether racial balance is improved in one district more than it is negatively affected in the other. However, he is not free to weigh the overall positive and negative impacts of severance or to determine that a substantial negative impact he has found in any category is "outweighed" by a positive impact in another. The reason for this is that the legislatively prescribed considerations do not exist in a vacuum but are inextricably bound up with the question of what kind of an education is to be provided. A substantial negative impact in one category necessarily implicates an overall educational quality issue. The focus of the Commissioner's inquiry is whether a substantial negative impact exists *at all*; if it does, severance is to be denied.
>
> [*Id.* at 462.]

Thus, when "assessing an application for severance, the finding of a substantial negative impact on educational quality in one district warrants disapproval of severance, notwithstanding any number of 'positive' impacts which severance would bring to the other district." *Id.* at 422. Based on this holding, the court rejected Cliffs' position that the positive impacts outweighed the single negative racial impact that

would result if severance were granted. *Id.* at 461-62. In so doing, the court pointed out that each of the positive impacts asserted by Cliffs

> is exclusively beneficial to Cliffs and fails to give a shred of consideration to the effect of severance on the students at DMHS. More importantly, the THS formula for educational success is to segregate a group of homogeneous students from relatively affluent families in a school run completely by white teachers, which stresses college preparation and does not even provide a full spectrum of special education programs for the students who require them. This scheme utterly fails to account for the considerable value which we have long placed on social and educational development in an atmosphere in which children with differences learn to celebrate and not fear them. THS, with its minuscule black and Hispanic population, is not a realistic forum for interaction among the children of different races. On the other hand, DMHS, which every fact finder has held to be a *very* good school, provides its education within such a heterogeneous framework. Thus Cliffs' positive impacts claim is problematic at best.
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> [*Id.* at 461 (citation omitted).]

As the court had held, "[t]here is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found." *Id.* at 462.

The court also rejected Cliffs' argument that because the record showed at the time of the application for severance that severance would reduce the DMHS white population by only 1.1%, the Board could not have reasonably concluded that a substantial negative impact would result. *Id.* at 463. The Board's conclusion was influenced by the relationship between Cliffs and Englewood that existed prior to the application, which was, contrary to Cliffs' position, within the Board's discretion to examine.[5] *Ibid.* The examination revealed that Cliffs' withdrawal from DMHS actually began in 1982, long before the application for severance, resulting in an initial loss of 6.5% of the white student population that continued over the years due in large part to

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[5]The court commented that if Cliffs' approach to the issue were accepted "a district would be rewarded for quiet complicity in long-term white flight with a payoff for delayed discovery: the inability of the State Board to consider what had already occurred in formulating its remedy." *Id.* at 463.

Cliffs' failure to encourage students to attend DMHS and the Tenafly tuition policy. *Id.* at 463-64. This decline, along with the "concentration of blacks and Hispanics at DMHS which would exist in the wake of severance, a concentration 'sharply out of balance' with the composition of the society in which the students would function; and the feelings of anger and inferiority which would be engendered in those who remained," resulted in long-term actual loss and symbolic loss which the Board appropriately concluded constituted "a substantial negative educational impact on the students at DMHS." *Id.* at 464.

The court agreed, finding a substantial negative educational impact on DMHS that was both far-reaching and long-term, therefore, denial of the petition for severance was affirmed. *Id.* at 464-65.

> [T]he mandate of *N.J.S.A.* 18A:38-13 [is] that racial balance is an important consideration in evaluating the potential destabilizing effect of severance. Indeed, that language was engrafted onto the statute specifically to avoid withdrawals for discriminatory purposes which would have the effect of recreating segregated school systems with their inherent inequality of educational opportunity.
>
> More to the point is the interrelationship between racial balance and education--a connection Cliffs persists in omitting from its reasoning. These are not isolated factors. They are different sides of the same coin. Our Supreme Court long ago recognized this principle in *Morean* and *Booker*, cases decided in the afterglow of *Brown v. Bd. of Educ.*, 347 *U.S.* 483, 74 *S. Ct.* 686, 98 *L. Ed.* 873 (1954). A generation later, the promise of *Brown* remains only partially fulfilled and the optimism it engendered has been sorely tested. In these circumstances, the principle enunciated in *Morean* and *Booker* is more hallowed than ever: when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the "mainstream" of human affairs.
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> [*Id.* at 464-65.][6]

[6] The citation for *Booker* is *Booker v. Plainfield Bd. of Educ.*, 45 *N.J.* 161 (1965). The citation for *Morean* is *Morean v. Montclair Bd. of Educ.*, 42 *N.J.* 237 (1964).

Merchantville

Englewood was relied upon in a recent decision by the State Board in *Merchantville Board of Education v. Pennsauken Board of Education*, State Bd. of Educ. #48-92 (Jan. 7, 1998),[7] in which Merchantville sought termination of its sending-receiving relationship with Pennsauken and sought to establish a new relationship with Haddonfield for its high school students. The ALJ approved severance of the relationship on May 1, 1992, finding no significant negative impact on the quality of education or the racial composition of the pupil populations, since Pennsauken High School would experience only a 1.7% decrease in its white student population, and no financial or educational implications. *Id.* at 3-4, 6. The Acting Commissioner rejected the ALJ's decision based on his conclusion that severance would advance "the deterioration in the balance of racial and national origin groupings represented at Pennsauken High." *Id.* at 4, 6.

Merchantville and Pennsauken appealed the Acting Commissioner's decision to the State Board of Education. The Board commenced its decision with a summary of the issue before it as follows:

> The case calls upon us to determine whether this agency may approve such a change in designation pursuant to *N.J.S.A.* 18A:38-13 where the statistical change in the racial composition of the current receiver may not be statistically significant, but under circumstances in which the current receiver is integrated, the proposed receiver is almost exclusively white and the sending district is predominantly white. Such determination requires that we further explore the relationship between racial balance and educational quality and our obligations in this context to effectuate our State's policies.
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> [*Id.* at 2.]

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[7] The petitioner erroneously indicates that the date of this decision is Jan. 8, 1997. The Board on that date issued an order directing the parties to provide a number of documents to update the record. The date of the Board's final decision in the matter was Jan. 7, 1998.

The State Board determined that questions of racial balance were pivotal in assessing Merchantville's petition for severance. Citing *Englewood*, the Board stated:

> [L]ike the Acting Commissioner, [we] reject the view that a statistical change in the racial composition of the current receiver is alone dispositive of whether a significant negative impact will result from severance. Rather, as mandated by the statute, it is imperative that the significance of the statistical change in a particular case be evaluated under "all of the circumstances."
>
> [*Id.* at 7 (citations omitted).]

Thus, the central question of the appeal was whether the requested change would result in a substantial negative impact on either of the districts involved. *Id.* at 9.

While the circumstances of the matter before it stood in stark contrast to the circumstances in *Englewood*, the Board concluded, nonetheless, that severance should be denied. *Id.* at 8. For example, unlike *Englewood* there was not a concentration of minority students in Pennsauken High School that was unacceptable from either a legal or policy perspective. *Ibid.* Nor was there conduct by the districts involved that could be viewed as inconsistent with the sending-receiving relationship between Merchantville and Pennsauken. *Ibid.* The facts also failed to show that there was a loss of students to Haddonfield affecting the racial balance of Pennsauken because of Haddonfield's tuition policy. *Ibid.*

Stressing the State's policy of eradicating segregation in the public schools and promoting the fundamental policy of providing equal educational opportunity in an integrated setting, the Board recognized its responsibility to ensure that educational opportunity was not limited to situations where a significant imbalance had already developed. *Id.* at 11-12. The record showed that Pennsauken High School offered an integrated setting with a white/minority ratio of 53.9% to 46.1% as of October 1996. *Id.* at 13-14. The Board considered the statistical balance of the high school to offer a "truly integrated setting," one in which students would have the "best opportunity for meaningful exposure of different races in the educational context." *Id.* at 14. Accordingly,

> it would be counterproductive to allow an existing sending-receiving relationship to be disturbed where the change may contribute to the development of racial imbalance.
>
> Furthermore, as we stressed in our decision in *Englewood, supra*, the educational benefits of a heterogeneous student population accrue not only to minority students, but to all children who attend school in an integrated educational environment.
>
> [*Id.* at 13 (citation omitted).]

The Board determined that severing the sending-receiving relationship so that Merchantville could establish a relationship with Haddonfield High School, which is virtually all white, would also plainly contradict the State's "long-standing policy favoring integrated educational opportunities and would constitute a substantial negative impact on both Merchantville and Pennsauken." *Id.* at 15. Pennsauken High School was viewed as affording Merchantville students "the educational opportunity to learn to live with and respect people from a variety of racial and ethnic backgrounds by attending school with such individuals." *Ibid.*

Additionally, the Board held that maintaining the existing level of diversity at Pennsauken High School was viewed as a necessary measure to further effectuate the State's policy against segregation, citing a study showing that there had been segregation of minorities in the larger New Jersey urban school districts as the white population shifted to the suburbs. *Id.* at 15-16. The Board determined that denying severance eliminated the possibility that racial imbalance in Pennsauken would be encouraged by any action taken by the Board. *Id.* at 16.

In conclusion, the Board summarized the reasons for denying Merchantville's application for severance of its sending-receiving relationship with Pennsauken as follows:

> As the record in this case shows, while the proportion of minority students at Pennsauken High has increased in recent years, its student population continues to be diverse. While severance would not change the diverse character of

> Pennsauken High School, it would result in a slight increase in the proportion of the minority population at Pennsauken High, which currently constitutes approximately 50% of the student population. In addition to the educational benefits which will accrue to Merchantville's students, their continued presence will help maintain the stability of the sensitive racial balance of the pupil population at Pennsauken High, and thereby avoid the future necessity for undertaking the much more difficult task of correcting an imbalance after it has developed.
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> [*Id.* 16-17.]

Belmar

Englewood was also relied upon in a 1996 decision by the State Board in *Belmar Board of Education v. Asbury Park Board of Education*, State Bd. of Educ. #42-89 (June 7, 1996),[8] in which Belmar sought termination of its sending-receiving relationship with Asbury Park and sought to establish a new[9] relationship with Manasquan for its high school students. The ALJ denied severance of the relationship on April 14, 1989, finding a significant negative impact on the racial composition of Asbury Park's pupil population, notwithstanding the fact that removal of Belmar's students from Asbury Park High School would result in only a 1% decrease in its white student population. The Commissioner concurred in the ALJ's decision and Belmar appealed the Commissioner's decision to the State Board of Education. The Board commenced its decision, dated June 7, 1996, with a summary of the conclusions reached by the ALJ and the Commissioner.

The Board, in its decision, initially rejected Belmar's argument that the community preference of the sending district is not at all relevant, and focused, as

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[8] Consolidated with a petition from Bradley Beach, which also sought to severe its relationship with Asbury Park. The State Board's decision denying severance in both cases was affirmed in an unreported opinion on May 26, 1998 (A-6681-95T3).

[9] Belmar split its high school students between Asbury Park and Manasquan. Its petition sought a new relationship whereby all its children of high school age would go to Manasquan.

required, on whether severance would have a "substantial negative impact," and concluded that it would.

While holding that a 1% decrease in the white population of Asbury Park would not in and of itself bar severance, nor would such a loss have a substantial negative impact on the structure of the educational program in Asbury Park, the Board found, "quite simply," in language specifically cited with approval by the Appellate Division, that

> severance of either of the sending-receiving relationships involved in this case at any time relevant to this litigation would have exacerbated an already high concentration of black and Hispanic students at Asbury Park High School and would have acted as a sanction for the racial isolation of the students at that school.
>
> [App. Div. #42-89 at 16.]

Thus, the Board and the Appellate Division were concerned not with the relatively insignificant statistical reduction of white students at Asbury Park, but with the already high concentration of minority students with the attendant "sense of stigma and resulting feeling of inferiority," citing *Booker v. Plainfield*, *supra*, 45 *N.J.* 161. Thus, the 1% becomes the significant "symbolic loss" described persuasively by the ALJ in *Englewood*, but premised on the high concentration of minority students in the receiving high school.[10]

Present Matter

The application for severance filed by Winfield in the present matter is based on several complaints about its sending-receiving relationship with Rahway and its desire to establish a sending-receiving relationship with the Kenilworth Board of Education. Accordingly, Winfield has asserted the following issues:

[10] Perhaps as significant was the unwillingness of the State Board to consider the Belmar petition in isolation. Severance of Bradley Beach's relationship with Asbury Park would have reduced the percentage of white students attending Asbury Park High School by 6%.

> (1) the lack of communication between the two Boards of Education; (2) low standardized test scores; (3) low educational standards; (4) high drop out rates; and (5) the lack of meaningful information about its students' education. Winfield believes that severing its relationship with Rahway is needed so that it may better serve the educational needs of its students and to maximize its involvement in that process. Winfield contends that the prospective send-receive relationship with [Kenilworth] will meet the educational needs of its students, as well as provide Winfield with the opportunity to have a guaranteed voice in the education of their children through an *ex officio* seat on the Kenilworth Board of Education and direct input into educational issues, such as curriculum development. Essentially, only through the creation of a new send-receive relationship will Winfield have any hope of becoming the educational partner with its receiving district.
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> [Petitioner's Posthearing Brief at 1.]

As indicated in the discussion above, the Commissioner shall grant the requested change only "if no substantial negative impact will result therefrom," *N.J.S.A.* 18A:38-13.

Thus, for an application to be denied the Commissioner must find that at least in one of the three categories (education, financial and racial), one of the involved districts would be impacted negatively by severance and that the negative impact would be substantial. Absent such circumstances or overriding social policy, as written by ALJ Springer, "it is preferable in a democratic society to let local people decide for themselves how their children should be educated and how their tax money should be spent." *Board of Education of the Township of Boonton v. Board of Education of the Town of Boonton*, 92 *N.J.A.R.*2d. (EDU) 235, 244. ALJ Marie P. Simonelli (now judge of the Superior Court) opined in 1996 that the Commissioner and State Board of Education are obliged to effectuate the desire of a sending district to educate its children in a district of its choice so long as there is insufficient basis for a finding of a substantial negative impact should severance occur. She wrote: "The Legislature recognized that a district can best decide how and where its students should be educated and it gave districts the power to make that decision." *Board of Education of*

the Borough of Ho-Ho-Kus v. Board of Education of the Borough of Midland Park, OAL Dkt. No. EDU 4243-95 (June 5, 1996), *aff'd*, Comm'r of Educ. (August 30, 1996).

The analysis here then becomes whether, if severance were permitted, there would be a substantial negative impact financially, educationally or with regard to racial composition in light of the foregoing facts that I found to be substantially uncontested.

As I have previously noted, the parties do not contest the fact that the financial impact would not be substantial, and I have concluded that the papers fail to show that Kenilworth's programs offer less educational quality than the programs provided at Rahway or vice versa.

The issue to be resolved then, is whether severance will result in a substantial negative impact to the racial composition of Rahway High School.

The sending-receiving relationship between Winfield and Rahway has been in existence for approximately forty-one years. Currently, Rahway High School has 924 students, thirty-seven of whom are from Winfield. The minority students attending Rahway total 506, or 54.7%, and the non-minority students total 418, or 45.3%. Four of Winfield's students are minority students. The breakdown of the 280 students attending high school in Kenilworth is approximately 20% minority and 80% non-minority. Under the various statistics proffered by the parties, severance would result in an approximately 1.9% decrease in the proportion of white students attending Rahway and a gross percentage decrease in the overall white student population of 7.9%. The minority student population would increase to 56.6% and the non-minority population would decrease to 43.4%.

The statistical changes are plainly not significant, however, the impact of the changes must be examined under the relevant case law. *See Merchantville, supra*, SB #48-92 at 7 (citing *Englewood, supra*, 257 *N.J. Super.* 413).

Merchantville and Belmar, despite their non-binding effect,[11] deserve consideration due to the Board's attempts at interpretation and application of *Englewood* to circumstances that are arguably similar to those of the current matter and are offered by the parties as authority.

In *Merchantville*, despite the absence of evidence of "white flight" and its attendant "symbolic loss," the State Board was particularly concerned that the proposed severance would transplant a substantially white group of students (residents of Merchantville) from a diverse school environment (in Pennsauken) to one it described as "virtually all white" (Haddonfield). The *Belmar* State Board was equally concerned with the lack of diversity in the proposed receiving district (Manasquan), but properly focused its attention on the circumstance that concerned the court in *Englewood*, a decision by which we are truly bound.

In *Englewood*, the existing receiving school (Dwight Morrow in Englewood) was 11.8% white and 82.2% non-white and the proposed receiving school was 8% non-white (Tenafly). In *Belmar*, the proposed receiving school was overwhelmingly white (Manasquan) and the existing receiving school (Asbury Park) was 83% non-white. Thus, in both *Belmar* and *Englewood*, the review bodies were concerned primarily with the stigma, social impact and symbolic loss attendant upon a removal of a relatively small number of white children from an overwhelmingly non-white school and placing them in an overwhelmingly white new receiving district. Doing so, they found, would violate the State's policy of discouraging or at least failing to condone the level of concentration of minority students in Dwight Morrow High School and Asbury Park High School. In so stating, the Board in *Belmar* noted that the elimination of school

[11] The concept of *stare decisis* is more "subject to the basic notion that experience is a teacher and not a jailer" in administrative proceedings than in a court. *In re Masiello*, 25 *N.J.* 590, 598-99 (1958). The OAL is a quasi-judicial forum designed to ensure that an agency head will make determinations for which s/he is statutorily responsible only after full consideration of all the relevant facts and applicable law. This forum gives an agency head the opportunity to assure himself or herself that his/her administrative determination will be worthy of the presumption of validity and reasonableness usually accorded by the courts. An agency is not irrevocably committed to its own precedents. When appropriate, an agency head may determine that it is time for a change in interpretation or that a predecessor's interpretation was just plain wrong. An administrative agency's departure from a previous interpretation, which is explained and justified, will require the same deference from the courts as long as the decision is not arbitrary, capricious or unreasonable, regardless of consistency.

segregation was not to be sought as an end in itself, but because such imbalance stands as a deterrent to the improvement of education.

Evidence of symbolic loss, from the testimony and statements of students and teachers showing that students would feel betrayed if severance were approved, was a consideration in *Englewood*, and would apply equally to *Belmar* in light of the high concentration of minority students in Asbury Park, but such evidence was lacking in *Merchantville*. Similarly, no such evidence has been submitted in this matter.

While *Englewood* indicated that the court's opinion was supported by the State's educational policy of promoting equal educational opportunity in an integrated setting, as was the Board's opinion in *Belmar*, the Board in *Merchantville* decided that the policy is not limited to situations where a significant imbalance has already occurred. Thus, the *Merchantville* Board found it appropriate that the policy be applied to the circumstances of Pennsauken High School in order to "maintain the stability of the [school's] sensitive racial balance," characterized by the Board as close to ideal. *Merchantville, supra*, SB #48-92 at 17. The Board refused to take an action that would even marginally increase the minority population in the receiving district, especially when the new district was "virtually all white."

It is difficult to deny severance in the present matter in light of the statute's preference for sending district choice absent evidence of racial concentrations like those described in *Englewood* and *Belmar*. The percentage of minority students attending Rahway High School, currently 55%, cannot be characterized as imbalanced, particularly when compared to the obvious imbalance in Dwight Morrow (82.2%) and Asbury Park (83%). Further, Rahway's expert testified that any school between 40% and 60% non-white is "in balance." Recognizing, respecting and agreeing with the State's educational policy against segregation, one must also obey the mandate of the governing statute, which recognizes and respects the sending district's say in where its children are educated and how its tax money is spent.

Absent evidence that an overriding social policy is being violated, the Winfield parents should decide, through their representatives on the Winfield Board of Education, where and how their children should be educated.

I **CONCLUDE** that there is insufficient evidence that an overriding social policy will be violated by granting the application for severance. I so **CONCLUDE** on the grounds that severance will not have a substantial negative impact on the quality of education or the racial composition of the affected districts.

ORDER

It is therefore **ORDERED** that Winfield be and hereby is authorized to terminate its existing sending-receiving relationship with Rahway and to enter into a new sending-receiving relationship with Kenilworth, subject to the following conditions:

1. Winfield must enter into a contract for a new sending-receiving relationship with Kenilworth for a minimum duration of five years; and

2. Withdrawal shall be phased out over a four-year period, starting with the incoming ninth-grade class in September 2000, the ninth- and tenth-grade classes in September 2001, the ninth-, tenth- and eleventh-grade classes in September 2002 and the ninth-, tenth-, eleventh- and twelfth-grade classes in September 2003.

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

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

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

January 19, 2000
DATE

Thomas R Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

January 19, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 7138-98
AGENCY DKT. NO. 109-4/98

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, Rahway Board of Education (hereinafter "Rahway"), and replies of petitioner, Winfield Board of Education (hereinafter "Winfield"), were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.

Rahway urges that the Administrative Law Judge's (ALJ) decision be rejected and the within sending-receiving relationship be continued. Its exceptions, presented verbatim, argue:

1. The Judge's Order fails to maintain the stability of Rahway High School's sensitive racial balance and instead would result in pushing it closer to an imbalanced status.

2. The Judge's conclusion that there was no submission of evidence of "symbolic loss" is correct in that there was no testimony or statements of students or teachers concerning same. However, the Respondent's expert witness, Dr. Judith A. Ferguson, both in her report dated May 31, 1999, Exhibit R-1, at page 11, and in her testimony (T 7/21/99, P78, Lines 12-22) stated that losing white

students has a negative impact on the remaining black students, and she continues at (T 7/21/99, P79, Lines 3-11) that it (the loss of white students) could negatively impact the achievement level of the black students.

3. The Judge concludes that the mere reduction and the degree of diversity may or may not be a negative impact in a vacuum, and there was no evidence that when the new receiving district is also diverse, the negative impact is substantial. However, Dr. Judith A. Ferguson testified (T 7/21/99, P84, Line 8) that Kenilworth is much less diverse than Rahway and at (T 7/21/99, P 100) that the exposure to black students would be dramactically [sic] reduced at David Brearley, factors which it is argued should most certainly be considered.

4. Contrary to the Judge's Order, the evidence clearly shows that permitting the severance would have a substantial negative impact on the racial composition of the affected Districts.

(Rahway's Exceptions at 1-2)

Winfield's reply exceptions, preliminarily, assert that the exceptions filed by Rahway are, as a matter of law, insufficient to provide the Commissioner with a basis for rejecting or in any way modifying the ALJ's Initial Decision in this matter. It cites *N.J.A.C.* 1:1-18.4(b)(3) for the proposition that a party opposing an ALJ's conclusions of law must cite in its exceptions the legal authority which forms the basis for its exceptions. Winfield urges that Rahway failed to offer a single authority in support of its exceptions but, rather, merely made blanket assertions that the ALJ was incorrect. Such assertions, it maintains, are insufficient to provide the foundation for reversing or modifying the ALJ's decision. (Winfield's Reply Exceptions at 1-2) Winfield also objects to Rahway's challenge to the ALJ's factual findings and credibility determinations, since Rahway failed to provide transcripts to the agency, as required by *Matter of Morrison,* 216 *N.J. Super.* 143 (App. Div. 1987), to allow the Commissioner to evaluate the correctness of its assertions in this regard. Winfield asserts that Rahway apparently wants the Commissioner to reverse the ALJ's decision based upon "paraphrased and isolated statements" advanced by its expert witness at hearing. Winfield maintains

that, without review of the entire transcript, including numerous contradictions of this expert's testimony revealed in cross-examination, "the Commissioner has no way of knowing that many of the statements provided by Rahway's expert lacked any meaningful evidential support." (Winfield's Reply Exceptions at 3)

Substantively, in response to Rahway's exception advancement that the ALJ's order failed to maintain racial stability, Winfield warrants that such a proposition "is false and against the clear weight of credible evidence presented at the hearing." (*Id.*) It argues:

> At the hearing, Rahway's expert relied upon a study that defined what is meant by a "balanced high school." Dr. Ferguson pointed out that the racial composition of Rahway High School is currently "in balance" (Exhibit R-1, p. 6). In her report, Dr. Ferguson cited Gray-Little and Carels' definition of a balanced high school as "40-60% of the school's population the same as the student's race" (Exhibit R-1, p. 9). Dr. Ferguson admitted that the racial balance of Rahway would remain within the 40% to 60% range with or without the Winfield students in its population (Ferguson – Cross, August 19, 1999, p. 17).*** Dr. Ferguson also agreed that the only way this balance could be disrupted would be by Rahway's own enrollment fluctuations (Ferguson – Cross, August 19, 1999, p. 17) Accordingly, Rahway's own expert and sole witness admitted that "racial balance" really was not at issue in this case. (*Id.* at 3-4)[1]

Further, Winfield advances, the ALJ, after acknowledging the realities and pitfalls of racially imbalanced schools, and exhaustively examining existing case law where such balance issues were critical in denying severance, determined that this particular concern did not come into play in the within matter, stating:

> It is difficult to deny severance in the present matter in light of the statute's preference for sending district choice absent evidence of racial concentrations like those described in *Englewood* and *Belmar*.

---

[1]Although Winfield's reply exceptions stated that, because it was using statements contained in Dr. Ferguson's cross-examination as a part of its argument, a copy of the transcript was being forwarded to the Commissioner with the hard copy of its reply exceptions, the referenced submission filed with the Commissioner did not include any transcripts.

> The percentage of minority students attending Rahway High School, currently 55%, cannot be characterized as imbalanced, particularly when compared to the obvious imbalance in Dwight Morrow (82.2%) and Asbury Park (83%). Further, Rahway's expert testified that any school between 40% and 60% non-white is "in balance." [Initial] Decision, pg. 41. (Winfield's Reply Exceptions at 4)

Winfield, therefore, contends that given the within record lacks any proof in substantiation of Rahway's contention of racial imbalance, its exception in this regard should be disregarded.

Winfield next states that it finds Rahway's exception with regard to "symbolic loss" perplexing, to say the least. While readily conceding that the ALJ correctly found that there was no objective evidence presented to establish any actual or potential psychological impact on Rahway minorities as a consequence of losing Winfield white students, Rahway contends that the ALJ "should have accepted its expert's speculation that severance *could* adversely impact Rahway students." (*Id.* at 5) (emphasis in original) Winfield advances that absent some objective proof tending to support its expert's conclusory statements which, it avers, Rahway had every opportunity to proffer but failed to do so, the mere "opinion" of this individual cannot serve to discredit the ALJ's ruling which is well supported in the record and case law. (*Id.*)

Responding to Rahway's argument that severance should be denied because Kenilworth is less diverse than Rahway and, therefore, Winfield students would not receive a culturally diverse education, Winfield avows that such a contention is categorically untrue. As recognized by the ALJ and fully evident in the record, it advances, "Kenilworth has a substantial minority population that comprises approximately 20% of its total student body." (*Id.* at 7) Winfield points out that the ALJ thoroughly and carefully addressed this very issue, in light of current case law stating:

> What distinguishes the proposed move of Merchantville students from Pennsauken to Haddonfield in *Merchantville* from the situation in the extant case is that here the proposed **new receiving district is diverse, just not as diverse as the current receiving district.** In *Merchantville*, the proposed receiving district was *not at all* diverse (described as "virtually all white" by the State Board [at 15]), and the current receiving district had a minority high school population of 25%.
>
> Thus the facts are clearly distinguishable on the educational impact issue. What *Merchantville* stands for is the proposition that a racially diverse environment is the preferred environment and I agree. **The mere reduction in the degree of diversity may or may not be a negative impact in a vacuum, but there was no evidence before me that when the new receiving district is also diverse (and apparently more diverse than the Winfield community) the negative impact is substantial.**
>
> I agree that severing a send-receive relationship with a diverse educational community to enter a relationship with a non-diverse educational community would result in a substantial negative impact on educational quality. I cannot, however, from the evidence before me, conclude that the proposed severance here would result in such a substantial negative impact.*** [Initial Decision], pp. 22-23.
>
> (*Id.* at 8; bolding emphasis in original)

Notwithstanding Rahway's unsupported declarations to the contrary, Winfield proffers, Kenilworth, where one out of every six students is from a different cultural, ethnic or religious background, would provide Winfield students with a very diverse education, and, therefore, Rahway's "specious" exception should be dismissed as meritless. (*Id.* at 8-9)

Finally, Winfield categorizes Rahway's last exception argument as "nothing more than a blanket statement that the Court was incorrect," which does not rise to the level of an exception. Because, it advances, at no time has Rahway persuasively established that any substantial negative impact would inure as a result of severance, Winfield urges that the Initial Decision be adopted. (*Id.* at 10)

Upon his careful and independent review of the record, including the exception submissions of the parties, the Commissioner affirms the conclusion of the ALJ that the

termination of the sending-receiving relationship between Winfield and Rahway will not result in any substantial negative financial, educational or racial impact and, therefore, severance must be granted pursuant to *N.J.S.A.* 18A:38-13. In so determining, the Commissioner concurs with the ALJ that it is uncontested in the record that the severance of the sending-receiving relationship would have no substantial financial impact. (Initial Decision at 19-20) Similarly, the Commissioner is persuaded, for the reasons outlined by the ALJ in his decision, that the requested severance will not result in a substantial negative impact on educational quality for either Rahway or Winfield students.

The pivotal issue in this case is whether negative racial impact arising as a consequence of a potential severance is "substantial" so as to defeat Winfield's application for severance. Rahway's exceptions dispute: 1) facts and conclusions of the ALJ with respect to the psychological effect that withdrawal of the white Winfield students could have on the remaining black students; 2) his finding that decrease in the white population at Rahway would not seriously affect the racial balance of Rahway; and 3) his finding that there was no evidence that, when moving to a receiving district which is also diverse, any negative impact is substantial. Rahway's exceptions request the Commissioner to overturn such determinations, claiming that they are belied by the testimony of its sole witness, Dr. Judith Ferguson, testimony to which, Rahway advances, the ALJ obviously failed to ascribe the proper weight and credence. However, the record before the Commissioner does not include transcripts of the five days of OAL hearings in this matter. It is axiomatic that challenges to the factual findings predicated upon testimony and resultant credibility determinations made by an ALJ require the party to supply the agency head with the relevant and necessary portion of the transcript. *See Matter of Morrison*, *supra*, at 158 (App. Div. 1987). Thus, without the ability to conduct a pertinent

transcript review from which to draw his own conclusions, the Commissioner defers to the determinations reached by the ALJ who was in a position to hear and adjudge the credibility of witnesses. *See Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976) Upon his full review, the Commissioner determines that such findings and conclusions of the ALJ are well grounded in the record and such record, additionally, does not provide any cause to challenge the weight ascribed by the ALJ to the testimony of Rahway's expert. Consequently, Rahway's exception challenges to credibility assessments made by the ALJ and the factual findings predicated thereon, are rejected as being without merit.

The Commissioner finds the ALJ's analysis of the racial impact issue, wherein he thoroughly reviewed the governing case law (Initial Decision at 23-37) and applied its principles to the particular facts and testimonial and evidentiary proofs advanced by the parties in this matter (*Id.* at 37-42), to be comprehensive and cogent. The ALJ recognized that "severance here would result in an approximately 1.9% decrease in the proportion of white students attending Rahway and a gross percentage decrease in the overall white student population of 7.9%" (*Id.* at 39), statistical changes which, in and of themselves are not significant, and ones which, according to its own expert, would not leave Rahway a racially out-of-balance school. (*See* Initial Decision at 41.) After fully considering the State Board's pronouncement in this connection in *Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County,* decided by the State Board January 7, 1998, wherein it stated at 7:

> we***reject the view that a statistical change in the racial composition of the current receiver is alone dispositive of whether a significant negative impact will result from severance. *Englewood, supra.* Rather, as mandated by the statute, it is imperative that the

> significance of the statistical change in a particular case be evaluated under "all of the circumstances"

the ALJ determined that, under the totality of the circumstances established here, this matter was clearly distinguishable from *Englewood, supra, Merchantville, supra,* and *Belmar, supra,* and he concluded that no *substantial* negative impact has been demonstrated here.

That some impact on Rahway and Winfield, both positive and negative, will follow from termination is a proposition implicitly recognized. However, the operative language of the controlling statute, *N.J.S.A.* 18A:38-13, requires that the Commissioner, in making a determination on a petition to terminate a sending-receiving relationship, shall grant the requested relief if no *substantial negative impact* be found to result. Also particularly pertinent here is the State Board's clarification of the allocation of the burden of proof in these matters:

> [W]e find that the initial burden of production on the petitioning party may be met by production of a feasibility study as required by the statute and the submission of appropriate proofs as to where its children are to be educated upon severance of the sending-receiving relationship. *See Absecon Bd. of Ed. v. Pleasantville Bd. of Ed.,* decided by the State Board of Education, October 7, 1988. Obviously, the feasibility study must address, at a minimum, all of the areas specifically set forth in the statute, and petitioner must establish in the proceedings the factual basis underlying the study so as to withstand challenge by the party contesting termination. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with evidence that termination will result in a negative impact.***
>
> The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the petitioning party. However, where a petitioner has met its initial burden of production in proceedings under *N.J.S.A.* 18A:28-13, ***the claim by the respondent that termination will have a substantial negative impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting that claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result.

(*Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County,* State Board of Education decision on motion, decided on Sept. 7, 1990, at 5-6)

The Commissioner finds, as did the ALJ, that Winfield has fulfilled its responsibility pursuant to the State Board's directive. On the other hand, the record is devoid of competent, credible evidence to substantiate the allegations and apparent speculations of Rahway and its expert that substantial negative impact will ensue from the granting of severance and, thus, the Commissioner concludes that Rahway has failed to meet its burden in this regard. Consequently, absent a showing of substantial financial, educational, or racial negative impact herein, the Commissioner is required to grant the requested severance.

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons expressed therein. Winfield's application for severance of its sending-receiving relationship with Rahway is hereby granted, subject to its entering into a new sending-receiving relationship with Kenilworth for a minimum duration of five years. Withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September 2000.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 02 2000

Date of Mailing: MAR 02 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

77-00

IN THE MATTER OF THE TENURE	:	
HEARING OF STANLEY K. UTLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

March 2, 2000

AGENCY DKT. NO. 42-2/98

IN THE MATTER OF THE TENURE	:	
HEARING OF STANLEY K. UTLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

For the Board, Thomas W. Sumners, Jr., Esq. (Sumners, George & Dortch)

For the Respondent, Arnold M. Mellk, Esq. (Wills, O'Neill & Mellk)

This matter having been opened before the Commissioner of Education on February 19, 1998 through certification of tenure charges of conduct unbecoming a tenured teacher by the Board of Education of the City of Trenton, by virtue of respondent's indictment for (1) possession of a controlled dangerous substance with intent to distribute and (2) possession of a controlled dangerous substance in a quantity of one-half ounce or more but less than five ounces; and

Prior to submission of respondent's Answer, this matter having been held in abeyance as of March 3, 1998, upon agreement of the parties, pending resolution of the criminal charges against respondent; and

The Board, by letter dated January 19, 2000, having notified the Commissioner that respondent was found guilty, on April 23, 1998, of possession of a controlled dangerous

substance (cocaine) and possession with intent to distribute, and providing the Commissioner with a copy of the Certified Judgment of Conviction; and

Respondent having been notified by letter dated January 27, 2000[1] that, inasmuch as the charges filed by the Board relate exclusively to his indictment for the offenses specified above, and in recognition of his conviction with respect to both counts, the Commissioner would consider respondent's arguments as to why he should not be found guilty of conduct unbecoming a teaching staff member so as to warrant his dismissal from his position as an elementary school teacher with the Board; and

Respondent having failed to provide any such argument in his defense; and

The Commissioner's review of the tenure charges certified against respondent by the Board, the statement of evidence in support of those charges and the Certified Judgment of Conviction indicating that respondent is guilty of possession of a controlled dangerous substance (cocaine) and possession with intent to distribute; and

The Commissioner finding that respondent's actions constituted conduct unbecoming a teaching staff member sufficient to warrant his dismissal from his tenured position; now, therefore

IT IS ORDERED this 2nd day of March 2000 that summary judgment shall be granted to the Board, and that Stanley K. Utley shall be dismissed from his tenured position as

[1] The return receipt (Z-451-490-310) indicates that respondent's counsel received said notice on January 31, 2000.

an elementary school teacher in the Board's employ as of the date of this order[2]. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[3]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 07 2000

Date of Mailing: MAR 07 2000

[2] Nothing herein shall be construed as creating an entitlement to employment beyond the date of any order of forfeiture, entered by a court of competent jurisdiction, but not reflected in the record before the Commissioner in this matter.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

79-00

STEVEN COHEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured teaching staff member appealed the Board's nonrenewal of his contract as Head Boys Soccer Coach for the 1999-2000 school year.

The ALJ determined that the Board's action in not renewing petitioner's coaching contract was not in violation of statute or implementing rule.

The Commissioner adopted the Initial Decision for the reasons expressed therein.

March 6, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4325-99

AGENCY DKT. NO. 87-4/99

STEVEN COHEN,

Petitioner,

v.

BOARD OF EDUUCATION OF

THE TOWNSHIP OF JACKSON,

Respondent.

Brent D. Miller, Esq., for petitioner (Starkey, Kelly, Blaney & White, attorneys)

Francis J. Campbell, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: December 6, 1999 Decided: January 14, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Steven Cohen, petitioner, alleges that the Jackson Township Board of Education violated State education law and regulations when it failed to renew his contract as head soccer coach for the 1999-2000 school year. The petitioner seeks an order of the Commissioner of Education (Commissioner) reinstating him to the position of head coach, awarding back pay and providing such other relief as the Commissioner may determine proper.

The matter was opened before the Commissioner of Education upon filing of a verified petition of appeal. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The matter was heard on November 19, 1999 at the Office of Administrative Law facility, Trenton. The parties timely filed post-hearing submissions and the record was closed on December 6, 1999.

ISSUES

This tribunal was asked to determine whether Cohen's nonrenewal was arbitrary, capricious or in violation of statute or administrative code.

PAROL AND DOCUMENTARY EVIDENCE

Steven M. Cohen

The petitioner testified that he has been at Jackson Memorial High School for eleven years as a physical education teacher. He has also served as a coach. He has taught and coached at Dayton and Matawan High Schools. His soccer coaching began in 1973.

At Jackson, he began as girls' junior high school coach. In or about 1992 there was a need at the high school. Athletic Director Reider approached the petitioner concerning a coaching position at the high school.

The petitioner says the former coach had discipline problems as well as problems with parents. The petitioner took the high school position and immediately set up a disciplinary code. Profanity was banned and a good sportsmanship policy was created and enforced.

The petitioner was always on an annual contract which was usually executed in June. His 1998-99 contract was for approximately $4,900. If he had a received a 1999-2000 contract, it would have been for approximately $200 more.

It was the petitioner's practice to begin the year with July practices. His teams participated in a summer tournament. There was usually a late summer pizza party at the high school. Meetings and practices were held regularly, even on some weekends. The team played an 18-20 game season, half of which were away games. The petitioner regularly wrote to college coaches on behalf of seniors and made telephone calls on the same subject. The petitioner states he had good rapport with students, parents and coaches. He had a particularly good relationship with administrators. In or about late August 1998 the son of a colleague and former coach tried out for the team. The petitioner regarded this situation as sensitive in that the colleague was trying to get back his coaching job. The witness assigned the son to others to coach and evaluate. He took their recommendations and did not select the colleague's son to play in goal.

He also had to decide which young men would play junior varsity (JV) and which would play varsity. He put the colleague's son on the junior varsity squad. All JV squad members knew they could work their way onto the varsity team.

On a certain occasion, the colleague accosted Cohen in a parking lot. Cohen stepped out of his truck and the other man assaulted and struck him. At that time, the colleague allegedly said he would use his influence to "get" Cohen's job. The witness also stated it is common knowledge that the colleague and the Board president's brother-in-law were friends. In addition, the colleague and the Director of Athletics were friends.

Cohen offered to resign. Superiors advised him not to resign. They said they would take care of the matter in-house. The petitioner rejected a complaint to police because both he and the other teaching staff member would have had to be suspended. In addition, the case would reduce to a matter of one's word against the other's.

Before Thanksgiving, the Director of Athletics called him in and told Cohen his contract would not be renewed. The Director indicated that it was not his decision. Cohen asked if it were all right to go to the Director of Personnel and the Director agreed. A meeting was set up quickly. In early December the petitioner met with the Director of Personnel and the high school principal. According to Cohen, they both indicated that it was the Director of Athletics' recommendation that cost Cohen the contract. He then went back to the Director of Athletics.

The Director said that no matter what happened, his hands were tied. He also refused to write a letter in support of Cohen, although they did discuss trying to get Cohen one more year. The idea was to bring in a new coach, have Cohen work with the person to bring him or her along and then resign with dignity at the end of the season. This did not come about.

The petitioner identified exhibit P-1, a memorandum from the Director of Athletics to him concerning Cohen's improvement plan. Six questions are posited:

1. How will you deal with the number of parent "complaints"?

2. The Boys Program "seems" to be split into two groups. How will you rectify this to unify the program?

3. How will you gain the respect of the returning players?

4. Describe motivational techniques you will use to raise the level of play and get the athletes to work in the off season.

5. What steps will you take to insure the competitiveness of the program?

6. How do you plan to deal with the pressure of high expectations of the parent's and fans?

[*sic*].

Cohen stated concerning parent complaints that they always exist, usually if a parent's son is not being played. Concerning question 2, he denied that there was any split in the way he treats or assigns players. The young men are simply assigned in accord with their abilities. There are freshman, JV and varsity squads.

Concerning gaining respect of returning players, Cohen said he has always had it. Concerning questions 4, 5 and 6, Cohen pointed to his response (P-2) to the Director dated January 12, 1999. In this memorandum he elaborates on the answers to points 1, 2 and 3 and concerning points 4, 5 and 6 he elaborates even more. The gist is that Cohen believes he has each of the concerns under control and has made plans to address each point.

The petitioner met on January 15, 1999 with the high school principal and the Director of Athletics concerning his coach's evaluation report of that date (P-3). His annual evaluations have always been positive. Exhibit P-3 says he needs improvement, but the witness contends that was because of one red card at an early tournament game and, further, that the card was provoked.

On page 2, the evaluator states:

> Although, all of the above items but one were satisfactory except sportsmanship, they represent only the logistical end of coaching but as the attached job description shows there is more to coaching than just the nuts and bolts. [*sic.*]

The petitioner knows the job description and believes he has lived up to it. Director of Athletics Carretta found his responses lacking, but gave no details to the petitioner.

On or about January 20, the petitioner met with his union representative, Anthony Bombaci, the high school principal, Harry Reider and Director of Athletics Carretta. The administrators expressed that they were extremely sorry, but would not recommend that Cohen be given another contract based in the main on his responses to Carretta's memorandum (P-1). Cohen asked what more he could do. The response was that parental problems existed now and Cohen indicated he would meet with parents. The administrators expressed the opinion that that should have been done before the date of the meeting. Cohen again offered to meet with the parents and was advised that it was too late.

Cohen further testified that the principal said he liked Cohen and, despite having said that he would not recommend Cohen for rehire, he wanted to think overnight about the matter. On the morning of January 21, 1999, Reider conveyed to Cohen that he was sorry, but would not recommend reappointment.

The petitioner identified his rebuttal to the evaluation (P-4). He also identified a letter of support from a coach at another high school (P-7) and thank you notes from parents that he had received at the end-of-year soccer banquet (P-8, P-9).

Cohen stated he was not present at the January 1999 Board meeting because he was told nothing about it. On February 23, 1999, a second Board meeting was held at the insistence of Cohen's union. Cohen attended with a union representative and made a presentation. The Board said it would consider what he had said. Cohen later received notice from Superintendent Elms that the Board had decided not to offer him a contract.

Cohen also testified that, before the meeting, a Board member said that he was "in your corner," but would abstain from voting because of personal friendship with Cohen. Later in the year at a sports banquet, a Board member told Cohen that he and all Board members had received materials from a man named Costa, the same person who had earlier vowed to get Cohen's job and who had been involved in an altercation with Cohen in the school parking lot.

Cohen also testified that in his meeting with Superintendent Elms and Director Bygott, he offered to resign if it would help the school. Elms and Bygott had both said that he should not resign because then "Costa would win out." Nearer to Thanksgiving, Cohen met with Carretta and Carretta suggested that it would be better if Cohen resigned. Cohen was unwilling at that time to resign. At some point, Cohen had asked for just one year so that he could go out with dignity. So far as he knows, there was no reason for his nonrenewal other than political considerations. There were no parental complaints except for parents who always complain if their son is not being played. Two other teachers as well as Costa complained about their sons not playing or not playing at the varsity level. On one occasion Carretta told Cohen that a teacher named Garbos had come in with a complaint, but it was "all taken care of." Cohen expressed his respect and friendship for Principal Reider and Athletic Director Carretta.

When asked about the responses (P-2) to Carretta's memorandum, the witness conceded that he did not mention parental complaints dealing with a boy not playing or not playing at a higher level. A teacher named Pepe never approached Cohen with a complaint. He did call Cohen about his son trying out for the team. Cohen had had two weeks of tryouts. Each young

man trying out for the team received a packet of information which included instructions as to when to appear. Pepe wanted special consideration for his son because the son was playing baseball at the time. Cohen advised Pepe to get the young man to some of the tryouts. He told Pepe, "I'll work with you." The young man actually was trying out for the freshman team and came to only one tryout. The decision was made by the freshman coach, not Cohen.

So far as Cohen knows, the confrontation with Costa was the only problem between them. He recalls no statement by a teacher named Garbos to the Board that Garbos was originally one of Cohen's most vocal critics. Cohen concedes that in evaluations before exhibit P-3 it was usually suggested that he attend more clinics and try to alleviate any red cards (ejections from the game for commission of fouls). This was an ongoing part of his Professional Improvement Program. Cohen stated he does not consider an illegal tackle, drawing a yellow or warning card, necessarily a sportsmanship problem.

The petitioner believes Costa exerted influence over the situation. However, Costa is not a coach now. He believes Costa has resigned but did not want to resign.

Cohen acknowledged an excerpt from Board minutes dated January 26, 1999 supplied in answer to interrogatories. It clearly shows Board approval by a vote of 6-0 of Cohen's nonrenewal. In response to another interrogatory, Cohen stated he did not receive a letter from the superintendent dated February 24. However, when shown a copy of that letter, Cohen acknowledged that he had seen it. It contains official notice of his nonrenewal. He knew from his union representative that he was not renewed even before the letter from the superintendent. Cohen never requested reasons in writing for his nonrenewal. He does recall filing a grievance. He had the superintendent's letter (P-6) referring to reasons in Carretta's evaluation. He began the grievance process at the end of March 1999. A settlement offer was put forward but not accepted. The grievance was denied and Cohen was so advised.

Cohen believes his friends, particularly the Director of Athletics and the high school principal were under pressure from above generated by Costa and presumably through Board members. He knows that Costa was forced to resign as boys' soccer coach sometime in the early 1990s. He then became a girls' soccer coach and has since resigned that position. Cohen

believes Costa is behind his problems. Costa has been campaigning for years to get back the boys' coaching position.

Joel Menzzopane

Joel Menzzopane, father of a soccer player and a soccer fan, testified as to Cohen's character and ability as a coach. He believes Cohen to be fair and reasonable and to make good use of discipline. The witness represented that the boys' soccer program had a bad reputation until Cohen took it over.

In September or October 1998 the witness went to the Director of Athletics in support of Cohen. The witness also stated that his son is a goalie and has just completed his last high school season, a season not under Coach Cohen. The witness stated that coaching this year has been good, that goalies are rotated and that the team has had a good year. The witness is a coach for the Jackson Soccer Club, a private organization that fields a team of seventeen- and eighteen-year-old players.

Michael J. Tomaino

Michael J. Tomaino knows Cohen as a colleague. Tomaino was a teacher and is now a guidance counselor. He has been a soccer coach. Approximately two years ago he received a telephone call from a teacher named Pepe. Pepe represented that the family was on vacation during soccer tryouts. Pepe had called Cohen. The witness suggested that Pepe get his son to the school before tryouts. The witness saw the younger Pepe only once and he believes that was on the first day of tryouts. The young man was not recommended for the team.

How many young men make the roster each year varies. It would not be unusual if forty to forty-two boys tried out and twenty-two to twenty-five boys made the team. It comes down to a "moral" decision. Some boys came to all eight days of tryouts and were cut. It would not be fair to accept the younger Pepe who had attended only one day of tryouts.

The witness was freshman soccer coach for three years. Prior to that, he coached at the middle school level. This year he is assistant coach of boys' varsity soccer. In the 1998 season, his team did not practice at the same time as the varsity. In 1998 he had some, but not much, contact with Cohen. The present head coach is Fred Napoli. Napoli's knowledge of the game is good and the team has had a successful year. Napoli came from employment in Elizabeth and has both high school and college soccer coaching experience. As a coach, he sees some value in the rotation of goalies.

Anthony Bombaci

Anthony Bombaci is a teacher in Jackson. He knows Cohen as a colleague. Bombaci is the Jackson Education Association building representative for the high school. In January 1999 he attended a meeting with the high school principal for Cohen. Director of Athletics Carretta and High School Principal Reider were present. They went over Carretta's evaluation of Cohen and reviewed Cohen's responses. The witness suggested that Cohen be given one more year.

The witness has seen Cohen as a wrestling coach and believes he interacts well with pupils. He believes that Cohen is a good person and a good coach. He also knows Reider was an excellent wrestling coach and was, for a time, Director of Athletics. He assumes Reider was knowledgeable about athletics in general.

The witness still coaches strength and conditioning and also competitive power lifting. After the 1998 season, the recommendation as to who would coach in 1999 would have to come from the athletic director, go through the building principal and then go to the central office. The athletic director is Carretta, a former coach, the principal is Reider, a former coach and athletic director, and the director of personnel, Bygott, is a former high school principal.

Edward Garbos

Edward Garbos teaches mathematics at the middle school. He is currently the liaison between middle school coaches and Carretta. He coaches girls' softball and is a volunteer boys' freshman soccer coach. He has been a teacher and a coach for twenty-nine years. His children

have played for Cohen and he believes there is no finer soccer coach. He expressed this opinion to Carretta and to the Board. He called parents on Cohen's behalf and assured a good turnout at the Board meeting at which Cohen's renewal was considered.

Garbos testified concerning Costa's attendance and loud remarks at certain soccer games. Upon hearing a rumor that Cohen would not be renewed, the witness immediately went to Carretta on Cohen's behalf. The witness believes that Costa and the school principal are close friends and he believes that Costa and a Board member are close friends.

At the February 1999 meeting, the witness spoke for Cohen. He also spoke to Pepe that night. Pepe believed his son should have been kept on the team as "a professional courtesy." He has heard occasional parent laments along the sidelines, but nothing serious. At some point before the February Board meeting, the witness heard Costa make a statement in a local market to the effect that "we got rid of Cohen." Garbos stated that he apologized to Cohen and also to parents to whom he had made comments about Cohen.

Steven J. Bado

Steven J. Bado has been a special education for six years in Jackson Township. He has been a junior varsity boys' soccer coach for four years. For the last two years he has also been assistant girls' and boys' middle school coach. He has worked with Cohen and admires Cohen's abilities.

In August 1998, he saw the Costa-Cohen confrontation. Cohen had announced the 1998 starting lineup. Costa approached Cohen about this and Cohen told Costa to set up a meeting. Costa's response was an obscenity. Cohen got out of his vehicle and Costa struck Cohen. Cohen got back into his vehicle and left the scene. There was a further exchange between Costa and the witness. A colleague named Wilson got between them and ended the exchange.

The witness says he was called by Carretta about playing Costa's son in a middle school game. He did not receive the call directly and had to return Carretta's call. He was informed that the call concerned Costa's son. The witness told Carretta he was playing a better player.

Carretta said that Bado had to play Costa's son or it would harm Cohen. Carretta allegedly told Bado that he had had calls from two administrators and a Board member concerning the Costa boy. Bado also testified that, as part of his involvement as JV coach, he confers regularly with the head coach as to the placement of players. He controlled his own JV team, but had no input concerning the varsity team. Head Coach Napoli makes those decisions.

The petitioner rested and the Board moved to dismiss. The petitioner survived the motion and the Board presented its case.

Ralph G. Carretta

Carretta has been in Jackson Township for seventeen or eighteen years, beginning as a physical education teacher. He has coached baseball, basketball and other sports. He served as supervisor of physical education and as high school vice principal prior to his service as Director of Athletics. He has had experience in other districts.

The witness has known Cohen for twelve or more years. They worked together for the recreation department and worked together in Little League. They have a good working relationship and friendship.

Evaluations of coaches were instituted in or about 1994. The witness prepared exhibit P-3, Cohen's evaluation dated January 15, 1999. He noted there was a need for improvement. In his opinion, this is an unsatisfactory evaluation. He believed players were losing enthusiasm. Parent concerns were being expressed more frequently and he had a fear of injury in the 1999 season because of "turmoil" surrounding the team. Carretta wanted a new start.

Before Carretta made a recommendation not to renew Cohen's contract, but after he spoke with Cohen, he received the petition from players in support of Cohen's renewal. Some parents called him by telephone and instructed him to remove their sons' signatures from the petition. Other players expressed dismay and the team captain was quite frank in expressing in the opinion that a change was needed.

Carretta's opportunity to speak to Cohen came with review of Cohen's Professional Improvement Plan. Carretta had no desire to see Cohen suffer publicly, yet wanted to rectify the situation he perceived. It was an agonizing decision. He had to weigh the needs of the team and program against what was good for Cohen. In recent years he had discussed problems, but not nonrenewal, with Cohen. There was no one precipitating incident here. He and staff talked about all aspects of the soccer program at all levels. They looked at needs and future direction. This occurred at approximately Thanksgiving time 1998. Carretta then called in Cohen and advised Cohen that Carretta would recommend that Cohen's contract not be renewed.

Garbos came to Carretta and spoke about the program, mainly Garbos' son, but also about parents' sideline complaints. Carretta said that these comments were better directed to Cohen. A few weeks later, Garbos said to Carretta, "I think I have it worked out." Concerning Mr. Pepe, the witness agreed with Michael Tomaino's testimony about Pepe and Pepe's son.

Costa teaches history at the high school and was boys' soccer coach before Cohen. At that time boys played in fall and girls played in spring. About six or seven years ago, Costa "lost" the boys' soccer team assignment. The witness is not sure whether Costa was nonrenewed or resigned. There had been turmoil on the field and the administration believed it was time for a change. The witness knows Costa well and expressed the belief that Cohen and Costa are personality opposites. Costa is volatile where as Cohen is thoughtful and works cooperatively.

Carretta had some concerns in each of the areas raised in his memo of January 6, 1999 (P-1). He also closely read Cohen's responses (P-2). Some of the questions Carretta raised are generic and would be in any coach's plan. Pepe, Costa and Garbos had all come to Carretta with complaints. These were all parent staff members. Other parents complained to him and other administrators. When he received a complaint, he usually suggested a meeting between the coach and the parent. Parents usually backed away at this suggestion. The universal answer was no, it will hurt my son's chances of playing. Parents prefer to speak to athletic directors and principals. They fear that their children will receive less playing time if they speak directly with a coach.

A Mrs. Verdi complained to him about her son's playing time, the direction the team was going, an incident in which players wore pacifiers the day after a loss (a player idea) and other concerns. A Mr. Holman spoke to Principal Reider. Holman's son spoke to Carretta. Both were concerned with the team's competitiveness failing off. A Mr. Thigpen complained to Principal Reider. A Board member, Mr. Krakauer, expressed concern with the direction of the program to Carretta. Krakauer believed the program was not working at its optimum level.

In Carretta's second point in P-1, he mentions a "split". There seemed to be groups or camps within the team having to do with the Jackson Eagles, a nonschool team for seventeen-and-eighteen-year-old players. Carretta saw the need to get all returning players on the same page and get them to ignore discussions in the community going on about bringing the team back to its former level of success.

Carretta believes Cohen's responses avoid some of his concerns. Cohen ignored or waited too long to address parent concerns. Carretta's general reaction to Cohen's response was that they simply did not agree. Cohen was not seeing problems or the magnitude of problems.

Carretta and other administrators held a series of meetings after seeing Cohen's responses. They decided that change was needed or the situation would get worse for players. Over a period of two or three months they looked for a way to better serve players, reassure parents and protect Cohen. Among the things they considered were an additional year for Cohen, a better improvement plan and a voluntary resignation. The meeting of January 20, 1999, referred to above, was for the purpose of discussing Cohen's evaluation. That broke down, however. The focus turned to consideration of a fair "out" for Cohen. Reider said he would explore the possibility of one year. Reider also agreed that he and Cohen would meet the next day. Later on the 20th, Reider and Carretta met. They discussed the problem generally and concluded that one more year would not work, one more year would probably put the program at risk and one more year would certainly expose Cohen to failure.

The witness also testified concerning the testimony of other witnesses and Costa's alleged influence. Carretta stated that Costa disrupted the process, but did not have any influence. Costa was not renewed as head girls' soccer coach. This was Carretta's recommendation as well. In

both instances, the factor uppermost in his mind was not to put someone in charge of a program who would have problems that could affect kids badly.

Carretta concedes that Cohen improved the program Costa left. In his early years, he had success with the team and was a good role model. More recently, Carretta had "inklings" from parents and players of potential problems. Four or five varsity players asked to speak to him privately and expressed concern with some problems. Players who believe they are not getting enough playing time are usually unhappy. He did not perceive that in the group of players that spoke to him. Carretta saw but did not receive the petition circulated by some players. Mr. Garbos showed it to him or at least told him about it. Carretta may or may not have told Cohen about players' complaints. He is sure that he did not mention the Garbos conversation. Carretta agrees that Cohen handled the Pepe matter properly. The pacifiers, even if used as a motivational tool and even if the players came up with the idea was not appropriate in Carretta's opinion. Carretta believes it was an assistant coach, not Cohen who approved the idea.

When Cohen relayed the decision to Cohen that Cohen would not be renewed, he did not use the phrase "the powers that be." Carretta also recalled that there was nearly daily communication between Cohen and him from 1993 forward. Program concerns were discussed regularly. Cohen knew about concerns and complaints expressed by parents. By January 1999, Carretta believes Cohen knew about most if not all parent concerns. The so-called split involving feeder programs had been discussed.

Carretta believes Bado was being put under pressure from Costa. Carretta did tell Bado not to draw any fire on Cohen. He does not believe that Costa's son should be punished for Costa's mistakes. Both Cohen and his assistant coach said that the Costa son was second on the depth chart, but close to number one. Carretta believes that when the son was moved to JV, it appeared to be a vindictive act. Principal Reider expressed the opinion that it looked like a vindictive act as did Board member Krakauer. Bado apparently put the Costa boy farther down the depth chart on the JV roster.

Francis X. Bygott

Bygott is Director of Personnel for the Jackson District. From 1980-1995, he served as high school principal. He has also been a middle school principal, a vice principal, a teacher and a coach. As high school principal, he was involved in coach selection. He knew both Cohen and Costa.

Concerning the selection process for the boys' soccer coach in 1999, he attended several meetings with Carretta, Reider and, occasionally, Superintendent Elms. There were many discussions about the program going in the wrong direction, low motivation on the part of players and parent complaints. It seemed clear to the witness that a coaching change was needed.

Near the end of the 1998 season, the witness became involved. On January 20, 1999 a meeting was scheduled among Cohen, his Association representative, Carretta, Reider and the witness. Cohen and his representative were advised that they would have an answer in a day or two. Following the meeting, at approximately 3 p.m., the witness met with Carretta, Reider and Elms in his office. The question of another year for Cohen was raised and the group discussed what that outcome might be. Reider and Carretta felt that the result would be more of the problems the program had experienced in the prior season. Reider said he would tell Cohen in the morning that Reider would not recommend Cohen's renewal. The superintendent's letter to Cohen was then written and mailed. The group had reached consensus.

Concerning statements made during the hearing about Costa's influence, the witness stated he knew that Reider and Costa were friends. Reider had a role in recommending that Costa not be renewed as girls' coach recently. Reider told Costa that Costa would either resign or he would be nonrenewed. That also was a consensus decision.

The witness identified an employee contract between the Board and Cohen dealing with the 1998-99 soccer season. It is the form usually used. It is signed by Cohen and the Board secretary. Under terms, the fourth is that either party may terminate the contract upon thirty days' notice. The decision not to renew Cohen was difficult. Cohen is a good person and is well liked by many people in the district. Problems with the program had to do with Cohen as a

coach, not as person. Decisions, however, must be made based on what is good for students. The information he was provided indicated the program was in trouble and that did not bode well for athletes.

Cohen came to see Elms and Bygott. Bygott said they would rely on the information they had received from Carretta and Reider. At no time did the witness say he would intervene on Cohen's behalf. It was his recommendation, based on Carretta's and Reider's information and input, that Cohen not be renewed.

FINDINGS OF FACT

Based on the testimony and other evidence presented at hearing, and having assessed the credibility of the witnesses, I **FIND**:

1. The petitioner is a tenured teaching staff member in the employ of the Jackson Township Board of Education;

2. The petitioner is also a coach, having served in Jackson Township as girls' junior high school coach and then moving to the high school to coach at the varsity level;

3. The petitioner and the Board always executed an annual contract concerning the petitioner's coaching duties;

4. The Director of Athletics raised several points with the petitioner during formulation of the petitioner's Improvement Plan;

5. The Athletic Director's evaluation of Cohen was largely but not completely positive;

6. A series of meetings and communications with the petitioner was begun almost immediately upon end of the 1998 soccer season;

7. Ultimately, the Director of Athletics, the Director of Personnel, the high school principal and the superintendent reached an agreement that, on balance, the high school soccer program would advance better with a new coach;

8. The petitioner was advised and was also provided an opportunity to meet with the administration;

9. The petitioner was also provided an opportunity to appear before the Board of Education on February 23, 1999;

10. The Board agreed with administration recommendations and decided by a vote of 6-0 not to renew the petitioner's coaching contract;

11. Contemporaneously with the above-recited events, a staff member and former coach named Costa was openly antagonistic toward the petitioner and the record indicates that Costa was involved in considerable "anti-Cohen" talk and activity in the community.

DETERMINATION AND ORDER

The record amply supports the last finding. The record does not show a connection between Cohen's nonrenewal and Costa's deplorable behavior. Under New Jersey law, the possibility of the existence of an event or act does not tend to prove its probability. *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 *F.*3rd 69 (3rd Cir. 1996). There is credible evidence that the administrators who ultimately made the nonrenewal recommendation to the Board of Education believed Costa disrupted the process rather than help it.

Cohen argued that Carretta and his superiors seemed to disagree as to who in the hierarchy created the impetus for nonrenewal. Cohen also suggests that complaints concerning him were insubstantial. Assuming, *arguendo*, these arguments to be correct, they fail to present the entire picture. The administrators, particularly Director Carretta, looked at the entire picture. This included much more than mere parental dissatisfaction which can be expected to crop up in

virtually in any cocurricular activity. And, while each parental complaint by itself may have been insubstantial, it was not wrong of the administration to look at the totality of these complaints. Significantly, the Athletic Director was also approached by varsity players, including the team captain.

Cohen asserts that it was more than a coincidence that his problems occurred in the 1998 soccer season. At the beginning of this season there was a confrontation between Costa and Cohen. At the end of the season there was a suggestion that Cohen resign. While there was some discussion about possibly extending Cohen's coaching contract one more year, that did not come about. Again, this concentrates on some parts of the picture, without acknowledging the whole.

The testimony of Carretta and Bygott was clear and was credible because consistent with common experience and common sense. No one in this case has suggested that Cohen is other than a fine and personable human being. The administrators were acutely aware of this as evidenced by their consideration of one more year for Cohen to coach. Their testimony bespeaks a desire to cushion the effects on Cohen to the greatest extent possible. The administrators also had a responsibility to the student athletes. The team had not been as successful under Cohen in the last two seasons as it had been when he first took the reins.

This is not an unheard of scenario in secondary schools. A person may be particularly personable and admired, yet not be a successful coach. And, sadly, at whatever level played, sports programs tend to be judged on the won and lost record. An organization such as a public school cannot choose its pool of talent, but it can choose its coach.

Cohen argues that the Board would have this judge believe that this case is about a well-respected soccer coach who was removed due to a number of trivial complaints from unidentified pupils and parents. Cohen argues that is simply not the case and I agree. The case is about a coach who had many fine qualities but who was not the best person for the job at a given time. I also agree with Cohen that no tenure rights attach to coaching positions, yet a coach may not be removed for arbitrary or capricious reasons. The facts simply do not support a conclusion that the Board's action was arbitrary or capricious. The short answer is that the Board accepted the

recommendation of its administrators and the administrators had sufficient information from which to conclude that the soccer program would benefit from new leadership.

School boards have always enjoyed broad discretion in decisions concerning the renewal, or not, of contracts of nontenured personnel including coaches and other persons involved in cocurricular activities. *Nello Dallolio v. Board of Education of the City of Vineland*, 1965 *S.L.D.* 18, 22. Teachers who serve as coaches and cocurricular advisors do not accrue tenure status in those positions. The case law is both clear and consistent: a school board is authorized to discontinue a coaching assignment at its discretion. *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School District*, 1971 *S.L.D.* 336, *aff'd* State Board of Education, 1974 *S.L.D.* 1376.

The Appellate Division of the New Jersey Superior Court has enunciated the same concept in the context of a board terminating the services of a nontenured teaching staff member. *Dore v. Bedminster Township Board of Education*, 185 *N.J. Super.* 447, 456 (App. Div. 1982).

I **CONCLUDE** that the Jackson Township Board of Education exercised its lawful powers to terminate the petitioner's assignment as coach of boys' soccer at the conclusion of the 1998 season. I **CONCLUDE** that the Board was in compliance with *N.J.S.A.* 18A:27-4.1 that requires the chief school administrator to notify the employee of the nonrenewal. I further **CONCLUDE** that, pursuant to *N.J.S.A.* 18A:27-4.1, a board may hire only persons recommended by the Superintendent of Schools. The record here is abundantly clear that the Superintendent of Schools did not recommend Cohen's renewal and that Cohen knew on January 20, 1999, that the superintendent would not do so. As the Director of Personnel testified, both he and the superintendent made clear to the petitioner that they would rely on the recommendation of the Athletic Director and the principal. It is not insignificant that the vote not to renew Cohen's contract was 6-0.

Finally, I **CONCLUDE** that there has been no violation of statute or code in this case. Therefore, I **CONCLUDE** that the petition is without merit.

For the reasons expressed above, it is **ORDERED** that the petition of appeal in this matter by Steven Cohen is **DISMISSED**.

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

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

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

JAN 14 2000 — Bruce R. Campbell

DATE — **BRUCE R. CAMPBELL**, ALJ

Receipt Acknowledged:

1/19/00 — D. M. Antanaitis/jr

DATE — DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 2000 — Barbara A Harnek

DATE — OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

Steven Cohen
Joel Menzzopane
Michael J. Tomaino
Anthony Bombaci
Edward Garbos
Steven J. Bado

For respondent:

Ralph G. Carretta
Francis X. Bygott

EXHIBITS

Petitioner's

P-1 Memorandum, Carretta to Cohen, Re: Improvement Plan, January 6, 1999
P-2 Memorandum in response, Cohen to Carretta, January 12, 1999, 3 pp.
P-3 Coaches Evaluation Report, January 15, 1999, 3 pp., with Head Coach Job Description, 2 pp.
P-4 Handwritten attachment by Steven Cohen, 2 pp.
P-5 Memorandum, Carretta to Cohen, Re: Evaluation Form, January 19, 1999
P-6 Letter, Elms to Cohen, January 20, 1999
P-7 Letter, Kmosko to Carretta, December 1, 1998
P-8 Photocopy of thank you note from soccer parents to Cohen, undated
P-9 Photocopy of thank you note from soccer parents to Cohen, undated

Respondent's

R-1 Employee contract between Jackson Township Board of Education and Steven Cohen for 1998-99, May 26, 1998

OAL DKT. NO. EDU 4325-99
AGENCY DKT. NO. 87-4/99

STEVEN COHEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 05 2001

Date of Mailing: MAR 06 2001

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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

SYNOPSIS

Petitioning Board contested respondent's conclusion that it is required to repay $153,238.60 as a result of a transportation department audit.

The ALJ determined that the Board improperly awarded a contract without competitive bidding to the Helfgott Group (the Helfgott contract) for a review of the District's transportation operations since the contract did not represent "extraordinary unspecifiable services" pursuant to *N.J.S.A.* 18A:18A-5a(2) so as to be exempt from the public bidding requirements of the Public Schools Contracts Law. The ALJ also determined that the Board improperly awarded a contract without competitive bidding to Dingman and James Auctioneers (the Dingman and James contract) to conduct two auctions to dispose of the District's fleet of buses since the services of an auctioneer do not fall within the "professional services" public bidding exception pursuant to *N.J.S.A.* 18A:18A-5a(1). The ALJ concluded that, pursuant to *N.J.S.A.* 18A:18A-46.1, respondent cannot recover the State aid disbursed in connection with the Helfgott contract ($7,075.50) because there is no evidence of bad faith or collusion on the part of the Board but that the expenditures derived from the Dingman and James contract are recoverable because *N.J.S.A.* 18:18A-46.1 does not reach violations made under the professional services exception to the bidding guidelines. Thus, the ALJ determined that the amount of State aid that the Board must return to respondent is $146,163.10.

The Commissioner affirmed the recommended decision of the ALJ for the reasons expressed therein and adopted the Initial Decision as the final decision in this matter.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4397-99

AGENCY DKT. NO. 5-1/99

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

Richard K. Sacks, Esq., for petitioner (Carluccio, Leone, Dimon, Doyle & Sacks, attorneys)

Terri A. Cutrera, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: December 10, 1999 Decided: January 21, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Lakewood Board of Education, petitioner, contests the conclusion of the Office of Compliance, New Jersey Department of Education, that it is required to repay the State $153,238.60 as a result of a transportation department audit conducted by the Office of Compliance. In accordance with Department guidelines, the petitioner initiated a Level I and a Level II review process before filing the present petition.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The matter was heard on October 21, 1999 at the Office of Administrative Law, Trenton, and additional argument was conducted on the papers. The record closed with the Department's last submission on December 10, 1999.

Lakewood asserts the matter arises from a transportation service audit in the period July 1, 1992 through February 28, 1997. Lakewood asserts considerable time elapsed before it was advised of the results. Upon first notice, Lakewood was advised that it would be required to reimburse $314,050.60. The district filed a request for a Level I review and, upon review, the amount was reduced to $198,535.79.

Lakewood then requested a Level II review and, as a result, the amount demanded was reduced to $153,238.60. This appeal followed. Specifically, Lakewood says it contests five specific findings in the Notice of Determination and asks that the sum of $39,807.28 be restored to it.

At issue are contracts executed by Lakewood which the Department says violate the New Jersey Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1 through -59. The matter was heard on October 21, 1999. Prior to commencement of hearing, it was decided that the Board's challenges to the second-level appeal determination findings no. 4, 5, 6 and 17C would be dismissed as those findings resulted in no State aid exceptions. Further, recommendations corresponding to those findings had been addressed in the Board's corrective action plan.

The Board presented testimony of the school business administrator, Kathryn D. Fuoto. Fuoto addressed a contract awarded to the Helfgott Group for a review of the district's transportation operations and a contract awarded to Digman and James Auctioneers to conduct two auctions to dispose of the district's fleet of school buses.

The Office of Compliance presented testimony from Regional Business Administrator Robert S. Finger and Chief Auditor Robert W. Ortley. Their testimony generally addressed the circumstances and findings of the audit review.

Briefly stated, the Office of Compliance contends that the contract awarded to the Helfgott Group on January 13, 1999, without competitive bidding, did not represent an extraordinary, unspecifiable service, and therefore was not exempt from the requirements of the Public Schools Contracts Law. The Office also maintains that the services of an auctioneer are not "professional services" as defined at *N.J.S.A.* 18A:18A-2h and are not exempt from bidding pursuant to *N.J.S.A.* 18A:18A-5a(1). The Office also maintains that seven bus routes were cancelled and, months later, reinstated without bidding and that this violated the Public Schools Contracts Law. Finally, the Office argues that there is no equitable estoppel against the Department of Education that would keep it from recovering State aid pursuant to the Lakewood transportation audit.

Lakewood argues that its acts are entitled to a presumption of correctness and validity. Its actions, therefore, can be overturned only where there is a finding that the decision was arbitrary, capricious or unreasonable. In addition, the action challenged should not be declared invalid without proof of an abuse of discretion by the Board. In Lakewood's view, the Office's audit findings as well as the determinations from the Level I and Level II audit appeals disregard this basic principle. The Office did not follow the timelines for challenging a decision by a board of education, *N.J.A.C.* 6:24-1.2(c). Lakewood also asks this judge to take notice of *N.J.S.A.* 18A:18A-46.1, effective April 9, 1999, which places a limitation on the withholding of State funds from school districts for alleged violations of the Public Schools Contracts Law.

Lakewood argues that the award of the contract to the Helfgott Group was an extraordinary, unspecifiable service and was exempt from the bidding statute. Lakewood asserts that the testimony and evidence presented at hearing indicated there was no allegation of collusion or of an intent to avoid or evade public advertisements and bid requirements. As a result, *N.J.S.A.* 18A:18A-46.1 is applicable to this finding and there should be no withholding of State aid as a result of the alleged violation.

Lakewood makes the same arguments as to the contracts for auctioneer services. In addition, Lakewood asserts that the practice of auctioneering is a profession regulated by the State under the provisions of *N.J.S.A.* 45:17-1 through -5. The Office failed to provide any credible evidence that the payment for auctioneer services was derived from State funds and therefore, subject to recapture by the Department. The monies paid to the auctioneer for services were from the proceeds from the auction sale of school buses and, thus, not from general revenues or State aid. There was no violation of the Public Schools Contracts Law and the amount of reduction from State aid, $32,731.78, should be restored to the Board.

Lakewood also argues that, although Finding 5 did not result in a recapture of State aid, it seeks a determination that there was no violation. It was agreed prior to hearing that the Board's challenges to the second-level appeal Findings 4, 5, 6 and 17C would be dismissed. Accordingly, Finding 5 is not addressed. The same circumstances obtain as to Finding 6.

ISSUES

There are two issues to be determined. First, whether the Board's actions were justified and, if the Board's actions were not justified, what is the maximum amount of money that the Department can demand.

ANALYSIS AND DETERMINATION

The short answers to these questions are that the Board's actions with respect to the failure to elicit competitive bids were not justified because the contract awarded to the Helfgott Group did not represent "extraordinary unspecifiable services." The services of an auctioneer do not constitute "professional services" and, therefore, the contract with Dingman and James is not exempt from the public bidding requirements.

Under *N.J.S.A.* 18A:18A-46.1, the Department cannot recover the State aid disbursed in connection with the contract awarded to the Helfgott Group because there is no evidence of bad faith or collusion on the part of the Board. The expenditures derived from the contract with Dingman and James, however, are recoverable.

Determination requires an analysis of the statutory and regulatory provisions governing the Public Schools Contracts Law, and the public bidding requirements in relation to the receipt of State aid. In general, the competitive bidding process is necessary to every contract paid out of school funds. The requirement, however, does not apply where the funds expended do not exceed the threshold amount. It is firmly established in New Jersey that courts must rigidly adhere to the bidding laws. *Hall Construction Co., Inc. v. N.J. Sports & Exposition Authority*, 295 *N.J. Super.* 629, 635 (App. Div. 1996). The purpose behind the bidding requirements is the desire for "open, free, and competitive bidding" for contracts as a matter of public policy. *N.J.A.C.* 6:21-13.1(b); *Newark Board of Education v. Division of Compliance*, 94 *N.J.A.R.*2d (EDU) 156, 157. In *Terminal Construction Corp. v. Atlantic County Sewerage Authority*, 67 *N.J.* 403 (1975), the New Jersey Supreme Court addressed the importance of the bidding guidelines:

> Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition. To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process.

Id. at 409-410. Thus, to maintain the propriety surrounding the disbursement of State aid, the bidding requirements may not be taken lightly.

In today's case, Lakewood argues that under *Kramer v. Sea Girt*, 45 *N.J.* 268 (1965), a board's action is entitled to a presumption of validity that cannot be overturned absent a finding that the decision was arbitrary, capricious or unreasonable. However, *Kramer* discusses the standard that should be applied in an appeal from a determination of a municipal board. This case does not involve an appeal by the Department regarding a determination made by Lakewood, but rather, is an appeal by Lakewood of the transportation audit conducted by the Department. In addition, the arbitrary, capricious or unreasonable standard of review is only

Department. In addition, the arbitrary, capricious or unreasonable standard of review is only available in a limited number of cases before the Office of Administrative Law because hearings are generally *de novo*. Moreover, an agency's determination is only reviewed under the arbitrary, capricious or unreasonable standard if the statutory or regulatory provisions demand that review. Consequently, the *Kramer* standard does not apply under these particular circumstances.

"In civil cases the most general rule is that in most causes of action, whether judicial or administrative, the party asserting a claim has the burden to prove it." *WCI-Westinghouse, Inc. v. Edison Township*, 7 *N.J. Tax* 610, 630 (Tax Ct. 1985), aff'd 9 *N.J. Tax* 86 (App. Div. 1986). Furthermore, "the burden of establishing the existence of a fact or circumstance is on the party relying thereon." *Snyder v. I. Jay Realty Co. v. Tami-Githens, Inc.*, 219 *N.J. Super.* 241, 250 (App. Div. 1987). The above principles dictate that Lakewood has the burden of proving that the specific audit findings should be overturned.

Findings in Dispute

Finding No. 1:

The contract awarded to the Helfgott Group on January 13, 1992 in the amount of $15,000, without competitive bidding, did not represent an extraordinary unspecifiable service.

On January 13, 1992, via a Board resolution, Lakewood contracted with The Helfgott Group, Inc. ("Helfgott") to conduct a "feasibility study on noninstructional services" throughout Lakewood Public Schools. Helfgott submitted a proposal to Lakewood discussing the services that would be performed in the noninstructional areas including transportation. In the transportation section of the proposal, Helfgott indicated the study would examine administration and management, driver services and training, vehicles used and contracted, and maintenance. Lakewood entered into the consulting contract with Helfgott without publicly advertising for bids to conduct the feasibility study. A "whereas" clause in the Board resolution stated

> The district has determined that because of the nature of the services to be provided by The Helfgott Group it is not reasonably possible to prepare specifications and further that the principals of

> the consulting firm have proven expertise, training and reputation by virtue of their prior services with the New Jersey Department of Education.

Lakewood spent $15,000 in connection with the Helfgott contract of which $7,075.50 represents reimbursable State aid.

Pursuant to *N.J.S.A.* 18A:18A-4, a school district must award contracts for pupil transportation that exceed the threshold amount by advertising for bids. *N.J.S.A.* 18A:18A-4 states in relevant part

> Every contract or agreement for the performance of any work or the functioning or hiring of any materials or supplies . . . shall be made and awarded only by the board of education after public advertising for bids and bidding thereof. . . .

However, there are exceptions to this statutory command that eliminate the necessity for public bidding in order to be eligible for State aid. *See, N.J.S.A.* 18A:18A-5. In respect of Finding No. 1, the analysis focuses on an exception to the advertising requirement.

Lakewood maintains that the Helfgott contract was exempt from advertising under the extraordinary, unspecifiable services (EUS) exception in *N.J.S.A.* 18A:18A-5a(2). The Department, on the other hand, asserts Lakewood's attempt at classifying the Helfgott contract as EUS ignores the plain language of the statute. *N.J.S.A.* 18A:18A-5a(2) provides in pertinent part

> Extraordinary unspecifiable services which cannot reasonably be described by written specifications, which exception as to extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding where possible and the State Board of Education is authorized to establish rules and regulations limiting its use in accordance with the intention herein expressed; and the board of education shall in each instance state supporting reasons for its action in the resolution awarding the contract for extraordinary unspecifiable services.

The meaning of EUS is further explained in the regulations as services "which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor." *N.J.A.C.* 6:20-8.1(a). Further, the Code indicates

> If specifications can reasonably be written covering the services, then they must be bid, not withstanding that the other criteria of the definition may be met. In cases which may appear too technical for local school officials to prepare detailed specifications two criteria must be addressed and found to be not possible before it may be concluded that the services cannot be reasonably be described by written specifications:
>
> i. If the local school officials do not possess the technical skill to prepare specifications, they should engage consultant assistance to do so;
>
> ii. If the services are of such a technical or massive nature as to make a description of all actions to be taken unfeasible, or if there are available various (optional or unknown) technical methodologies for achieving the desired end, then the specifications should be written in terms of required end-products and/or standards of performance rather than (or in concert with) descriptions of all technical steps to be taken.

N.J.A.C. 6:20-8.1(b)4. Thus, services are not automatically deemed EUS in situations where the contract specifications are too technical for the board to prepare. If, as the Board's agent testified, the Board members did not have the knowledge or experience to write specifications for the study, it had these two avenues open to it. Under these circumstances, the Board had an obligation to take additional steps before the bidding requirements were waived.

Analysis of the statutory and regulatory provisions illustrates that bidding requirements will be waived only in extreme and specific circumstances. In this case, the question is whether the Helfgott contract involved EUS and that question, in turn, focuses on whether the specifications covering the services enumerated in the Helfgott contract could have been reasonably drafted in order to elicit other bids. The regulations clearly state that it is not enough for the Board officials to say that they personally did not have the skill or expertise necessary to draft the specifications in order to advertise to the public for bids. The proposal submitted by

Helfgott to Lakewood contained detailed written specifications for the feasibility study. As the Department points out, if the Board did not possess the technical expertise to draft the specifications, Lakewood could have hired Helfgott to draft the necessary specifications. Thereafter, in compliance with *N.J.A.C.* 6:20-8.1(a)i, Lakewood could have advertised those specifications for public bidding. Under this scheme, Helfgott as well as other consulting firms would have been enabled to engage in the bidding process.

The procedures followed by Lakewood in awarding the contract to Helfgott as an EUS did not satisfy the regulatory guidelines laid down in *N.J.A.C.* 6:20-8.1(b)6:

> Before awarding a contract under the EUS provisions, a designated school official of the district board of education must file a certificate with the district board of education clearly describing the nature of the work to be done, stating it is not reasonably possible to write specifications, describing the informal solicitation of quotations (if quotes not sought, or lowest responsible price is not observed explain this also) and describing in detail why the contract meets the provisions of the statute and these rules. A mere recitation of the language in the statute shall not be sufficient for this purpose. . . .

To this point, Lakewood has not produced a copy of the required certification and there is no indication in its post-hearing brief that the certification will be provided or even exists. In addition, the "whereas" clause found in the minutes from the Board's resolution in which Helfgott was awarded the contract, is no more than a recitation of the regulatory language. Therefore, the contract awarded to Helfgott does not fall within the boundaries of the EUS bidding exception and, thus, Lakewood did not satisfy its obligation to publicly advertise for the project.

Finding No. 2:

The district did not solicit competitive bids for services of an auctioneer to dispose of the fleet of buses and did not properly advertise the auction.

On July 27, 1992, Lakewood contracted with Dingman and James (DJ) to conduct a public auction for fifty-six of the district's school buses. The contract granted by Lakewood derived from quotes received from six auctioneers, without public bidding. Again on May 24, 1993, Lakewood awarded a contract to DJ to conduct an auction for the remainder of the district's bus fleet. The contract provided that DJ would receive compensation equal to ten percent of the gross selling price of the buses. Finding No. 2 of the second level audit review determined that $32,731.38 in State aid was recoverable because of Lakewood's failure to solicit competitive bids for the services of an auctioneer to dispose of its fleet of buses.

Lakewood argues that the contract with DJ did not have to comply with the bidding procedures because the services of an auctioneer are professional services and are thus exempt from the public bidding requirements under *N.J.S.A.* 18A:18A-5a(1). Professional services are defined at *N.J.S.A.* 18A:18A-5h as

> Services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning required by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services also means services rendered in the performance of work that is original and creative in character in a recognized field of artistic endeavor.

The definition of professional services in *N.J.S.A.* 18A:18A-2h is consistently embraced by the New Jersey Legislature when defining professional services in other statutes. *N.E.R.I. Corp. v. New Jersey Highway Authority*, 147 *N.J.* 223, 236 (1966).

In *Burlington Township v. Middle Department Inspection Agency*, 175 *N.J. Super.* 624, 630 (Law Div. 1980), the court emphasized the notion that "profession inherently requires attainments in special knowledge as distinguished from mere skill." In that case, the court held that electric sub-code inspection services do not satisfy the professional services standard and are not exempt from competitive bidding. The *Burlington* court further suggested

> While present-day society is not at all reluctant to generally accord most individuals functioning in the community with a professional-sounding title in order to afford them a greater personal feeling of dignity and self-esteem, this worthy motive cannot alter the basic definition of "profession."

Ibid. An example of what meets the professional services standard is found in *Nachtigall v. N.J. Turnpike Authority*, 302 *N.J. Super.* 123, 134-137 (App. Div.), certif. den. 151 *N.J.* 77 (1977). In that case, the court ruled that designing and installing an integrated electronic toll collection system constituted professional services because it "required a panoply of sophisticated technological, engineering and financial services."

A review of the statutory language with the relevant case law compels the conclusion that DJ's auctioneering services do not satisfy the professional services standard. Auctions and auctioneering services are referenced in *N.J.S.A.* 45:17-1, -5. The statute discusses the requirements that auctioneers must keep record books that remain open for inspection; however, the statutory provisions do not require licensing for all auctioneers nor do they require a certain type of education or training. Although conducting an auction may require certain skills, auctioneering does not require advanced knowledge in a field of learning acquired by a prolonged formal course of specialized instruction. Importantly, the policy behind the public bidding requirements supports the principle that services should be characterized as professional services within the meaning of *N.J.S.A.* 18A:18A-5a(2) only under very specific circumstances. Because auctioneering is not a professional services, the DJ contracts are not exempt from the public bidding requirements.

The Role of *N.J.S.A.* 18A:18A-46.1

Lakewood argues that even if it did not comply with the public bidding requirements with respect to the Helfgott contract, *N.J.S.A.* 18A:18A-46.1 prevents the Department from exercising its ability to demand return of State funds. *N.J.S.A.* 18A:18A-46.1 is a new statutory provision. It was enacted in April 1999 and provides limitations on the withholding of State funds from school districts by the Commissioner of Education for certain violations. The statute states in pertinent part

> The Commissioner of Education shall not withhold State funds from any school district, or require any school district to remit any State funds previously paid to that district, because of an act or omission by the district which the commissioner determines to have been taken or permitted to occur in violation of the extraordinary unspecifiable services exception to the requirements for public advertisement and bidding as set forth in *N.J.S.A.* 18A:18A-5. . . .

The statutes continues by addressing three circumstances that will enable the commissioner to withhold State funds. A violation of EUS exception will not result in a waiver in the reduction of State aid if the commissioner determines that

> (1) the act or omission was the result of any collusion between any officer or employee of the district and any contract vendor; or
>
> (2) the act or omission was prompted by an intent on the part of any officer or employee of the district to evade the public advertisement and bidding requirements . . . or
>
> (3) a prior act or omission resulted in a withholding of State funds due to a violation of the extraordinary unspecifiable services exception to the requirements for public advertisement. . . .

As indicated above, the Helfgott contract did not satisfy the EUS exception to the bidding procedures. Therefore, *N.J.S.A.* 18A:18A-46.1 will apply to this case as long as Lakewood has not demonstrated bad faith. The Department stated in its post-hearing brief that there is no evidence of bad faith or collusion on the part of Lakewood in connection with the contract. Therefore, the amount of State aid recoverable by the Department must be reduced by $7,075.50, the State aid received in conjunction with the Helfgott contract.

Although Lakewood is not obligated to return the State aid received for the Helfgott contract under *N.J.S.A.* 18A:18A-46.1, it is important that it be clearly indicated that there was a violation of the EUS exception to the requirements for public advertisement and bidding. This distinction is necessary because, if Lakewood engages in the same violation in the future

concerning the EUS exception, it will be precluded from asserting *N.J.S.A.* 18A:18A-46.1. The statute does not grant relief to a school district that has previously utilized it in order to limit the withholding of State funds for certain violations. *N.J.S.A.* 18A:18A-46.1a(3).

Although the Helfgott contract did not fall under the EUS exception to the bidding procedures, the State aid granted in conjunction with that contract is not recoverable by the Department because of *N.J.S.A.* 18A:18A-46.1. However, the auctioneer contract with Dingman and James does not constitute professional services and is not exempt from public advertising for bids. In addition, the State funds received in connection with that contract are recoverable by the Department because *N.J.S.A.* 18A:18A-46.1 does not reach violations made under the professional services exception to the bidding guidelines.

Therefore, the amount of State aid that Lakewood must return to the Department is the total amount due following the Level II audit review, $153,238.60, reduced by the amount of aid received in connection with the Helfgott contract, $7,075.50. The total amount of State aid recoverable by the Department of Education is $146,163.10.

In consideration of the foregoing, it is **ORDERED** that the Lakewood Board of Education remit to the New Jersey Department of Education the amount of $146,163.10.

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

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

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

JAN 21 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Jan 24, 2000
DATE

Receipt Acknowledged:

D. N. Antanaitis Jr
DEPARTMENT OF EDUCATION

JAN 25 2000
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For petitioner:

Kathryn Fuoto

Robert S. Finger

For respondent:

Robert W. Ortley

EXHIBITS

For petitioner:

P-1 Excerpt, Board minutes, January 13, 1992, 2 pp.

P-2 Proposal from Helfgott Group, Inc., January 17, 1992, 4 pp.

P-3 Excerpt, Board minutes, May 24, 1993, with addenda, 19 pp.

For respondent:

R-1 Transportation Audit, July 1, 1992-February 28, 1997, by Office of Compliance, 16 pp.

R-2 Level I audit appeal decision, May 19, 1998, 7 pp.

Joint:

J-1 Excerpt, Board minutes, July 27, 1992

OAL DKT. NO. EDU 4397-99
AGENCY DKT. NO. 5-1/99

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

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

Upon his careful and independent review of the record, the Commissioner determines to affirm the recommended decision of the Administrative Law Judge (ALJ) for the reasons expressed therein.

Accordingly, the Initial Decision of the ALJ is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 0 8 2000

Date of Mailing: MAR 0 8 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

DERON SCHOOL II,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning private school for disabled children appealed a state audit disallowing salary and fringe benefits costs of an uncertified teacher in calculating its 1994-95 tuition rate.

The ALJ upheld the audit determination, concluding that, pursuant to *N.J.A.C.* 6:20-4.4(a)4 and 11, the Department correctly disallowed salary and fringe benefits costs for an uncertified teacher in calculating Deron's 1994-95 tuition rate and that delay in issuance of the teacher's certificate was attributable not to the Department but to the teacher, whose responsibility it was to submit the necessary documents required to obtain her certification.

The Commissioner adopted the Initial Decision for the reasons expressed therein, finding no cause to disturb the ALJ's findings and conclusions.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3057-98
AGENCY DKT. NO. 18-1/98

DERON SCHOOL II,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

Jerry N. Friedland, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: July 16, 1999 Decided: January 13, 2000

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

Statement of the Case

This is an appeal by an approved private school from a state audit disallowing costs of an uncertified teacher in calculating its tuition rate. Deron School II ("Deron"), a private school for disabled children, is approved by the Department of Education ("Department") to accept students from public schools on a tuition-paying basis. The Department's Office of Compliance monitors annual tuition rates, which cannot exceed "the actual cost per pupil as determined under the rules prescribed by the commissioner and approved by the State Board of Education." *N.J.S.A.* 18A:46-21.

See state regulations at *N.J.A.C.* 6:20-4.1 to –4.11. In the annual audit for the 1994-95 academic year, the Department disallowed salary and employee benefits totaling $4,851 because a particular teacher was not properly certified for the entire school year. Both parties stipulate that Enid Schey ("Schey"), a teaching staff member at Deron, did not obtain her instructional certificate until December 1994. Deron contends that the Department should estopped from denying its claim because the Department's delay in issuance of the certificate was "beyond the control of either petitioner or Mrs. Schey." For the reasons that follow, it was Schey's responsibility to submit the necessary documents required to obtain her certificate and any delay was not due to the Department. Therefore, the audit determination must be upheld.

Procedural History

On October 16, 1997, the Department issued an audit of Deron's 1994-95 tuition rate. After exhausting all internal avenues of appeal up to the level of the Office of Compliance, Deron filed a notice of appeal to the Commissioner of Education ("Commissioner") on January 23, 1998. Respondent Office of Compliance filed its answer on February 20, 1999. Subsequently, on March 10, 1999, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on June 9, 1999. Witnesses and exhibits are listed in the appendix. Petitioner filed a post-hearing brief on July 16, 1999, on which date the record closed.

Findings of Fact

Many of the relevant facts are undisputed. Deron School II is an approved private school for learning-disabled and handicapped children located in Montclair, New Jersey. Enid Schey began working for Deron in September 1992. Previously, she had served as a substitute teacher in the public schools. When hired by Deron, she had a college degree, but not a teaching certificate. She received an emergency certificate endorsed as a teacher of the handicapped in early September 1992.[1] At the beginning

[1] An emergency certificate is a substandard one-year certificate issued in certain fields, including teacher of the handicapped. Only school districts can make application for

OAL DKT. NO. EDU 3057-98
AGENCY DKT. NO. 18-1/98

DERON SCHOOL II,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 08 2000

Date of Mailing: MAR 08 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

83-00

MARY WASSEF, :

PETITIONER, :

V. :

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY. : COMMISSIONER OF EDUCATION

DECISION

IN THE MATTER OF THE TENURE HEARING OF MARY WASSEF, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY. :

March 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

MARY WASSEF,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

OAL DKT. NO. EDU 3798-99
AGENCY DKT. NOS. 273-9/99

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY,
Petitioner,
v.
MARY WASSEF,
Respondent.

OAL DKT. NO. EDU 9927-99
AGENCY DKT. NO. 273-9/99

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: January 10, 2000 Decided: January 13, 2000

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

On August 31, 1998, petitioner, Mary Wassef, filed a petition of appeal with the Commissioner of Education alleging that respondent's determination to withhold her salary and employment increments for the 1998-99 school year was arbitrary, capricious and unreasonable. On September 21, 1998, respondent filed an answer to

the petition denying that its action was improper. On October 29, 1998, the matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52;14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held in this matter on March 9, 1999 by the undersigned judge. At that time this case (one of thirty-one appeals by tenured teachers), was separated for hearing and assigned an individual docket number. The matter was scheduled for hearing before the undersigned judge on December 2 and 3, 1999 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

On or about September 7, 1999, the State-Operated School District of Jersey City certified charges of inefficiency against Mary Wassef, a tenured teacher. On September 22, 1999, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The matter was assigned to Administrative Law Judge Michael L. Ravin and scheduled for hearing on February 24 and March 8, 2000.

On December 2, 1999, the date scheduled by the undersigned for hearing on the increment withholding matter, settlement conferences were held in regard to the above-referenced cases. A settlement was reached and the hearings scheduled in these matters were adjourned.

The parties have agreed to settle these matters and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

1. The settlement agreement complies with the requirements of *Cardonick v. Brooklawn Board of Education*, 193 *S.L.D.* __ (St. Bd. April 6, 1983).

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

3. The settlement agreement is in the public interest.

4. The settlement fully disposes of all issues in controversy in regard to both matters and is consistent with the law.

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

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

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

January 13, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/24/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Jersey City School District

MARY WASSEF, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No. EDUOR 3798-99 Agency Dkt. No. 399-9/98
IN THE MATTER OF THE TENURE HEARING OF MARY WASSEF STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY	OAL Dkt. No. EDUTH 9927-99 Agency Dkt. No. 272-9/99 **STIPULATION OF SETTLEMENT**

WHEREAS, Mary Wassef has been employed as a full-time teacher with the Jersey City School District since December 5, 1977, as a teacher of English as a Second Language on the elementary school level; and

WHEREAS, Ms. Wassef appealed the withholding of her increment by the District for the 1998-99 school year for less than satisfactory performance during the preceding 1997-98 school year (which appeal bears OAL Docket No. EDUOR 3798-99 and Agency Docket No. 399-9/98); and

WHEREAS, tenure charges of inefficiency were certified against Ms. Wassef and

filed with the Commissioner on September 7, 1999, (which charges bear OAL Docket No. EDUTH 9927-99 and Agency Dkt. No. 272-9/99) and hearing thereon is scheduled to commence on February 24, 2000; and

WHEREAS, Ms. Wassef was suspended without pay upon the filing of the tenure charges, and salary payments are required by N.J.S.A. 18A:6-14 to be resumed after 120 calendar days until proceedings have been concluded and a final decision has been reached by the Commissioner; and

WHEREAS, the parties wish to resolve the within matters and believe that settlement is appropriate and in the public interest because the tenure charges do not involve any misconduct or danger to students and because settlement will avoid the uncertainties of litigation as well as avoid the waste of financial and human resources entailed with litigation;

NOW, THEREFORE, it is hereby stipulated and agreed as follows:

1. Mary Wassef resigns from employment with the District effective June 30, 2000, and the District accepts the resignation of Ms. Wassef.

2. The District agrees to resume full salary payments to Ms. Wassef as of January 5, 2000 (which is the 121st calendar day from the certification of the tenure charges) and to continue Ms. Wassef on full salary through June 30, 2000. It is understood by the parties that Ms. Wassef will not return to active duty and that salary payments during the period from January 5, 2000 through June 30, 2000, will be charged against any and all unused personal business days and accumulated sick days that Ms. Wassef has to her credit. The salary payments for the period from January 5, 2000 through June 30, 2000

will be based on Ms. Wassef's current annual salary of $69,450.00.

3. The District agrees to restore the increment which was withheld from Ms. Wassef for the 1998-99 school year. With the restoration of the increment, Ms. Wassef respondent Jersey City School District agrees to pay Ms. Wassef the difference between her annual salary of $68,700.00 and the salary which she would have received with the increment, approximated to be the amount of $1125.00.

4. The District agrees to withdraw with prejudice the tenure charges of inefficiency bearing OAL Docket No. EDUTH 9927-99 and Agency Docket No. 272-9/99.

5. Mary Wassef agrees to withdraw with prejudice her appeal from the increment withholding for the 1998-99 school year, which appeal bears OAL Docket No. EDUOR 3798-99 and Agency Docket No. 399-9/98.

6. Pursuant to In re Cardonick, 1990 S.L.D. 842, Ms. Wassef has been advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of teaching certificate.

7. Ms. Wassef and the District acknowledge that the terms of this Stipulation are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that the terms of this Stipulation are disapproved, this Stipulation shall be null and void and the parties shall return to the same positions which they held prior to their entering into this Stipulation.

8. Mary Wassef acknowledges that she has had the right and opportunity to discuss all aspects of this Stipulation with her attorney prior to signing it, that she has read and fully understands all of the terms of this Stipulation, and that she had entered into this

Stipulation knowingly and voluntarily, without coercion or duress.

MARY WASSEF

DATED: 12/23/99

PHILIP FEINTUCH, Esq.
Attorney for Mary Wassef

DATED: 12/23/99

CHARLOTTE KITLER, Esq.
Attorney for Jersey City School District

DATED: 1/6/00

OAL DKT. NOS. EDU 3798-99 and EDU 9927-99 (CONSOLIDATED)
AGENCY DKT. NOS. 399-9/98 and 273-9/99

MARY WASSEF,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION
		DECISION
IN THE MATTER OF THE TENURE HEARING OF MARY WASSEF, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter.* *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

* In approving this Settlement Agreement, the Commissioner has presumed that there is a typographical error in item number three of this agreement, and that the parties intended this section to read as follows: "With the restoration of the increment *to* Ms. Wassef, respondent Jersey City School District agrees to pay Ms. Wassef the difference between her annual salary of $68,700.00 and the salary which she would have received with the increment, approximated to be the amount of $1125.00."

A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 08 2000

Date of Mailing: MAR 08 2000

84-00

MICHAEL ASHER, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

March 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9809-98
AGENCY DKT. NO. 408-9/98

MICHAEL ASHER,

Petitioner,

v.

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

Respondent.

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

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

Record Closed: December 21, 1999 Decided: January 14, 2000

BEFORE **RICHARD McGILL,** ALJ:

Michael Asher filed a petition with the Commissioner of Education to contest a determination by the Board of Education of the Township of Verona to withhold his increment for the 1998-99 school year. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on October 29, 1998, for determination as a contested case.

On the hearing day, the parties agreed to an amicable resolution of the matter and subsequently submitted a written Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

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

Jan. 14, 2000
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

1/24/2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, NJ 07963-0905
(973) 539-1000
Attorneys for Respondent, Verona Board of Education

MICHAEL ASHER, Petitioner v. BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY Respondent	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUOR 09809-98N** **AGENCY REFERENCE NO. 408-9/98** **STIPULATION OF SETTLEMENT**

WHEREAS, Petition, Michael Asher, has filed a petition with the Commissioner of Education challenging the decision of the Respondent Board of Education of the Township of Verona, Essex County to withhold his salary increment for the 1998-1999 school year and the parties have amicably settled their differences.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED TO by and between counsel to the respective parties as follows:

1. Petitioner hereby withdraws the petition, with prejudice.

2. The Board of Education agrees that, in September 2001, Michael Asher shall be paid in accordance with the step reflecting his years of service with the Board and in accordance with the Collective Bargaining Agreement for the 2001-2002 school year for teaching staff

members. Petitioner's salary for the 2000-2001 school year shall be based on the 1999-20[illegible] Collective Bargaining Agreement.

3. Respondent reserves all its rights with respect to Petitioner's future employment activities, and Petitioner reserves the right to challenge such actions by the Board of Education, if any.

SPRINGSTEAD & MAURICE
Attorneys for Petitioner,
Michael Asher

BY: HAROLD SPRINGSTEAD

Dated: Dec 20, 1999

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent,
Verona Board of Education

BY: SIDNEY A. SAYOVITZ

Dated: Dec 14, 1999

::ODMA\PCDOCS\SPSKLIB1\388605\1

OAL DKT. NO. EDU 9809-98
AGENCY DKT. NO. 408-9/98

MICHAEL ASHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 08 2000

Date of Mailing: MAR 08 2000

FRANKLIN LAKES EDUCATION ASSOCIATION *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE, BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 3498-98

AGENCY DKT. NO: 52-3/98

FRANKLIN LAKES EDUCATION ASSOCIATION, ET AL.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioners
(Zazzali Zazzali Fagella & Nowak, P.C., attorneys)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: January 10, 2000 Decided: January 18, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 9, 1998 for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

1/18/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

Jan. 24, 2000
DATE

N.N. Antonacci
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 10 4 47 PM '00

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

FRANKLIN LAKES EDUCATION ASSOCIATION, on behalf of itself and the members named herein, ELEANOR PERRY, JOAN McGOURTY and BARBARA J. COLLINS Petitioners, v. BOARD OF EDUCATION OF FRANKLIN LAKES, BERGEN COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 52-3/98 OAL DKT. NO. EDU 03498-98 STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner o Education upon the above-captioned Petition of Appeal, the petitioners and respondent hereby agree to amicably resolve the dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. The school health aide (a/k/a professional nurse), who is assigned to the Franklin Avene Middle School, shall recommend to the certified school nurse the exclusion of students from school pursuant to the following procedure: She shall communicate, by telephone, the health condition of the student to the certified school nurse at the Woodside Avenue School. If that certified school nurse is unavailable, she shall contact the certified school nurse at the High Mountain Road School. The certified school nurse shall make recommendation to/grant the authorization for the principal to exclude the student from school. (N.J.S.A. 18A:40-7; N.J.S.A. 18A:40-8)

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

2. Respondent will employ a substitute certified school nurse for two to three weeks each school year to conduct the scoliosis, vision and audiometric screenings required on the students at the Franklin Avenue Middle School. (N.J.A.C. 6:29-1.2; N.J.A.C. 6:29-5.1, et seq.)

3. During that time period, the substitute certified school nurse shall also assist the medical inspector, if necessary, with any physical examinations of grade 7 students which are scheduled to coincide with the students' participation in athletic events/teams during that particular period of the school year. During the balance of the school year, when the substitute certified school nurse is not employed, the school health aide (a/k/a professional nurse) shall assist the medical inspector with such examinations; the school health aide, however, is not permitted to conduct any scoliosis, vision and/or audiometric screenings as part of such examination. (N.J.S.A. 18A:40-4, N.J.A.C. 6:29-3.4)

4. The substitute certified school nurse shall enter this data, as well as other such data into the pupil health record cards (A45 Health Record card) for those students at the Franklin Avenue Middle School during the two to three weeks of his/her employment each school year. (N.J.A.C. 6:29-1.2)

5. The substitute certified school nurse shall complete all necessary state-required health forms for the students at the Franklin Avenue Middle School during the two to three weeks of his/her employment each school year. (N.J.A.C. 6:29-1.2)

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

6. There are currently approximately fifty-nine (59) classified students at the Franklin Avenue Middle School. Responsibility for assessing the needs of those

students with special health conditions and for formulating the Health Component of the Individualized Education Plan (I.E.P.) for these classified students shall be equally divided between the two certified school nurses. At the start of each school year, the certified school nurses shall be provided with a listing of the particular classified students at the Franklin Avenue Middle School for whom they have been assigned the responsibility of making such health assessments and formulating the Health Component of their I.E.P.

7. The certified school nurses shall thereafter be given adequate advance notice of the I.E.P. meeting for each of the students assigned to that particular certified school nurse. Respondent shall thus direct the child study team to provide the particular certified school nurse with notice of the I.E.P. meeting at the same time that it provides notice of that meeting to all other interested parties.

8. The school health aide shall provide coverage for the certified school nurse if necessary to administer medication when the certified school nurse is absent from her particular assigned school building in order to be present at the I.E.P. meetings at the Franklin Avenue Middle School.

9. Any attendance responsibilities previously assigned to the certified school nurses shall be performed by school secretarial staff.

10. Petitioners shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education with prejudice, under the following Docket Numbers: Agency Ref. No.: 52-3/98, and EDUOA 03498-98N.

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

11. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

Petitioner, Franklin Lakes Education Association

Suzanne Taylor — 11/22/99

By: Suzanne Taylor, President — Dated:

Barbara Collins — 11/29/99

Petitioner, Barbara Collins — Dated:

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners

Kathleen A. Naprstek — 12/6/99

By: Kathleen A. Naprstek, Esq. — Dated:

Respondent, Board of Education of the Borough of Franklin Lakes

Edward J. Sullivan — January 5, 2000

By: Dr. Edward J. Sullivan, Superintendent — Dated:

FOGARTY & HARA, ESQS.
Attorneys for Respondent,
Board of Education of the Borough of Franklin Lakes

January 7, 2000

By: Stephen R. Fogarty, Esq. — Dated:

2d

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 3498-98
AGENCY DKT. NO. 52-3/98

FRANKLIN LAKES EDUCATION ASSOCIATION *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE, BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

Date of Decision: MAR 08 2000

Date of Mailing: MAR 08 2000

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA FINN,	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
BORDENTOWN REGIONAL SCHOOL	:	DECISION
DISTRICT, BURLINGTON COUNTY.	:	

SYNOPSIS

Board certified tenure charges of incapacity and other just cause against respondent teacher.

The ALJ determined that charges A1, 2, 3, 4 and B 1, 2, 3, 4 and 5 constitute charges of inefficiency rather than incapacity and thus dismissed these charges without prejudice because of the Board's failure to provide respondent the 90-day remediation period mandated by *N.J.S.A.* 18A:6-11. The ALJ returned without consideration of the merits charges B6 and B7 alleging other just cause for the Commissioner's review pursuant to *N.J.S.A.* 18A:6-16.

The Commissioner concurred with the ALJ that charges A1, 2, 3, 4 and B1, 2, 3, 4, and 5 must be dismissed because the Board failed to accord respondent a 90-day improvement period. (*In the Matter of the Tenure Hearing of April Renee Bradley*, 1990 *S.L.D.* 790, *aff'd as modified* by the State Board of Education, 1991 *S.L.D.* 2521) Upon review of the remaining charges, B6 and B7, the Commissioner found them sufficient, if true, to warrant dismissal or reduction in salary. The matter was remanded to the OAL for further proceedings on tenure charges B6 and B7.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4205-99

AGENCY DKT. NO. 96-5/99

BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT,

Petitioner,

v.

PATRICIA FINN,

Respondent.

Frank P. Cavallo, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: December 15, 1999 Decided: February 10, 2000*

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on May 3, 1999, when the Board of Education of Bordentown Regional School District (hereinafter petitioner) filed tenure charges against tenured teacher Patricia Finn (hereinafter respondent) alleging incapacity and other just cause. An answer on behalf of respondent was filed on May 20, 1999 and on May 21, 1999, the Commissioner

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* An extension of time for issuing the decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

transmitted to the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was conducted on June 21, 1999, at which time the following were identified as the issues for determination at hearing:

1. Are the tenure charges, or any of them, in fact true?

2. Do the charges actually constitute inefficiency charges, requiring provision of the 90-day improvement period?

3. If the charges are proven, what are the appropriate sanctions/remedies?

Hearing dates were scheduled for October 13, 14 and 15, 1999, at the Trenton office of the Office of Administrative Law. Prior to that time respondent filed a motion for summary decision together with supporting papers seeking an order dismissing the tenure charges. Petitioner filed a brief and affidavit in opposition to the motion for summary decision on September 30, 1999. Oral argument on the motion for summary decision was conducted by telephone conference call on October 15, 1999. By letter dated November 22, 1999, the undersigned advised both counsel as follows:

> I have completed by review of the charges in the above-captioned matter and have considered your respective arguments concerning them. I have come to the conclusion that charges A1, 2, 3 and 4 and B1, 2, 3, 4 and 5 are actually charges of inefficiency and therefore require the provision of the 90-day remediation period mandated in *N.J.S.A.* 18A:6-11. Charges B6 and 7 do not appear to constitute charges of inefficiency, however, but rather may be characterized as conduct unbecoming a teaching staff member.
>
> Since *N.J.A.C.* 1:1-12.5(d), (e) and (f) provide for the issuance of a partial summary decision order, there are several possible ways of proceeding in this matter: 1) We could schedule hearing dates and proceed to hearing on the charges set forth in B6 and 7 and simultaneously forward a partial initial decision to the Commissioner on the other charges; 2) I could send the whole case back to the Commissioner for a final determination on the inefficiency issues and for a determination pursuant to *N.J.S.A.* 18A:6-16 concerning whether charges B6 and 7 standing alone are

> sufficient to warrant dismissal or reduction in salary or 3) You could enter into an agreement concerning a withdrawal without prejudice of the charges set forth in B6 and 7 pending a resolution on the inefficiency issues, and your agreement concerning B6 and B7 could be attached and included with my decision on the other charges and issued as an initial decision. Please let me know your preferences concerning how best to proceed. If you have other ideas, I will gladly consider them.

The responsive letters from the parties, dated December 9, 1999 and December 15, 1999, respectively, both requested a final decision from the Commissioner on the inefficiency issue and a determination from the Commissioner pursuant to *N.J.S.A.* 18A:6-16 concerning whether charges B6 and B7 standing alone are sufficient to warrant dismissal or reduction in salary.

FINDINGS OF FACT

The facts necessary to a determination of this motion do not appear to be in dispute and accordingly I **FIND** the following as uncontested facts.

The 1998-99 school year was respondent's 28th year teaching special education at the Clara Barton School in petitioner's district. On April 15, 1999, at its regularly scheduled meeting petitioner voted to certify the following tenure charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-10:

A. INCAPACITY, AS A TEACHING STAFF MEMBER

> 1. Throughout a substantial period of time Ms. Patricia Finn has refused and failed to prepare adequate lesson plans. Her continued and repeated failure and refusal to prepare lesson plans has been documented in observations by her supervisors throughout this time period without improvement.
>
> 2. Throughout a substantial period of time, Ms. Patricia Finn has continually and repeatedly failed to adhere to lesson plans which have been developed. Additionally, Patricia Finn has continually and repeatedly failed, over the same period to provide pupils with the instruction which is scheduled on a given date.

3. Ms. Patricia Finn has failed to adhere to the individual educational plans of special education pupils taught by her.

4. Ms. Patricia Finn has repeatedly failed to supervise and utilize instructional Aide in an appropriate manner.

B. JUST CAUSE FOR REMOVAL

1. Failing and refusing to adhere to the policies of the Bordentown Regional School District, and the Clara Barton School with respect to meetings with parents and other staff members.

2. Failing and refusing to appropriately prepare lesson plans over the course of a fourteen (14) year period.

3. Failing to follow and adhere to lesson plans when developed.

4. Failing to provide pupils with scheduled instruction over a substantial period of time.

5. Failing to adhere to the individual educational plans of pupils.

6. Repeatedly leaving classroom unattended, thereby denying students of direct instruction and supervision.

7. Permitting an Instructional Aid to deliver instruction directly to pupils without supervision in violation of New Jersey Administrative Code.

Prior to filing the charges with the Commissioner, petitioner did not follow the procedures set forth in *N.J.S.A.* 18A:6-11 for certifying charges of inefficiency. Petitioner did not provide respondent with written notice of inefficiencies and the statutorily mandated 90-day period in which to correct them. There has been no suggestion by either party that respondent is physically or mentally disabled from the performance of her regular and assigned duties such as to warrant the filing of an application for ordinary disability retirement benefits pursuant to *N.J.S.A.* 18A:66-41, and both parties denied any knowledge of such a physical or mental incapacity when questioned by the undersigned during oral argument on the motion.

With respect to the documents submitted regarding the substance of the charges, it appears that although respondent's formal evaluations prior to the 1996-97 school year were not entirely without constructive criticism, for the most part they were favorable. Her year-end summary evaluation for the 1995-96 school year completed on June 27, 1996, by an administrator whose name is not entirely legible, but appears to be Robert I. Foster, provided in pertinent part:

. . .

> Let me state at the beginning of this summary/evaluation that Mrs. Finn is a dedicated, experienced teacher within the Bordentown Regional School District's special education department and once again her efforts during the course of the 1995-96 school year have demonstrated her competence and her expertise with the students with whom she works. There is no question that Mrs. Finn establishes an excellent rapport with students and parents and is a valuable asset to the special services operations of our district.
>
> A review of the observations conducted during the 1995-96 school year clearly show that Mrs. Finn has the capacity and demonstrates the ability to carry out excellent teaching with her students.

. . .

> A review of Mrs. Finn's attendance during the 1995-96 school year, indicates that Mrs. Finn was absent for a total of six days. These days consisted on two and a half sick days, one and half personal days, two family emergency days, and six professional days that were designated for the SSI Initiative Program at Trenton State College.
>
> Overall, this certainly is considered a very satisfactory attendance record and Mrs. Finn is to be commended for only being out when absolutely necessary. She remains a most diligent member of our staff and performs her services in excellent fashion and provides us with an extremely professional special education instructor.
>
> Mrs. Finn remains a dedicated, enthusiastic, and highly motivated professional whose effective services in the classroom provide at the Clara Barton School and within Bordentown Regional with outstanding services. Her rapport with students, parents, and staff continue to make her an asset to our district. I am grateful that she

> is a member of the special education team and I look forward to her continued service and outstanding year as Mrs. Finn moves to the three-four level at Clara Barton for multiply handicapped.

During the 1996-97 school year and thereafter respondent's formal evaluations were generally less favorable, although they were not without words of praise and recognition of accomplishments. Bernice Blum-Bart, the principal of Clara Barton School, who was respondent's supervisor during that period of time and who observed respondent's performance on a number of occasions, has set forth the following summary of her assessment in an affidavit in opposition to the motion for summary judgment filed herein:

. . .

> The recurring themes throughout those observations are: lack of written lesson plans; disorganization; failure to utilize different teaching modalities; failure to report to her classroom in a timely manner; failure to individualize lessons for special needs students in violation of their I.E.P.'s; and, a general failure to implement lessons which were planned in advance.

. . .

Either in the spring of 1997 or the spring of 1998, however, Principal Blum-Bart wrote respondent the following undated letter:

> Last nights Curriculum Fair was outstanding! Many parents stopped me to congratulation and thank me for all your efforts on behalf of their child(ren). You richly deserve the recognition and accolades for your excellence and enthusiasm. You have consistently demonstrated that "high expectations bring high performance."
>
> It has made me very happy to see this philosophy enhanced through your yearlong efforts with your students. Last night I was also very impressed with the quality and diversity of work projects.
>
> I was especially pleased that we were able to have students and parents join together with us to share in their child's(ren) learning experiences.

> Congratulations and thank you very much for your dedication to helping our students and families become a "Community of Learners."
>
> . . .

At the conclusion of the 1997-98 school year Ms. Blum-Bart recommended the withholding of respondent's increment pursuant to *N.J.S.A.* 18A:29-14. Her letter to the superintendent in this regard provided in pertinent part as follows:

> . . .
>
> I am recommending increment withholding for Ms. Finn based on the observation criteria list signed by Ms. Finn on 12/4/97. This plan was developed to clarify expectations for observations during the remainder of the school year. The intent was to insure consistency and continuity in each area specified in the plan. The criteria was reviewed and mutually agreed upon on 12/4/97 with the following people present: Patricia Finn, Teacher of Special Education, Robert Foster, Director of Special Services, P. Bruce Sholley, Assistant Principal, Steve Martin, BREA Building Representative, and Berenice Blum-Bart, Principal. It was also signed by Ms. Finn indicating her agreement to the plan and knowledge of the criteria.
>
> In general, Ms. Finn has been unreceptive to remedial efforts on the part of the administration. Observations and conferences with Ms. Finn have identified areas of continuing need for improvement and have indicated suggestions to clarify specific changes. This has been ongoing and mostly unsuccessful.
>
> Furthermore, development of observation criteria and specifications were also created to help identify areas of need along with planning for articulation to work together for improvement. Observations and memos have defined the tasks and actions to be accomplished by Ms. Finn, and the classroom behaviors which should be used in achieving these goals. This has occurred minimally. In addition, cancellation of meetings by Ms. Finn, misrepresentation of facts and issues, as well as involvement of other parties to the agreed upon plan have created confusion, lack of consistent dialogue and incorrect information. Ms. Finn has delayed signing observation reports, in a timely fashion, as well as submitting substitute plans for the beginning of the year. This year, she never returned a post observation clarification memo signed as requested by me, she involved office staff in the review process, and

> reprimanded/confronted the assistant principal of the school in the hallway of her classroom prior to an unannounced observation. She has involved her teaching assistant and other teaching professionals in this process which we had all mutually agreed was to be a confidential process.
>
> Ms. Finn is patient with her class, but I am extremely concerned that her standards/knowledge for the academic expectations for her students are too low, and that lessons are insufficiently individualized and challenging for her current group of students.
>
> The administrative team, has worked diligently with Ms. Finn, formally and informally, to help her improve and correct identified deficiencies in her teaching. I am enclosing Ms. Finn's annual evaluation for the 1997-98 school year. I am hopeful that next year things will improve.

The affidavit of Ms. Blum-Bart which was submitted by petitioner in opposition to respondent's motion herein concludes with the following:

> I do not believe that any amount of additional assistance will make Finn a competent teacher. Nor do I feel that any additional time in which to correct the serious deficiencies in her teaching will result in improvement to Finn's teaching performance.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.* 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter the only issue from the prehearing order which is addressed in respondent's motion for summary decision is issue number two, *i.e.*, "Do the charges actually constitute inefficiency charges, requiring provision of the 90-day improvement period?" Accordingly, whether the evidence offered by petitioner in support of its various allegations is in fact true is not relevant to a determination of the motion. None of the facts related to the process which occurred here are in dispute and accordingly, I **CONCLUDE** that this matter is ripe for summary decision.

N.J.S.A. 18A:6-10, the Tenure Employees Hearing Law, provides in pertinent part:

No person shall be dismissed or reduced in compensation,

> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state,

. . .

> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

. . .

Noticeably absent from both the above-quoted statutory enumeration of causes for dismissal and from the actual charges certified by petitioner in the within matter is any mention of the word "incompetency." Over the years, a number of hearing examiners, administrative law judges and commissioners have struggled with a definition of "incompetency" which would identify it as a cause for dismissal separate and apart from "inefficiency." The definition most frequently quoted and the one cited by both parties in the present matter appears in *School District of the Township of East Brunswick v. Renee Sokolow*, 1982 *S.L.D.* 1358, 1362, aff'd by State Board of Education, 1983 *S.L.D.* 1645:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, *N.J.S.A.* 18A:6-11, would be a useless exercise. (*See In the Matter of the Tenure Hearing of Inez McRoe*, (sic should say McRae) 1977 *S.L.D.* 572, 584.) Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

The exact same definition is cited again in *Ridgefield Board of Education v. Patricia Nafash*, 1984 *S.L.D.* 333, 335-336 and in *Board of Education of the City of Newark v. April Renee Bradley*, 1990 *S.L.D.* 790, 813, aff'd as modified in *State Board of Education*, 1991 *S.L.D.* 2521.

The case upon which the others rely, *School District of the City of Trenton v. Inez McRae*, 1977 *S.L.D.* 572, does not use the same language, but rather provides in pertinent part:

> Notwithstanding respondent's contention that inefficiencies did, in fact, exist, the hearing examiner finds that respondent demonstrated gross ineptness in performing the responsibilities of a classroom teacher. The testimony of the supervisors clearly portrays this ineptness. Whether the ineffectiveness in this case results from lack of understanding of the teaching-learning process, from lack of effort or from indifference, the hearing examiner finds that respondent failed to measure up to even minimal standards of satisfactory teaching. Respondent's lack of adequate and thorough planning demonstrated a dereliction of duty. Her lack of discipline and class control was so gross as to rise above a charge of minimal inefficiency to incompetency. (Citations omitted). *Id.* at 584.

The charges against respondent McRae, however, were brought pursuant to a statute which was repealed in 1976. That statutory provision was found at *N.J.S.A.* 18A:6-12, and read as follows:

> The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same." *Id.* at 581.

The Newark Board of Education asserted that it gave respondent McRae the required notice on January 16, 1975 which was reinforced by a memorandum to her from the assistant superintendent, dated March 17, 1975, wherein he advised her that he intended to continue to observe her progress and to assess the need to consider alternatives for the following school year. On August 12, 1975, the Board certified charges to the Commissioner based upon respondent McRae's "failure to improve or correct her inefficient, inept and incompetent performance of her teaching duties." Accordingly, it would appear that the charges certified against respondent McRae by the Newark Board of Education were in fact in compliance with the requirements for inefficiency charges as they existed prior to February 7, 1976.

The statutory provisions which apply in the within matter, however, *N.J.S.A.* 18A:6-11, require that after the charge has been filed against a tenured employee with the secretary of the board of education, the board shall determine by a majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary:

> In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting.

The Appellate Division reviewed the provisions of the current statute in *Rowley v. Board of Ed. of Manalapan-Englishtown*, 205 *N.J. Super.* 65 (App. Div. 1985) and endorsed the Commissioner's interpretation of the statutory provisions as requiring a board which chooses to file tenure charges of inefficiency against any teacher to render positive assistance to the teacher in an effort to overcome the inefficiencies both before and after the filing of charges. The court noted with approval language from a State Board of Education decision which explained:

> The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills. *Id.* at 73.

The issue is *Rowley* was not whether the 90-day period for improvement had been provided, but whether the local board had satisfied its obligation to accord meaningful assistance during the

90-day period. In the present matter there is no question that the 90-day period, after the filing of charges and prior to certification, was not provided at all.

In an effort to escape dismissal of the charges for failure to comply with the proper procedure, petitioner's papers* characterize the charges as "incompetency" as opposed to inefficiency, presumably, therefore, not requiring the 90-day improvement period. A review of each of the cases cited for this proposition, however, suggests that in fact "incompetency" is nothing more than gross inefficiency and therefore is not a charge standing on its own, separate and apart from inefficiency, but rather is different only in degree, not in kind. With the exception of the *McRae* case which has already been discussed, in none of the other cases was the teacher dismissed because of "incompetency." In each of the other cases, after extensive hearings on the merits, the judges concluded that the proofs might at best show inefficiency, but of course since the proper procedure for filing and certifying inefficiency charges had not been followed, the charges were dismissed. In *Bradley, supra*, the Commissioner reversed the conclusion of the administrative law judge who had found that the charges against the teacher were actually inefficiency charges rather than incompetence, but upon review the State Board held that the petitioner had failed to prove incompetence, although it upheld the dismissal on grounds of unbecoming conduct. The State Board held that the petitioner had not demonstrated that respondent Bradley was *unable* to perform her duties, explaining at 1991 *S.L.D.* 2524:

> Although the record before us does not include a history of Respondent's teaching performance prior to the 1987-88 school year, it is undisputed that Respondent had served in the district as a teacher for a sufficient period of time to achieve tenure and evident that she had been employed since at least 1980. Moreover, we stress that it is the Board's burden to establish incompetency. In support of its charge, the Board relies upon Respondent's conduct and performance only during the 17-month period between December 1987 and April 1989, subsequent to her achievement of tenure, as proof of her incompetency. The evidence does not demonstrate nor does the Board allege that Respondent's teaching

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* Petitioner's motion papers assert that the charges describe incompetency, but the charges themselves characterize the allegations as "incapacity." As noted in the finding of facts section hereinabove, "incapacity" implicates the filing of a disability retirement application, and both sides concede that respondent is not suffering from any physical or mental disability which incapacitates her.

> performance was unsatisfactory during her service in the district prior thereto. Under the circumstances, in view of Respondent's previous years of service and achievement of tenure, which service has not been shown by the Board to have been unsatisfactory, we cannot conclude that the Board had demonstrated that Respondent lacked the ability to be an effective teacher. In addition, while we are not unmindful of the serious concerns raised by the Board's evidence of Respondent's conduct and performance during the limited period in the record, there is no tangible evidence indicating the existence of some underlying condition which has undermined Respondent's abilities and rendered her incapable of effectively performing her duties.
>
> Thus, under the circumstances, we find that the Board failed to satisfy its burden of proof in demonstrating *incompetency*, and we would therefore dismiss those charges. In so deciding, we do not downplay the gravity of the concerns raised by the Board's evidence of Respondent's conduct and performance during that limited portion of her employment included in the record. While the record may well support a charge of *inefficiency*, we agree with the ALJ that such a charge could not be sustained since Respondent was not afforded the written notice and 90-day correction period required by *N.J.S.A.* 18A:6-11. *See, e.g., In re Booth, supra.* The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he or she is still capable of effective teaching. *In the Matter of the Tenure Hearing of Donald Rowley*, decided by the State Board of Education, 1984 *S.L.D.* 2006, 2007, *rev'd on other grounds*, Docket #A-4666-83T7 (App. Div. 1985).

Although previous decisions have recognized "incompetency" at least as a theoretical cause for dismissal, the time has come to acknowledge that the difference is not really a difference in the nature of the charges, but rather in degree only. In order to avoid lengthy hearings or a motion such as the present one in cases where the charges, as here, are classic inefficiency charges [*], the previous line of cases should be rejected and the requirement should be confirmed of complying with the statutorily mandated procedure which the Legislature has deemed necessary prior to a conclusion that a tenured teacher either cannot or will not perform in an efficient manner any longer. In this regard the concept of *stare decisis, i.e.,* adherence to precedents is more "subject

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[*] Compare Rowley, supra, at 70 where the inefficiency charges alleged "failure to perform" properly in numerous designated areas.

to the basic notion that experience is a teacher and not a jailer" in administrative proceedings than in a court. *In re Masiello*, 25 *N.J.*. 590, 598-599 (1958). The Office of Administrative Law is not a court. It is a *quasi-judicial forum* designed to ensure that an agency head will make determinations for which he/she is statutorily responsible only after full consideration of all the relevant facts and applicable law. An agency is not irrevocably committed to its own precedents. When appropriate an agency head may determine that it is time for a change in interpretation or that a predecessor's interpretation is just plain wrong. A holding that an agency's earlier decisions (even if they were affirmed by the Appellate Division) have frozen a particular interpretational issue would be a misconception of the nature of administrative decision-making. *See, N.L.R.B. v. J. Weingarten, Inc.*, 420 *U.S.* 251 (1975). Accordingly, for the reasons set forth hereinabove, I **CONCLUDE** that the charges set forth in petitioner's certification to the Commissioner and described in the affidavit of Ms. Blum-Bart quoted hereinabove, *i.e.,* lack of written lesson plans; disorganization; failure to utilize different teaching modalities; failure to report to class in a timely manner; failure to individualize lesson plans for special needs students; and, general failure to implement lessons which were planned in advance, describe charges of inefficiency and the only way for petitioner (and ultimately for the Commissioner) to conclude, under the law, that respondent cannot or will not teach effectively is to provide the written notice of a "last clear chance" and the 90-day statutory period of meaningful assistance to the teaching staff member to overcome the specific inefficiencies. Although as a practical matter, Ms. Blum-Bart may be absolutely correct in her belief that no amount of additional assistance will make respondent a competent teacher and that additional time in which to correct the serious deficiencies alleged will not result in improvement to respondent's teaching performance,* the only way to establish that fact so that the Commissioner may come to a similar conclusion is pursuant to this statutory procedure which has been established. The Legislature obviously felt that formal written charges against the teacher prior to provision of the 90-day improvement period were necessary to impress upon the staff member, who obviously had performed efficiently in the past in order obtain tenure, the importance of continuing to provide effective instruction to students. As I indicated to counsel in my November 22, 1999 letter to them, I

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* As respondent's motion papers point out, Ms. Blum-Bart's previous written evaluations and comments are not entirely consistent with her professed belief. See, e.g., her May 5, 1998 letter quoted at page 7 hereinabove, where she concludes, "I am hopeful that next year things will improve."

CONCLUDE that charges A1, 2, 3 and 4 and B1, 2, 3, 4, and 5 are actually charges of inefficiency and therefore require the provision of the 90-day remediation period mandated in *N.J.S.A.* 18A:6-11. Accordingly, those charges are **DISMISSED WITHOUT PREJUDICE.**

With respect to charges B6 and B7, those charges appear to me to constitute allegations of discrete incidences of conduct or behavior which violate some known rule or regulation as opposed to alleging deficient skills or techniques or a failure to perform teaching duties up to an acceptable standard. Accordingly, I would characterize charges B6 and B7 as conduct unbecoming a teaching staff member or perhaps "other just cause." Because *N.J.S.A.* 18A:6-16 requires a determination from the Commissioner of Education prior to transmitting the case to the Office of Administrative Law that the charges if true are sufficient to warrant dismissal or reduction in salary and because the determination in the within matter was made by the Commissioner on the totality of the charges certified by petitioner, I am hereby returning charges B6 and B7 to the Commissioner, without any consideration on the merits, for him to make the determination required in 18A:6-16 with respect to those charges standing alone.

For all of the foregoing reasons, it is hereby **ORDERED** that the charges certified to the Commissioner by petitioner and identified as A1, 2, 3, and 4 and B1, 2, 3, 4, and 5 are hereby **DISMISSED WITHOUT PREJUDICE** and charges B6 and B7 are hereby administratively returned to the Commissioner for a determination pursuant to *N.J.S.A.* 18A:6-16 prior to any consideration at the Office of Administrative Law on the merits.

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

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

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

February 14, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/10/00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 15 2000
DATE

Barbara A Hernal
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 4205-99
AGENCY DKT. NO. 96-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA FINN,	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
BORDENTOWN REGIONAL SCHOOL	:	DECISION
DISTRICT, BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Respondent's exceptions urge the Commissioner's adoption of the Administrative Law Judge's (ALJ) determination that charges 1 through 5 should be dismissed, relying on her motion briefs, incorporated by reference, as support for the correctness of the ALJ's conclusion in this regard. (Respondent's Exceptions at 1) Respondent further posits that charges 6 and 7 should be dismissed because "[c]onsidering the sparse allegations, the lack of any substantiation or evidence of significant impropriety in those charges***, those charges, standing alone, do not warrant further tenure proceedings." (*Id.* at 2)

Upon his independent and careful review of the record in this matter, the Commissioner agrees with the conclusion of the ALJ that charges Al, 2, 3, 4 and B1, 2, 3, 4 and 5 must be dismissed because the within Board failed to accord respondent a 90-day improvement period. In so determining the Commissioner is persuaded that this matter is analogous to *In the*

Matter of the Tenure Hearing of April Renee Bradley, School District of the City of Newark, Essex County, 1990 *S.L.D.* 790, *aff'd as modified* by the State Board of Education, 1991 *S.L.D.* 2521. Here, as in *Bradley,* the Board filed performance based tenure charges against respondent, a teaching staff member of 28 years' service, relying on what it alleges was unsatisfactory job performance beginning with the 1996-97 school year and thereafter, a relatively short period within the context of respondent's overall employment. The ALJ observes, and the record does not refute, that prior to this time respondent had received generally favorable performance evaluations. Moreover, the Commissioner observes, as did the ALJ, that, while respondent was charged with unsatisfactory performance during this limited period, the within record reflects that during this same period respondent received a letter from her supervisor, the very person who had conducted the majority of respondent's negative evaluations, praising her "efforts," "excellence," "enthusiasm," and "dedication to helping our students and families become a 'Community of Learners.'" (*See* Initial Decision at 6-7) Under these particular circumstances, the Commissioner finds applicable the State Board's holding that:

> a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity [through the procedural protections afforded by *N.J.S.A.* 18A:6-11] to demonstrate that he [or she] is still capable of effective teaching."
> (*Bradley, supra,* at 2524, *citing In the Matter of the Tenure Hearing of Donald Rowley, School District of Manalapan-Englishtown Regional, Monmouth County,* decided by the State Board of Education, 1984 *S.L.D.* 2006, 2007, *rev'd on other grounds*, Docket #A-4666-83T7 (App. Div. 1985))

Having so determined, the Commissioner declines to reach the further issues discussed at 13-15 of the Initial Decision, since they are unnecessary for resolution of the instant matter.

Additionally, the Commissioner has reviewed the remaining charges, B6 and B7, pursuant to *N.J.S.A.* 18A:6-16, and finds them sufficient, if true, to warrant dismissal **or** reduction in salary.

Accordingly, except as to the discussion at 13-15 of the Initial Decision, which is *not* adopted by the Commissioner, the recommendation of the OAL is affirmed. The Board's tenure charges A1, 2, 3, 4 and B1, 2, 3, 4 and 5 are dismissed, without prejudice. This matter is hereby remanded to the OAL for further proceedings on charges B6 and B7.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 10 2000

Date of Mailing: MAR 10 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

88-00

IN THE MATTER OF THE DISTRIBUTION	:	
OF LIQUID ASSETS UPON DISSOLUTION	:	
OF THE UNION COUNTY REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT NO. 1, UNION	:	DECISION
COUNTY.	:	
	:	

March 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1266-98
AGENCY DKT. NO. 392-10/97

IN THE MATTER OF THE DISTRIBUTION OF LIQUID ASSETS UPON DISSOLUTION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY

Cherie L. Maxwell, Esq., (Sills, Cummis, Zuckerman, Radin, Tishman, Epstein & Gross, attorneys), for petitioner

Douglas J. Kovats, Esq., (Kenny, Gross & McDonough, attorneys), for respondent, Clark Board of Education

William S. Jeremiah, Esq., (Buttermore, Mullen, Jeremiah & Phillips, attorneys), for Garwood Board of Education

Beth Leigh Mitchell, Deputy Attorney General, (John J. Farmer, Attorney General of New Jersey, for Dr. Francis Lobman, Union County Superintendent of Schools

James P. Granello, Esq., for Kenilworth Board of Education

Teresa L. Moore, Esq., McCarter & English, for Berkeley Heights Board of Education

David Rubin, Esq., for Mountainside Board of Education

Record Closed: January 5, 2000 Decided: January 19, 2000

BEFORE **IRENE JONES**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 22, 1998 for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were scheduled for March 3, 1999 and May 20 & 21, 1999 but were adjourned at the request of the parties. The parties were engaged in settlement discussions and reached a tentative settlement on October 19, 1999. A Resolution and a Stipulation of Dismissal was filed on January 19, 2000. A copy is attached hereto.

I have reviewed the Resolution and the Stipulation of Dismissal and I **FIND**:

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

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

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

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

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

1/14/2000
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

1/28/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 31 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 17 4 11 PM '99

JAMES P. GRANELLO, ESQ.
530 Prospect Avenue
Little Silver, New Jersey 07739
(732) 842-4114
Attorney for Respondent Kenilworth Board of Education

IN RE: DISSOLUTION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1	STATE OF NEW JERSEY BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOT 01266-98N AGENCY REF. NO. 392-10/97 STIPULATION OF DISMISSAL

The matter in difference in the above-entitled action having been adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs.

DATED: November 2, 1999

SILLS, CUMMIS, ZUCKERMAN, RADIN, TISCHMAN, EPSTEIN & GROSS

By Cherie L Maxwell
Cherie L. Maxwell, Attorney for petitioner
Board of Education of Springfield

JOHN J. FARMER, JR.
Attorney General of New Jersey

By Beth J. Mitchell
Beth Leigh Mitchell, D.A.G., for the
Union County Superintendent of Schools

JAMES P. GRANELLO

By _____
James P. Granello, Attorney for respondent
Kenilworth Board of Education

KENNEY & GROSS

By _____
Douglas J. Kovats, Attorney for respondent
Board of Education of Clark

BUTTERMORE, MULLEN, JEREMIAH & PHILLIPS

By _____
William S. Jeremiah, Attorney for respondent
Board of Education of Garwood

McCARTER & ENGLISH, L.L.P.

By _____
Teresa L. Moore, Attorney for respondent
Board of Education of Berkeley Heights

DAVID B. RUBIN

By _____
David B. Rubin, Attorney for respondent
Board of Education of Mountainside

OAL DKT. NO. EDU 1266-98
AGENCY DKT. NO. 392-10/97

IN THE MATTER OF THE DISTRIBUTION	:	
OF LIQUID ASSETS UPON DISSOLUTION	:	
OF THE UNION COUNTY REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT NO. 1, UNION	:	DECISION
COUNTY.	:	
	:	

The record of this matter, Initial Decision and signed Stipulation of Dismissal have been reviewed. Noting the absence of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 3 1999

Date of Mailing: MAR 3 1999

[1] Additionally, in accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of December 15, 1998 denying a Motion to Dismiss this matter.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

89-00 E

LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION, AND LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 PRINCIPALS AND SUPERVISORS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW,	:	DECISION ON MOTION
RESPONDENTS.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENCY INTERIM RELIEF

OAL DKT. NO. EDU 962-00

AGENCY DKT. NO. 83-3/00

LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION AND LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER 1 PRINCIPALS AND SUPERVISORS ASSOCIATION,

Petitioners,

v.

BERLIN TOWNSHIP BOARD OF EDUCATION, CHESILHURST BOARD OF EDUCATION, CLEMENTON BOARD OF EDUCATION, LINDENWOLD BOARD OF EDUCATION, PINE HILL BOARD OF EDUCATION, WATERFORD BOARD OF EDUCATION and WINSLOW TOWNSHIP BOARD OF EDUCATION,

Respondents.

Steven R. Cohen, Esq., co-counsel for petitioner Lower Camden County Regional Education Association, (Selikoff and Cohen, attorneys)

Richard A. Friedman, Esq., co-counsel for petitioner Lower Camden County Regional Education Association, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Robert M. Schwartz, Esq., for petitioner Lower Camden County Regional High School District Number 1 Principals and Supervisors Association

Vito A. Gagliardi, Jr., Esq., for respondent Berlin Township Board of Education, Clementon Board of Education, Lindenwold Board of Education, Pine Hill Board of Education, and Winslow Township Board of Education

No Appearance for Chesilhurst Board of Education or Waterford Board of Education

Record Closed: March 9, 2000 Decided: March 12, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

This matter arises as the result of voter approval on May 12, 1998 of the constituent districts of Berlin Township, Chesilhurst Borough, Clementon Borough, Lindenwold Borough, Pine Hill Borough, Waterford Township and Winslow Township to dissolve the Lower Camden County Regional High School District, a grade 7-12 limited purpose regional school. The issue presented here addresses the employment rights of staff members affected by the dissolution. While the Commissioner of Education has not yet approved an effective date for the dissolution, the districts anticipate that the effective date will be July 1, 2001. Under the parameters of *Staggard v. Contini*, 97 *N.J.A.R.* 2d. (*EDU*) 217, aff'd State Board Oct. 1, 1997, the constituent districts intend to conduct a selection process commencing for certificated staff on March 13, 2000 and for noncertificated staff on April 3, 2000.

On March 8, 2000 the Lower Camden County Regional Education Association and the Lower Camden County Regional High School District Number 1 Principals and Supervisors Association (petitioners) filed an application for emergency relief before the Commissioner of Education seeking a stay of the scheduled staff selection process by the constituent boards of education pending a plenary hearing on the merits of their simultaneously filed two count Petition of Appeal. The Commissioner immediately transferred the matter to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and

N.J.S.A. 52:14F-1 to-13. Oral argument on the emergency relief application was heard March 9, 2000 at the Office of Administrative Law, Mercerville. The record of the application for emergency relief includes petitioners' motion for interim relief with supporting letter memorandum and affidavits, along with the two count petition of appeal, and the letter memorandum of the respondent boards of education with supporting affidavits in opposition to the motion. An audio transcript of the oral argument is also included in the record.

FACTS

I have reviewed petitioners' memorandum in support of its motion for emergency relief and the supporting affidavits. I have also reviewed the response of the constituent boards of education in opposition to the motion as well as the affidavits filed in support of the opposition. For purposes only of the motion, and except as otherwise may be noted, the facts of the matter are these. It appears that after the effective date of the dissolution, the Boroughs of Lindenwold, Pine Hill, and Winslow Township will each operate a K-12 school district; Berlin Township and Clementon Borough will each operate its own K-8 district and, for grades 9-12, enter a sending-receiving relationship with Pine Hill; Chesilhurst will operate its own K-6 district and, for grades 7-12, enter a sending receiving relationship with Winslow Township; and, Waterford Township will operate its own K-6 district and, for grades 7-12, enter a sending receiving relationship with the Hammonton Board of Education. Affidavits of the superintendents of schools from Lindenwold and Winslow Township state that construction on their new school facilities are on schedule for the July 1, 2001 effective date, while the other school facilities to be used post dissolution are in existence.

The constituent districts have been planning the staffing selection process for the past year with the assistance of consultants they retained for the preparation of seniority to be credited each certificated staff member presently employed by the regional school district. Staff members have had the opportunity to correct errors the consultants may have made and, it appears, that staff will have the continuing opportunity to correct errors should they occur in the future before the effective date of the dissolution. In addition, each superintendent attests that the selection process has been discussed with the leadership of both petitioning associations for the past year,

and that a two day seminar was sponsored in May 1999 at which the selection process was explained to all staff. The districts note that the staffing selection process had been tentatively scheduled to be conducted during September 1999 but was rescheduled for March 2000 to avoid the risk of disruption to the existing educational program and the planning process as a whole.

The staffing plan contemplates that principals, supervisors and teachers will have the opportunity of ranking four preferences for continued employment placement in any one of the seven constituent districts for which they are otherwise qualified. If a present staff member cannot be accommodated within his or her certification by any available high school position at the time of the effective date of the dissolution, that person would then be entitled to 'bump' less senior or nontenured staff in a constituent districts.

ARGUMENTS ON THE MOTION FOR INTERIM RELIEF

PETITIONERS' ARGUMENTS

Petitioners seek emergency relief because they assert the selection sheets being utilized do not accurately reflect employees' relative lengths of service and their qualifications; the posting sheets being used do not accurately reflect the staffing needs of the constituent districts, and the effective date of the dissolution is more than two budget years away and, consequently, the constituent districts cannot accurately predict their budgets, enrollments or staffing needs. They assert that the facts in this case merit the granting of the requested emergency relief under *Crowe v. De Gioia*, 90 *N.J.* 126, 132-134 (1982). Petitioners assert they will suffer irreparable injury if the requested relief is not granted because their legitimate employment rights will not be honored by the constituent boards of education; that they have a reasonable likelihood of prevailing on the merits of the petition of appeal simultaneously filed with the application for emergency relief; that in balancing the relative hardship of the parties, it would suffer greater harm if the relief is not granted than the damage the constituent boards would incur if the relief were to be granted; and, the public interest support granting the relief requested. While the affidavits filed in support of petitioners' motion for relief say mistakes have been made in the calculations of seniority and that it is too early for constituent districts to have solid plans in

ORDER

It is hereby **ORDERED** that petitioners' motion for emergency interim relief must be and is **DENIED**.

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

March 13, 2000
DATE

DANIEL B. MC KEOWN, ALJ (t/a)

OAL DKT. NO. EDU 962-00
AGENCY DKT. NO. 83-3/00

LOWER CAMDEN COUNTY REGIONAL EDUCATION ASSOCIATION, AND LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 PRINCIPALS AND SUPERVISORS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on March 10, 2000, and the decision and Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief, since he concurs with the ALJ that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is denied. This matter shall move forward for further proceedings on the merits as deemed necessary.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 14 2000

Date of Mailing: MAR 14 2000

[1] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

90-00

S.E. AND J.M. on behalf of minor child, S.T.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

March 15, 2000

91-00

IN THE MATTER OF BRUCE WHITE, :

EWING TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, MERCER COUNTY. : DECISION

SYNOPSIS

Relying on Advisory Opinions A10-93(b) and A07-94 and its prior decision entitled *In the Matter of Frank Pannuccci,* the School Ethics Commission concluded that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when, as a board member, he negotiated and voted on a contract with a local bargaining unit where his wife was a member of the same statewide general union. The Commission recommended that the Commissioner impose a penalty of removal from the Board.

During the pendency of the administrative proceedings, the State Board of Education reversed the Commission's decision in *Pannucci.* The Commissioner found that, given the change in law that had occurred during the ongoing proceedings in this matter, he could not adequately assess the Commission's recommended penalty without having the benefit of that body's review of its decision in light of the State Board's ruling in *Pannucci.* The Commissioner, therefore, returned the matter to the Commission so that it could determine what effect, if any, the State Board's reversal of prior decisional law might have on its finding of violation and recommended penalty.

IN THE MATTER OF	:	
BRUCE J. WHITE,	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
	:	
EWING TOWNSHIP	:	**Docket No.: C18-99, C22-99**
BOARD OF EDUCATION,	:	**(Consolidated)**
MERCER COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Ewing Township Board member Edward Vickner alleging that fellow Board member Bruce White violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. when he entered into negotiations with members of the Ewing Township Education Association (ETEA) without Board authority and when his spouse is a member of the New Jersey Education Association ("NJEA"), with which the ETEA is affiliated. In addition, the complainant alleges that Mr. White violated the act by participating in such negotiations in 1994 and 1996. Last, he alleges that Mr. White also participated in negotiations and voted on contracts concerning the Ewing Township Administrators' Association (ETAA) while he is a member of the Principals and Supervisors Association (PSA), in violation of the Act. The complaint alleges that he did so in 1996 and 1999. Board member Frank Ferrante filed a similar complaint approximately a month after Dr. Vickner indicating that Mr. White took it upon himself to negotiate a new teachers' contract without board approval when his wife works as a teacher in Trenton. The Commission consolidated the two complaints for hearing.

Bruce White filed timely answers to both complaints admitting to being present at a meeting at which members of the Board and the Association negotiated a contract, but denied any knowledge that such conduct was in violation of the School Ethics Act. He indicated that he negotiated the ETEA contract informally in the same way he had in prior years. He indicates that the board attorney advised him in June 1999 that he should not have been present when the contract was discussed, and now understands that his presence may be construed as a "technical violation" of the Act. Regarding the administrators' association, Mr. White answered that he did not consider the meetings that he attended to have been negotiations, but "a sharing of ideas...leading up to and resulting in a contract agreement between those parties." He denies any intent to violate the Act.

The parties appeared before the Commission in November at which time the Commission found the material facts to be undisputed and found Mr. White to have violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. It asked the parties to provide written submissions as to the penalty to be imposed. The Commission received timely

submissions by both parties. As the complainants responded to the submission of Mr. White, the Commission allowed Mr. White the opportunity to respond to their submissions. His submission was received on January 18, 2000. The Commission rendered its decision on January. 25, 2000 finding Mr. White in violation of N.J.S.A. 18A:12-24(c) of the Act and recommending a penalty of removal from the Board.

FACTS

Based on the pleadings, documents submitted, and testimony of the parties, the Commission found the following material facts to be undisputed.

Bruce White has served as a member of the Ewing Township Board of Education for 14 years. He served on the Board from 1984 to 1990 and was elected again in 1992. He served as Board President twice. Dr. Vickner was elected to the Board in April 1996.

At all times relevant to this complaint, Mr. White's spouse was a teacher in the neighboring district of Trenton and a member of the NJEA. On February 28, 1994 and September 16, 1996, Mr. White voted for approval of the ETEA contracts for 1994-1997 and 1997-2000 respectively.

Because the teachers' contract was not scheduled to expire until June 2000, Board President Maria Bua did not appoint a committee to negotiate with the teachers on the advice of the board attorney that it would be premature to do so. Three contracts were to end in 1999 so Ms. Bua appointed contract negotiation teams for the support staff association (ETESSA), the administrators' association (ETAA) and the ETDCA. Mr. White was named chair of the committee to negotiate with the ETESSA. He was not placed on any other negotiation team. Dr. Vickner was named chairperson of the ETAA negotiation team and was a member of the ETDCA team.

At a May 1999 Board meeting, Mr. White was approached by the President of the ETEA and asked if he was interested in reaching a contract settlement with the Association in the same manner as in the past. He discussed this proposal with the Superintendent and assumed that he informed the Board President. A meeting was arranged between members of the Board and the Association that was to take place after the Board's dinner for the retiring teachers in June. Mr. White said that he was present at that meeting, but did not participate in the negotiations. He said that the process took about 40 minutes. The other Board member present was Frank Fontana. The President and Vice President of the ETEA were present along with the Superintendent.

Mr. White notified Board President Bua on the first Saturday in June that he had met with the President of the ETEA and discussed a new contract. This was the first that she had heard of it.

At the Board's June 23, 1999 meeting, the Superintendent presented the contract for approval. Dr. Vickner raised the issue of Mr. White having a conflict of interest in

negotiating the contract because his wife is a member of the NJEA. After Board attorney John Dyer confirmed that Mr. White should not have participated in negotiations, Mr. White responded, "I'll take the punishment because we got a good contract." When an argument ensued, Mr. White indicated that he did not care whether Dr. Vickner filed an ethics complaint against him and said, "Go ahead and file it. Get it over with." Mr. White stated at that meeting that he was unaware that he was prohibited from negotiating.

Mr. White has been a dues-paying member of the PSA for 22 years. The ETAA is an affiliate of the PSA. On October 25, 1993, April 29, 1996 and May 10, 1999, Mr. White voted for approval of the ETAA contracts.

ANALYSIS

The complainants cite the Commission's prior advisory opinion A10-93(b) and A07-94 as evidence that Mr. White violated N.J.S.A. 18A:12-24(c). At the time that the conduct complained of occurred, this section set forth:

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

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

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

The Commission believes that it would be appropriate to apply the statute that was in effect at the time that the alleged conduct occurred. However, it ultimately concludes that it is inconsequential which statute it applies because the conduct raises an issue of a financial involvement, which remains the same under both statutes.

In A10-93 and A10-93(b)/A07-94, the Commission advised that a board member would violate N.J.S.A. 18A:12-24(c) of the School Ethics Act if he were to negotiate and vote on a contract with a local bargaining unit if he or his immediate family member were a member of the same statewide general union with which the board is negotiating. The Commission then said that it is reasonable for the public to perceive that a board member could not be objective in voting for his or his spouse's fellow union members to receive a

contractual award or service, as an increase in benefits or pay could influence an increase in the rate of pay to all members of the same statewide general union and thereby benefit the board member or his spouse. This constitutes an indirect financial involvement for the board member that might reasonably be expected to impair his objectivity or independence of judgment.

Bearing in mind the Commission's advisory opinion and the cases to follow, including *In the Matter of Frank Pannucci*, C08-96 (1996), it is clear that Mr. White violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. Not only did Mr. White vote on the contract of two local bargaining units in which he and his spouse were members of the statewide general union with which he was negotiating, but he set up negotiations with the teachers' union without knowledge of or authorization from the Board or the Board President. The Commission finds such action to be a flagrant disregard for the office he holds. Clearly Mr. White's arranging of a meeting with the teachers' union at the union president's urging, without the knowledge or authorization of the Board, provides the public even greater reason to perceive that he was attempting to acquire some benefit for the statewide general union to which his spouse belongs. Mr. White's representation to the union that he was acting with the Board's authority placed the Board in the untenable position of either approving the contract that had been formed at his clandestine meeting or face charges of an unfair labor practice if it declined to honor it. Again, a reasonable person would easily perceive that Mr. White engaged in such conduct because of his ties to the statewide general union.

PENALTY

The Commission has carefully considered the submissions of the parties in this matter. The complainants, in their submission, reject with incredulity Mr. White's representations that he did not know that the School Ethics Act prohibited his participation in negotiations with the teachers' association and the administrators' association and ask that he be removed. They note that Mr. White has served on the Board for approximately 14 years and served as Board President for two years. They also note that, prior to these actions, he raised an ethics issue and directed the Board attorney to seek an ethics opinion as to whether another board member could negotiate. Further, they note that Mr. White specifically denied having a conflict of interest on the night that the negotiation meeting took place and that even now, knowing that his conduct violated the Act, Mr. White deflects blame by stating that he was never properly advised. Overall, the complainants point to numerous acts of Mr. White that they believe evidence that he believes that he is above the law. Specifically, they note that although there was ample time during the retirement party prior to the private meeting with the union to tell the board members that he had been approached about negotiating, he chose not to tell anyone. They say that Mr. White's admission that this is not the first time that he has negotiated a contract with the union in such a manner further evidences his lack of respect for the law. Last, they point to his comments on the June 28, 1999 meeting tape such as "[g]o ahead. File a complaint. I don't care" as a demonstration of his arrogance and evidence that if not severely punished, he will continue to violate the rules.

In his submission, Mr. White argues that only a reprimand is warranted. He points out that he did not knowingly or intentionally violate the School Ethics Act although he acknowledges that his actions were a violation of N.J.S.A. 18A:12-24(c). He cites to a bill that was introduced in March 1999, which would have made Mr. White's conduct lawful under the School Ethics Act, A-2977, and states his belief that under the amended N.J.S.A. 18A:12-24(c), he would not have been found guilty of a violation. He also cites to various decisions of the Commission involving the attendance of a board member at a meeting where the board discussed a matter in which he had a conflict of interest and the Commission or the Commissioner imposed at most a censure. He states that his participation was limited in that he did not actually negotiate, but only participated in a side bar discussion with the other Board representative and the Superintendent. He urges the Commission to reject the representations of the complainants and rule consistently with the record and recommend no more than a censure.

The Commission has carefully reviewed the submissions of the parties. It is also aware of Mr. White's representations to the media indicating that Mr. Vickner's complaint stems from his opposition to prior litigation of Mr. Vickner. In a statement he released to the media, he charges Mr. Vickner with violating the Act and states that he should receive nothing more than a reprimand. The Commission notes parenthetically that Mr. White has never filed with the Commission any complaint against Mr. Vickner.

The Commission, while not finding Mr. White to have misrepresented his lack of knowledge, finds that it was Mr. White's duty as a former Board President, board member and administrator to familiarize himself with the rulings of the Commission. The fact that he was excused from attending training because of his continuous membership on the Board from 1984 to 1990 did not obviate the need for him to familiarize himself with the School Ethics Act, which became effective in 1992. In response to questions by Commission members, Mr. White represented to this body that he received the New Jersey School Boards Association (NJSBA) publication *School Board Notes*, but never read it, and received the PSA's publication, but recalled only that it focused on professional development. The Commission's advisory opinion was noted in both publications. The Commission finds that his representations to this body evidence, at best, a serious lack of concern for the rules that govern his conduct.

The Commission finds that the introduction of a bill in March 1999, which would render acceptable Mr. White's conduct in voting for the contracts, is irrelevant. The Commission can only render decisions based on the law as it currently exists. Further, the bill certainly did not address Mr. White's conduct in usurping the authority of the Board President and entering into negotiations without Board authority to do so. Regarding N.J.S.A. 18A:12-24(c) as it currently provides, the Commission has already stated that the amendment does not affect the outcome in this case.

Last, the Commission finds the cases that Mr. White has cited to be inapposite. The Commission has found that Mr. White violated N.J.S.A. 18A:12-24(c) of the Act by

participating in negotiations and voting on contracts with the ETEA on three separate occasions in 1994, 1996 and 1999. Even discounting Mr. White's 1994 participation as too close to when the Commission advised that the conduct would constitute a violation, the Commission has ample information to distinguish this case from the cases cited. The Commission has expressed particular concern about the manner in which Mr. White has stated that he entered into negotiations with the association and the way that negotiations were conducted in 1996 and 1999 without the appointment of a committee and without authorization. Mr. White also violated N.J.S.A. 18A:12-24(c) of the Act by voting on the ETAA contracts in 1996 and 1999 as set forth in the complaint. It was not demonstrated that Mr. White participated in negotiations on the ETAA contracts. Nevertheless, the Commission finds these facts to be unlike any other that it has previously decided based on the number and manner of the violations.

In the past, the Commission has recognized mitigating factors such as acting on the advice of an attorney or being newly elected to the Board. Neither of these is applicable here. Further, the Commission believes that unless punished severely, Mr. White will continue to take actions on behalf of the Board without the authority of the Board. Mr. White's continued reference to his violations of the Act as "technical," as though the term makes them less valid, and his attitude as evidenced on the tape of the meeting and in his representations to the press, indicate to the Commission that only the maximum penalty that it may recommend will convince Mr. White that he did anything wrong.

For the foregoing reasons, the Commission recommends that the Commissioner of Education impose a penalty of removal from the Board.

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

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C18-99, C22-99 (Consolidated)

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

Whereas, the Commission concluded at its meeting of November 23, 1999, that respondent Bruce White violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the written submissions of the parties regarding the penalty to be imposed; and

Whereas, the Commission now finds that the appropriate penalty to be recommended to the Commissioner of Education is removal from the Board; and

Whereas, the Commission has reviewed a proposed decision setting forth its findings and conclusions; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties of the Commission's decision herein finding Bruce White in violation of N.J.S.A. 18A:12-24(c) of the Act and recommending a penalty of removal.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on January 31, 2000.

Lisa James-Beavers
Executive Director

AGENCY DKT NO. 45-2/00

IN THE MATTER OF BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION

The record in this matter and the decision of the School Ethics Commission (Commission) have been reviewed. Complainant Edward Vickner, Jr.[1], and respondent submitted comments with respect to the Commission's recommended penalty.

In his submission, Complainant reiterates the arguments in his complaint and urges the Commissioner to impose a penalty of removal from the board of education as recommended by the Commission.

Respondent argues that this action is the result of a vendetta against him by complainants and that removing him from the board of education is too severe a penalty because he acted without specific knowledge that he was in violation of the School Ethics Act (Ethics Act). Respondent further argues that the Commission relied on *In the Matter of Frank Pannucci,* 97 *N.J.A.R.* 2d (EDU) 339, which was reversed by the State Board of Education on March 1, 2000 subsequent to the Commission's decision in this matter, and that, based on the State Board's decision, there should be no finding of violation of the Ethics Act. However, if such a finding is made, respondent submits that the record in this matter, as well as previous decisions by the Commission and the Commissioner, and consideration of his 13 years of loyal

[1] Complainant Frank Ferrante did not submit comments.

service to the board, dictate that a reprimand is the appropriate penalty in this instance. (Respondent's Comments at 5-7)

After a thorough review of the record, and with due consideration of the arguments advanced by the parties with respect to the sanction to be imposed, the Commissioner finds that, given the change in law that has occurred during this ongoing administrative proceeding, he cannot adequately assess the Commission's recommended penalty without having the benefit of that body's review of its decision in light of the State Board's ruling in *Pannucci, supra.* Accordingly, this matter is returned to the Commission so that it may determine what effect, if any, the State Board's reversal of prior decisional law may have on its finding of violation and recommended penalty.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 15 2000

Date of Mailing: MAR 15 2000

169-00 CONSOLIDATED WITH → 91-00

IN THE MATTER OF BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION
	:	

SYNOPSIS

Citing *In the Matter of Frank Pannucci*, the School Ethics Commission concluded that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when, as a Board member, he negotiated and voted on a contract with a local bargaining unit where his wife was a member of the same statewide general union. The Commission recommended that the Commissioner impose a penalty of removal from the Board.

During the pendency of the administrative proceedings, the State Board of Education reversed the Commission's decision in *Pannucci*. The Commissioner found that, given the change in law that had occurred during the ongoing proceedings in this matter, he could not adequately assess the Commission's recommended penalty without having the benefit of that body's review of its decision in light of the State Board's ruling in *Pannucci*. The Commissioner, therefore, returned the matter to the Commission so that it could determine what effect, if any, the State Board's reversal of prior decisional law might have on its finding of violation and recommended penalty.

In its decision on return, the Commission considered the effect of the *Pannucci* decision on its finding of a violation and the penalty recommendation. The Commission reaffirmed that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act and added that the facts also established a violation of *N.J.S.A.* 18A:12-24(a) and (b) and reaffirmed its recommendation that the Commissioner impose a penalty of removal from the Board.

The Commissioner reiterated that the findings and conclusions of the Commission as to what occurred or whether it was a violation of the School Ethics Act are outside the scope of the Commissioner's review and must be accepted by him in reviewing the Commission's recommended penalty. The Commissioner determined that the violations of *N.J.S.A.* 18A:12-24(b) and (c) found by the Commission were insufficient to warrant the extreme result of respondent's removal from elected office. The Commissioner determined that the appropriate penalty to be imposed upon respondent as a school official found to have violated *N.J.S.A.* 18A:12-24(a), (b) and (c) of the School Ethics Act, under the circumstances set forth by the Commission, was suspension from the Ewing Board of Education for a period of 45 days.

IN THE MATTER OF BRUCE J. WHITE,	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
EWING TOWNSHIP BOARD OF EDUCATION,	:	**Docket No.: C18-99, C22-99 (Consolidated)**
MERCER COUNTY	:	**DECISION *ON RETURN***

PROCEDURAL HISTORY

On January 31, 2000, the School Ethics Commission adopted a decision finding Ewing Township Board of Education (Board) member Bruce White in violation of N.J.S.A. 18A:12-24(c) of the Act and recommending that the Commissioner of Education impose a sanction of removal from the Board. The Commissioner of Education returned the above-captioned matter to the School Ethics Commission by his decision dated March 15, 2000. In his decision, the Commissioner stated that he could not render a determination on the penalty until the Commission considered how the State Board of Education's decision in the case, *In the Matter of Pannucci*, SB #16-97, which issued on March 1, 2000, affected its determination of violation and assessment of penalty.

The complaint alleged that Ewing Township Board member Bruce White violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. when he entered into negotiations with members of the Ewing Township Education Association (ETEA) without Board authority. The complaint also alleged that he violated the Act by negotiating and voting on the contract with the ETEA when his spouse is a member of the New Jersey Education Association ("NJEA"), with which the ETEA is affiliated. The complaint alleged that Mr. White participated in such negotiations in 1994 and 1996 as well as 1999. Last, the complaint alleged that Mr. White violated the Act when he participated in negotiations and voted on contracts with the Ewing Township Administrators' Association (ETAA) when he is a member of the Principals and Supervisors Association (PSA), with which the ETAA is affiliated. Mr. White was alleged to have voted for approval of the ETAA contracts on April 29, 1996 and May 10, 1999. The second complaint, which was consolidated with the first, alleged that Mr. White took it upon himself to negotiate a new teachers' contract without board approval when his wife works as a teacher in Trenton.

At its meeting of March 28, 2000, the Commission considered the effect of the *Pannucci* decision on its finding of a violation and the penalty recommendation. The Commission reaffirmed that Bruce White violated N.J.S.A. 18A:12-24(c) of the School Ethics Act, and added that the facts also established a violation of N.J.S.A. 18A:12-24(a) and (b) and reaffirmed its recommendation that the Commissioner impose a penalty of removal from the Board. The reasons are set forth below.

DECISION

In its January 31, 2000 decision, the Commission concluded that Mr. White violated N.J.S.A. 18A:12-24(c) of the Act by participating in negotiations with the ETEA in 1996 and 1999 and voting on contracts with the ETEA on three separate occasions in 1994, 1996 and 1999. The Commission discounted his voting in 1994, however, since the Commission had just issued the advisory opinion in 1994 that advised that voting on such contracts was in violation of the Act. The Commission also concluded that Mr. White violated N.J.S.A. 18A:12-24(c) of the Act by voting on the ETAA contracts in 1996 and 1999 as set forth in the complaint.

The Commission finds that its decision that Mr. White violated N.J.S.A. 18A:12-24(c) of the Act by voting on the contracts with the ETEA and the ETAA has been reversed by *In the Matter of Frank Pannucci.* In the *Pannucci* decision, the State Board reversed the Commission's decision saying "we reject the view that status as a member of another local union within the same statewide union should, on a per se basis, preclude a board member from voting on a collective negotiations agreement in the district where he or she is a member." (Slip op. at p.13). The Commission found violations of the Act based on the fact that Mr. White voted on the collective bargaining agreements with the ETEA and the ETAA when his spouse was a member of the ETEA and he was member of the ETAA. Therefore, the Commission reverses its finding of a violation on those charges of the complaint.

However, the State Board noted that its decision addressed only the question involved in *Pannucci* and Advisory Opinion A10-93(b) and A07-94, that is, whether a board member who is a member of a statewide general union could vote on a contract with the local affiliate of the same statewide general union. Mr. White's votes on the contracts were not the conduct that was most disturbing to the Commission. As the Commission noted in its decision, Mr. White participated in negotiations with the ETEA. He took it upon himself to set up negotiations with the President of the ETEA without authorization from the Board or Board President. Furthermore, he did so before the contract was even scheduled to expire and thus, before the other associations that had been scheduled for negotiations due to expiring contracts had the opportunity to negotiate with the Board. The Commission has never heard of negotiations occurring in such a manner, although Mr. White said the ETEA contract was reached the same way in prior years. It is the secret negotiations about which the Commission is most concerned.

As the Commission previously stated, because the teachers' contract was not scheduled to expire until June 2000, Board President Maria Bua did not appoint a committee to negotiate with the teachers on the advice of the board attorney that it would be premature to do so. Three contracts were scheduled to end in 1999, so Ms. Bua appointed contract negotiation teams for the support staff association (ETESSA), the administrators' association (ETAA) and the ETDCA. There was no team appointed to negotiate the ETEA contract. This testimony by Board President Bua was undisputed.

In response to the complaint, Mr. White stated in his affidavit:

> Since my tenure on the ... Board contracts between the Ewing Township Education Association ("Association") and the Board have been resolved outside of the typical, and often contentious, arena of negotiations. In the past, one or two board members along with the Superintendent of Schools, who served as the chief spokesperson, and one or two representatives of the Association, met informally to discuss the issues and reach an understanding. Each side presented the ideas to their own groups and the contracts were settled. There had been no negotiating teams or hours of negotiations.
>
> I was approached during a break of a Board meeting in May of 1999 by the President of the Association. I was asked if the Board was interested in reaching a contract settlement with the Association in the same manner as in the past. I discussed this with the Superintendent of Schools, Timothy Wade, whom I assumed informed the Board President. A meeting was arranged between members of the Board and the Association. I was present at that meeting, but did not participate in the negotiations.
>
> I believe I followed all the appropriate chains of command in arranging the meetings between the members of the Board and the Association since the matter was discussed with the Superintendent of Schools, who advised the Board President.

The Commission based its findings on Mr. White's sworn affidavit and testimony. The meeting took place at a restaurant in Ewing on June 3, 1999. The Commission found the material facts to be undisputed, although there is a discrepancy in Mr. White's answer at the conclusion of the above passage. At the end, Mr. White says the matter was discussed with the Superintendent, who advised the Board President, while at the beginning of the above passage, he indicates that he discussed the matter with the Superintendent who he assumed told the Board President. However, Ms. Bua testified that no one told her that the meeting was going to take place and that she did not find out until Mr. White told her on June 5, 1999, after it had been accomplished. Mr. White admitted that he did not tell her and does not dispute her testimony that she did not know.

The other Board member present at the meeting was Frank Fontana. The President and Vice President of the ETEA were present along with the Superintendent. Again, the Commission found these facts based on the testimony and affidavits of Bruce White.

Mr. White denied having actually negotiated with the ETEA. However, he admitted to arranging the meeting at the request of the union president, attending the meeting and being present throughout the meeting while a contract was being negotiated, all without notifying or being authorized by the Board president. Further, no other

negotiations were held with the ETEA prior to the presentation of the contract to the board membership on June 23, 1999. Given the foregoing, the Commission finds that Mr. White participated in negotiations. It does not find his denial that he actually negotiated to be credible, but it matters not whether he actually negotiated, since it is clear that the totality of his conduct with the ETEA constitutes participation in negotiations.

The Commission noted in its January 31st decision that, at the Board's June 23, 1999 meeting, when the Superintendent presented the contract for approval, Dr. Vickner raised the issue of Mr. White having a conflict of interest in negotiating the contract because his wife is a member of the NJEA. The Commission listened to the tape of the meeting in which Mr. White responded, "I'll take the punishment because we got a good contract." This further supports the Commission's view that he participated in negotiations. Mr. White further indicated on the tape that he did not care whether Dr. Vickner filed an ethics complaint against him and said, "Go ahead and file it. Get it over with." The Commission now reaffirms that Mr. White's conduct violated N.J.S.A. 18A:12-24(c) and finds that such conduct violated other provisions of the Act as well.

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

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

In A10-93, the Commission advised that a board member would violate N.J.S.A. 18A:12-24(c) of the Act if he were to participate in negotiations on a contract with a local bargaining unit if he or his immediate family member were a member of the same statewide general union with which the board is negotiating. The School Ethics Act does not differentiate between whether the school official or his spouse has the involvement; either creates a conflict for the school official. The Commission reasoned in A10-93 that a reasonable member of the public would perceive that a board member could not be objective in negotiating for his or his spouse's fellow union members to receive a contractual award or service. This is because in determining contract settlements, it is a well-established practice for negotiating teams to compare salaries of neighboring and similar statewide districts. An increase in benefits or pay could influence an increase in the rate of pay to all members of the same statewide general union and thereby benefit the board member or his spouse. The Commission notes that the district in which Mr. White serves is a neighboring district to the district where his wife teaches. The Commission finds the comparisons even more likely where the districts are neighboring districts such as Ewing and Trenton in the present case.

In addition, the Commission interprets N.J.S.A. 18A:12-24(c) in conjunction with N.J.S.A. 18A:12-22(a), which states,

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

Again, Mr. White did not just participate in negotiations on the contract with the local bargaining unit when his spouse was a member of the statewide general union with which he was negotiating. He arranged negotiations with the teachers' union without knowledge of or authorization from the Board or the Board President. The Superintendent's knowledge or presence does not absolve Mr. White of acting on his own initiative without the Board or Board President's authorization. The negotiation session was held out of the hearing of the public, as is the normal practice; however, the Board, the members of which constitute the duly elected representatives of the public, were also kept completely in the dark. Neither the Board nor the Board President had any knowledge that such negotiations were even being considered. There was no committee appointed, no discussion of parameters and to the Board's knowledge, no urgency to negotiate since the contract was not scheduled to expire until June 2000. The public, as well as the Board, has the right to know when negotiations are taking place and who will be negotiating. Mr. White's conduct robbed them of their right to such knowledge. By his actions, Mr. White engaged in conduct that would create a justifiable impression that the public trust is being violated further supporting a violation of N.J.S.A. 18A:12-24(c).

The Commission does not believe that the State Board's ruling in *Pannucci* applies to these circumstances. Voting is the act of approving that which others negotiated or otherwise worked upon, which is a ministerial act, albeit a necessary and important act. However, negotiations actually establish the benefits and rate of increases in salary which impact the rest of the school budget as well as the local tax base to be voted upon by the Board and ultimately the public. Mr. White's arrangement of a clandestine meeting went above and beyond merely voting. To obtain a contract despite the lack of authority to do so demonstrates a high level of financial involvement. Mr. White could have followed proper procedures and allowed Ms. Bua to choose a team to negotiate with the ETEA. Instead, he chose to begin the negotiations himself. A reasonable member of the public would easily perceive that Mr. White's spouse's ties to the statewide general union impaired his independence of judgment when he engaged in such conduct. Therefore, the Commission reaffirms its finding that Mr. White acted in his official capacity in a matter in which his spouse had a indirect financial involvement in violation of N.J.S.A. 18A:12-24(c).

In addition, on review the Commission finds Mr. White's conduct in violation of N.J.S.A. 18A:12-24(a), which states:

> No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

Just as a school board member alone cannot hire someone, even with the Superintendent's approval, a school board member alone cannot decide to arrange a meeting to "discuss the issues and reach an agreement." When a board member takes it upon himself to make an agreement on behalf of the board without the authority of the board, it places the board in the untenable position of being forced to go along with the action of the board member or risk an unfair labor practice charge. The purpose of the School Ethics Act is to rid school boards of backroom deals to ensure a democratic process. This much is clear from N.J.S.A. 18A:12-22(a). Mr. White usurped the authority of the Board and acted as a Board unto himself when, through the Superintendent, he presented an agreement that was reached without the Board's knowledge. It is not in the public interest to reach a collective bargaining agreement in this fashion, no matter what the result. The Commission finds that Mr. White's meeting with the union president and reaching an agreement as he did, constituted engaging in a transaction that is in substantial conflict with the proper discharge of his duties in the public interest.

Similarly, on review, the Commission finds that Mr. White's conduct violated N.J.S.A. 18A:12-24(b), which provides:

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

It is undisputed that in June 1999, three contracts were scheduled to expire and the Board President appointed three negotiation teams for those bargaining units. As set forth above, the ETEA was not one of the units, as its contract did not expire until June 2000. By agreeing with the ETEA president to meet with him without the Board's knowledge, prior to the Board's negotiations with the other bargaining units, Mr. White gained a privilege and advantage for the ETEA to the exclusion of the other bargaining units. The ETEA was able to resolve its issues, reach an agreement and set the standard for the other units. Reaching an agreement a year ahead of schedule and before other units whose contracts are scheduled to expire is certainly to the ETEA's advantage. Reaching an agreement in the manner in which it was done is an unwarranted privilege. Mr. White gained a privilege for his spouse as well since she is a member of the general statewide union of which the local unit is an affiliate. It is always beneficial to set the standard to which other affiliates of the statewide general union will aspire. For the foregoing reasons, the Commission finds that Mr. White violated N.J.S.A. 18A:12-24(b) as well.

PENALTY

Mr. White has consistently denied any knowledge of the Commission's prior advisory opinions that stated that a school official would violate the Act if he negotiated with a local bargaining unit of a statewide general union to which he or his spouse belongs. The Commission concluded in its January 31st decision that Mr. White's denial evidenced, at best, a serious lack of concern for the rules that govern his conduct. It concluded that it was Mr. White's duty as a former Board President, Board member and an administrator to familiarize himself with the rulings of the Commission as well as the School Ethics Act. Thus, the Commission does not find his stated lack of knowledge to mitigate in his favor.

In fact, the Commission could not find any mitigating factors that would apply to Mr. White. He did not act on the advice of an attorney nor was he newly elected to the Board. Although the Superintendent was with Mr. White at the meeting in question, he was there because Mr. White told him that the union president had asked that a meeting be arranged and he took it upon himself to arrange it. Therefore, the Commission does not find that the Superintendent's attendance was a mitigating factor. Indeed, since Mr. White has noted that the Superintendent's spouse was also a member of the NJEA, his attendance does nothing to improve the public's perception of this clandestine meeting.

The Commission stated its belief in its January 31st decision that, unless punished severely, Mr. White will continue to take actions on behalf of the Board without the authority of the Board. Mr. White does not find any fault with his conduct as he stated when he said, "I believe I followed all the appropriate chains of command." He acted as though he was at the top of the chain of command selectively disseminating information and leaving others in the dark. The Commission remains convinced that only the maximum penalty that it may recommend would convey to Mr. White that he acted in an unethical manner.

For the foregoing reasons, the Commission recommends that the Commissioner of Education impose a penalty of removal from the Board.

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

Paul C. Garbarini rc

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C18-99, C22-99 (Consolidated)

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

Whereas, the Commission rendered a decision on January 28, 2000, that respondent Bruce White violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the *Pannucci* decision as instructed by the Commissioner of Education and determines that it does not alter its conclusion that the conduct of Bruce White constitutes a violation of the School Ethics Act; and

Whereas, the Commission reviewed the *Pannucci* decision with regard to the penalty and reaffirms that the appropriate penalty to be recommended to the Commissioner of Education is removal from the Board; and

Whereas, the Commission has reviewed a proposed decision setting forth its findings and conclusions; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties of the Commission's decision herein finding Bruce White in violation of N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24(a) and (b) of the Act and recommending a penalty of removal.

Paul C. Garbarini, Chairperson

I hereby certify that this decision was
authorized by the School Ethics Commission
at its public meeting on March 28, 2000.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 45-2/00

IN THE MATTER OF BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION
	:	

The decision of the School Ethics Commission (Commission) and the comments submitted by the respondent Board member, Bruce White, have been reviewed.

In undertaking such review, the Commissioner is mindful that, pursuant to *N.J.S.A.* 18A:12-29(c) and its implementing rules, he may not review the findings and conclusions of the Commission as to violation of the School Ethics Act. Even accepting, however, that Mr. White has violated *N.J.S.A.* 18A:12-14(a), (b) and (c) in the manner set forth by the Commission, the Commissioner notes that removal of an elected official from public office is the ultimate penalty for violation of the School Ethics Act, that decisional law is evolving with respect to violations of the type found to have been committed by Mr. White, and that penalties assessed against board members for other instances of violation under the same provisions of the School Ethics Act have generally been less severe than removal.[1,2]

[1] Since the establishment of the School Ethics Act, no board member found guilty of violating *N.J.S.A.* 18A:12-14(a), (b) and/or (c) has ever been given the extreme penalty of removal from the board. Further, there has been only one instance in which a board member was suspended; in *In the Matter of Salvatore Buono,* decided by the Commissioner, April 9, 1996, a one-month suspension was imposed on a board member who voted on the award of contracts to his business partner/transportation director and also voted on the renewed contract of his emancipated daughter. There have been a number of censures for violation of the same provisions of the School Ethics Act. *See, for example, In the Matter of William Gunning,* decided by the Commissioner July 29, 1994; *In the Matter of Mark Connolly,* decided by the Commissioner June 23, 1997; and *In the Matter of James Russo,* decided by the Commissioner April 16, 1998.

[2] In *Scannella v. Scudillo,* 95 *N.J.A.R.*2d (EDU) 190, *rev'd and remanded* State Board 195, decided by the Commissioner June 10, 1997, the board member was censured for casting the deciding vote for her son-in-law as superintendent and for selling gloves to district employees. However, at the time when the penalty for violation was determined, Ms. Scudillo was no longer a member of the Board, so that the penalties of suspension or removal from office were no longer possibilities.

Accordingly, the Commissioner determines that the appropriate penalty to be imposed upon Bruce White, as a school official found to have violated *N.J.S.A.* 18A:12-24(a), (b) and (c) of the School Ethics Act, under the circumstances set forth by the Commission, is suspension as a member of the Ewing Township Board of Education for a period of 45 days from the date of this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 01 2006
Date of Mailing: JUN 01 2006

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

91-00

SEC #C18-99 and #C22-99 (consolidated)
C # 91-00SEC
C # 169-00
SB # 33-00

IN THE MATTER OF BRUCE WHITE, :

EWING TOWNSHIP BOARD OF EDUCATION, : STATE BOARD OF EDUCATION

MERCER COUNTY. : DECISION

Decided by the School Ethics Commission, January 31, 2000

Remanded by the Commissioner of Education, March 15, 2000

Decision on remand by the School Ethics Commission, March 28, 2000

Decided by the Commissioner of Education, June 1, 2000

For the Complainants-Appellants, Edward H. Vickner, Jr., pro se, and Frank Ferrante, pro se

For the Respondent-Respondent, Parker, McCay & Criscuolo (Frank P. Cavallo, Jr., Esq., of Counsel)

For the Respondent School Ethics Commission, Thomas Russo, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This matter was initiated by two complaints, one filed by Edward Vickner, a member of the Ewing Township Board of Education, and another filed by Frank Ferrante, a resident of Ewing. Mr. Vickner alleged that Ewing Board member Bruce White had violated the School Ethics Act by entering negotiations with the Ewing Township Education Association although his wife was a member of the New Jersey Education Association. Mr. Vickner also alleged that Mr. White had improperly voted on contracts concerning the Ewing Township Education Association while a member of the

SEPT. 6, 2000

Principals and Supervisors Association. Mr. Ferrante's complaint made similar allegations.

The School Ethics Commission consolidated the two complaints and, on January 31, 2000, it adopted a decision finding that Bruce White had violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by participating in negotiations with the Ewing Township Education Association and by voting on contracts with the Association. The Ethics Commission recommended that the Commissioner of Education impose the sanction of removal from the Board.

By decision of March 15, 2000, the Commissioner remanded the matter to the School Ethics Commission. In doing so, the Commissioner stated that he could not determine the appropriate sanction to impose in this case until the School Ethics Commission considered the effect of the State Board's recent decision in In the Matter of Frank Pannucci, decided by the State Board of Education, March 1, 2000.

On March 28, 2000, the Ethics Commission considered the effect of Pannucci on this matter. By its decision, the Ethics Commission reaffirmed its previous finding that Bruce White had violated N.J.S.A. 18A:12-24(c), and added that the facts also established a violation of N.J.S.A. 18A:12-24(a) and (b). The Ethics Commission also reaffirmed its earlier recommendation that Mr. White be removed from his position as a member of the Ewing Board.

By decision of June 1, 2000, the Commissioner determined that the violations found by the School Ethics Commission did not warrant removing Mr. White from his position on the Board. Rather, the Commissioner found that, under the circumstances,

the appropriate sanction was Mr. White's suspension from the Board for a period of 45 days.

Both Mr. Vickner and Mr. Ferrante filed appeals to the State Board of Education from the Commissioner's determination of the penalty.

When review of the record revealed that Mr. Vickner and Mr. Ferrente had been complainants in the matter before the Ethics Commission, the appeal was referred to the Legal Committee of the State Board for review of whether they had standing to appeal to the State Board. By letters of June 25 and June 30, 2000, each complainant was advised that the State Board's decision in Pannucci had held that the complainant in that case did not have standing to appeal. However, all parties were afforded the opportunity to submit briefs on the issue of the complainants' standing to appeal in this case, and the briefing schedule was placed in abeyance pending resolution of that issue by the State Board.

All parties submitted briefs. In their brief, the complainants indicate that they are requesting standing for the purpose of supporting the recommendation of the School Ethics Commission to remove Mr. White from the Ewing Township Board of Education. In contrast, the Deputy Attorney General representing the School Ethics Commission argues that the appeal must be dismissed based upon the State Board's holding in Pannucci. Similarly, Mr. White's attorney argues for dismissal.

In Pannucci, the State Board concluded that a complainant did not have standing to prosecute an appeal from a Commissioner's determination of the appropriate sanction to be imposed for a violation of the School Ethics Act. That conclusion was based on a careful examination of the controlling statutes, which revealed that:

> the role of a complainant was designed to provide the vehicle by which allegations against a school official would be brought to the School Ethics Commission, but that these statutes do not confer on the individual who files the complaint the right to prosecute the matter.

Pannucci, supra, slip op. at 6.

The State Board also found that:

> Consistent with N.J.S.A. 18A:12-29(d) and the statutory framework governing appeals to the State Board, see N.J.S.A. 18A:6-27 through 6-29, the State Board's regulations delineate that "any party aggrieved by a decision...or by the School Ethics Commission finding a violation of the School Ethics Act may appeal to the State Board of Education." As set forth in N.J.A.C. 6:3-9.2, a complainant is the person bringing a complaint of an alleged violation of the School Ethics Act. Quite simply, given the role of a complainant as defined in the statute and implementing regulations, regardless of whether the proceedings result in a finding of a violation and the imposition of a penalty, a complainant is not an "aggrieved party" by virtue of his status as a complainant. In re Lazarus, 81 N.J. Super. 132 (App. Div. 1963).

Id. at 7.

The State Board stressed that even under the liberal approach taken by the New Jersey courts, standing is generally confined to situations in which the individual concerned with the subject matter of the litigation evidences a sufficient stake in the outcome and real adverseness. Id. at 8, citing New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 68 (1980); Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 107 (1971). At the same time, the State Board, like the courts, recognized that lack of standing to invoke the power of judicial review may confer a conclusive character on administrative action to the possible detriment of the public and that a narrow approach

to standing may lose sight of the overriding need of the system to make sure that someone shall in fact be able to secure review of administrative action. Id. Hence, the State Board recognized that where a substantial public interest is involved, a slight interest may be sufficient to give standing to invoke judicial review. Id., citing New Jersey State Chamber of Commerce, supra; Elizabeth Federal Savings and Loan, supra.

However, as expressed by the State Board in Pannucci, supra, slip op. at 9:

> ...the function of a complainant is to bring acts by school officials which may indicate a violation of the School Ethics Act to the attention of the Ethics Commission so as to protect the public's confidence. See N.J.S.A. 18A:12-22. It is the Commission, not the complainant, which is charged in this context with acting as the guardian of the public interest.

The complaints in this matter reflect that both complainants are residents of Ewing Township. Although Mr. Vickner is also a member of the Ewing Board of Education, there is no expression that either complainant possesses any interest in this matter that is greater than that of any other member of the public. Specifically, neither complainant has shown that he has been affected adversely in any degree greater than the public generally by the Commissioner's determination that suspension from the Board was sufficient sanction. Moreover, we reiterate that it is not the function of the Ethics Commission or the Commissioner of Education in this context to adjudicate the rights of complainants vis-à-vis other school officials even if such a complainant is also a member of the district board. Id.

Therefore, for the reasons stated herein, we hold that neither complainant in this case has standing to challenge on appeal the Commissioner's determination that the appropriate sanction for the violations found by the School Ethics Commission was Mr.

White's suspension from the Board for 45 days. Accordingly, we dismiss the appeals filed in this matter.

September 6, 2000

Date of mailing SEP 06 2000

ELIGIO CASTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning nontenured teacher contested the Board's nonrenewal of his contract, asserting that the Board failed to provide him with the required number of teaching evaluations and that the Board discriminated against him because he was a cancer patient.

The ALJ determined that the Board complied with *N.J.A.C.* 6:3-4.1, providing petitioner with three evaluations, including one which petitioner requested be set aside upon learning that he had cancer but which the Board was unable to repeat because petitioner never returned to school. The ALJ also found that petitioner abandoned his discrimination claim because petitioner reported that his claim had been filed in federal district court.

The Commissioner concurred with the findings and conclusions of the ALJ that respondent evaluated petitioner in conformity with applicable law and affirmed the recommended decision for the reasons expressed therein.

OAL DKT. NO. EDU 8008-99
AGENCY DKT. NO. 267-8/99

ELIGIO CASTRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his independent and careful review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that respondent evaluated petitioner in conformity with the applicable law. Since it is a well-established legal principle that a district board of education has virtually unlimited discretion in hiring or renewing non-tenured teachers, the Commissioner concurs that respondent acted within its lawful discretion in not renewing petitioner's employment in the school district.

Accordingly, the recommended decision of the OAL is affirmed for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 15 2000

Date of Mailing: MAR 15 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

92-00

C #92-00
SB #43-00

ELIGIO CASTRO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 15, 2000

For the Petitioner-Appellant, Eligio Castro, pro se

For the Respondent-Respondent, Michael C. Epps, Esq.

On March 15, 2000, the Commissioner of Education rendered a decision in which he rejected a claim by Eligio Castro (hereinafter "appellant"), a non-tenured teacher, that the Atlantic City Board had improperly failed to renew his employment. The Commissioner stressed that a district board had virtually unlimited discretion in hiring or renewing non-tenured employees.

On July 2, 2000, the appellant filed a notice of appeal with the State Board of Education from the Commissioner's March 15 determination. By letter dated July 31, 2000, the Director of the State Board Appeals Office acknowledged receipt of that notice. By letter dated August 11, 2000, the Director advised the appellant that review of his notice indicated that it had been filed beyond the thirty-day statutory time limitation of N.J.S.A. 18A:6-28, and that, as a result, this matter had been referred to the Legal Committee of the State Board for consideration of the effect of his failure to file his notice of

Oct. 4, 2000

appeal in a timely manner. The appellant was informed that he could submit an affidavit setting forth any relevant circumstances with respect to the timeliness of his appeal by August 28, 2000. The appellant was also provided with a copy of the regulations governing appeals to the State Board.

The appellant did not file an affidavit or otherwise provide an explanation for his late filing. Nor did he respond in any way to the Director's letters.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6A:4-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6A:3-1.3(d); N.J.A.C. 6A:3-1.16, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by the appellant's counsel, who alleged that

he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause. See also In the Matter of the Grant of the Charter School Application of the International Charter School of Trenton, etc., Docket #A-004932-97T1 (App. Div. 1998) (the Court, upon reconsideration, upheld the State Board's dismissal of an appeal filed one day late).

In the instant case, the Commissioner's decision was rendered on March 15, 2000 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6A:4-1.4, the decision appealed from was deemed filed on March 18, 2000, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6A:4-1.3(a); N.J.A.C. 6A:4-1.4(a), as computed under N.J.A.C. 6A:4-1.4(c), the appellant was required to file his notice of appeal to the State Board on or before April 17, 2000. As previously indicated, the appellant's notice of appeal was not filed until July 2, 2½ months after the statutory deadline.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this instance.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

October 4, 2000

Date of mailing OCT 06 2000

93-00

EDU #8816-98
C # 93-00L
SB # 23-00

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 16, 2000

For the Petitioner-Appellant, Carluccio, Leme, Dimon, Doyle & Sacks, LLC (Richard K. Sacks, Esq., of Counsel)

For the Respondent-Respondent, John K. Worthington, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

This matter involves a challenge under N.J.S.A. 18A:7F-15[1] by the Board of Education of the Township of Lakewood (hereinafter "Board") to a determination by the Division of Finance of the Department of Education to reduce its core curriculum standards aid for 1998-99 in the amount of $1,054,109. The case is currently pending before the Office of Administrative Law ("OAL"), and the primary issue to be resolved is

[1] That statute provides in pertinent part that:

> A school district may make an appeal to the commissioner on the amount of its core curriculum standards aid on the basis that the calculation of income within the local share formula under section 14 of this act does not accurately reflect the district's income wealth.

N.J.S.A. 18A:7F-14 provides that each school district shall receive core curriculum standards aid predicated on a local share determined by district property wealth and district income and includes a complex formula for making that determination.

JUNE 7, 2000

whether the district income wealth data relied upon by the Division of Finance in determining the amount of aid were accurate.

After the case had been transmitted to OAL, the Board moved to compel discovery of all New Jersey State income tax records relied upon by the Department of Treasury and/or the Department of Education to determine Lakewood's district income for the purpose of establishing state aid for 1998-99. On February 16, 2000, the Administrative Law Judge ("ALJ") denied the motion on the grounds that, pursuant to N.J.S.A. 54:50-8(a), such tax records were confidential.

The Board sought interlocutory review by the Commissioner of Education. By letter decision of March 16, 2000, the Commissioner denied the motion to compel discovery, agreeing with the ALJ that the income tax records that had been used by the Department of Treasury were protected from disclosure pursuant to N.J.S.A. 54:50-8.

The Board then moved for leave to appeal to the State Board so as to obtain interlocutory review of its motion. By its motion, the Board seeks limited access to as much of the tax return information as was relied on by the Department of Education and is necessary to determine the accuracy of the figures used to calculate the core curriculum standards aid given to Lakewood.

We grant leave to appeal, but deny the Board's motion. Our determination is based solely on the fact that the records at issue are in the possession of the Department of Treasury, which is not a party to the matter and over which we have no authority.

June 7, 2000

Date of mailing JUN 09 2000

V.A., on behalf of minor child, K.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent contested the Board's expulsion of K.M.A. for changing the shutdown message on a computer to a message which the administration interpreted as a "bomb threat."

The ALJ determined that expulsion was too harsh a penalty, under these circumstances, and ordered K.M.A. suspended from March 23, 1999, the date of his offense, until the end of the 1998-99 school year. The ALJ further ordered that K.M.A.'s record should reflect that he is eligible for reinstatement thereafter and that K.M.A. shall be reinstated upon request.

The Commissioner affirmed the ALJ's conclusion that the Board's expulsion of K.M.A. cannot be upheld. The Commissioner ordered that K.M.A.'s record shall reflect that he is entitled to reinstatement for the 1999-2000 school year, and, should K.M.A. request readmission to the Board's District pursuant to *N.J.S.A.* 18A:38-1, the Board shall conduct a full and fair evaluation in order to determine whether a return to the regular school environment or an alternative placement is warranted for K.M.A.'s subsequent education in the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2799-99
AGENCY DKT. NO. 97-5/99

V.A. ON BEHALF OF MINOR CHILD,
K.M.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,
Respondent.

J. Shane Creamer, Jr., Esq., on behalf of petitioner (Duane, Morris & Heckscher, attorneys)

Ellen M. Boylan, Esq., co-counsel for petitioner (Education Law Center)

Lenora M. Lapidus, Esq., co-counsel for petitioner (American Civil Liberties Union of New Jersey)

Craig D. Bailey, Esq., on behalf of respondent (Capehart & Scatchard, attorneys)

Record Closed: January 20, 2000 Decided: February 2, 2000

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a decision by the Collingswood Board of Education (Board) to expel K.M.A. for an incident that occurred on March 23, 1999. On May 5, 1999, his mother, V.A., petitioned the Commissioner for review, pursuant to *N.J.S.A.* 18A:6-9, and included an application for emergent relief. The matter was transmitted to the Office of Administrative Law

as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. Oral argument on the emergent relief application was scheduled for May 19, 1999, and an order denying the application was issued on May 25, 1999. The Commissioner affirmed in an order of June 29, 1999, with directions for expedition should the parties require a plenary hearing. Petitioner requested such a hearing by letter dated July 23, 1999. On July 30, 1999, petitioner filed a notice of motion to amend her pleadings raising various constitutional questions, at which time the American Civil Liberties Union and the Education Law Center entered the case on her behalf. A hearing was conducted on August 31 and September 21, 1999. The record closed on January 20, 2000, with receipt of the last post-hearing submission.[1]

Certain facts are undisputed. K.M.A. was born on April 10, 1983, and he transferred into the Collingswood School District in February 1999, at age fifteen. K.M.A. is interested in and proficient with computers. On the morning of March 23, 1999, he was in a computer lab for math class. The lesson was finished and the teacher gave the students free time to use as they pleased until class ended. The shutdown screen message on the computers in the lab usually reads something like "It is now safe to turn off your computer." K.M.A. opened the shutdown message file on the computer he had been operating and substituted the message "if you turn me off i will blow up." Class ended at approximately 10:30 a.m. About one and one-half hours later, a teacher working in the same laboratory came upon this message and reported it to school principal James Misek. The principal commenced an investigation and K.M.A. was identified as the student who had been sitting at that computer. He was located, taken out of class, and confronted. The laboratory was closed for the day, K.M.A. was suspended, petitioner was called, the police arrived and K.M.A. was arrested. The school was not evacuated.

On March 25, 1999, K.M.A. wrote a letter of apology to Principal Misek as follows:

> I am sorry for what I did. At the time when I changed the shutdown screen, I was thinking of nothing other than that it would be funny if I put it up. I used a wrong choice of words; I did not mean for it to be taken as a threat to any human being. I meant no intent to harm. When I downloaded the program, I thought it

[1] In the face of uncertainties about his status for the coming school year, K.M.A. went to live with his father in North Carolina so that he could attend a regular public school program. At that point the matter lost its emergent quality and the parties submitted briefs according to the schedule they sought.

> contained Telnet commands and not anything else. When I opened the file, I realized it wasn't and then realized it might have been a virus. I tried to get rid of it but then realized it was [a] fake virus; I still believe it is a fake. I had no intention of harming any computers or any network systems. All in all I had no intent to harm and I am sorry for making a mistake.
>
> [P-7.]

Superintendent James H. Bathurst met with petitioner and K.M.A. on April 13, 1999. At the end of that conference he indicated that he would recommend K.M.A.'s expulsion to the Board. At its meeting of April 26, 1999, the Board voted for expulsion. It noted also that K.M.A. could apply for readmission in September if he underwent counseling and was found to pose no threat. In a letter of April 29, 1999, Superintendent Bathurst wrote to petitioner as follows:

> The Board of Education carefully considered all of the testimony and evidence that was presented on April 26, 1999 in private session. Hearings such as these are always difficult, and the Board seeks to evaluate each on its own merit.
>
> [P-4.]

K.M.A. received fifteen hours of home instruction to cover the period between suspension and expulsion and an additional eight hours during the summer to make up for a miscalculation in the amount of home instruction due him. K.M.A. received credit for the spring semester. On August 23, 1999, petitioner applied to have K.M.A. reinstated and the matter was heard at a regular Board meeting on August 30, 1999. The request was denied by letter of September 2, 1999, and the Board offered alternative education should K.M.A. return to the district from North Carolina (R-2). Three criminal charges had been filed against K.M.A. in connection with the events of March 23, 1999, and he pled guilty to making a false alarm. He received nine months' probation and was required to attend a fire safety program through the County Fire Marshall's office. This condition had yet to be satisfied at the time of hearing.[2]

[2] I am not privy to the full details of the Family Court proceeding.

Petitioner is K.M.A.'s custodial parent. She testified that he has never before been subject to school discipline. After the expulsion hearing she was told that the Board had no further obligation to educate her son. Petitioner tried to have him admitted to a private school, but it was too late in the semester. K.M.A. was evaluated on August 4, 6 and 20, 1999, by Stephen G. Underwood, M.D., a psychiatrist. Dr. Underwood concluded that he posed no danger and should be readmitted to school (P-6). K.M.A. was also evaluated by the Camden County Division of the Fire Marshall, which determined that he was a low-risk individual (P-5). Petitioner testified that she explained to her son that his shutdown message could have been misread as a threat even though his intentions were harmless.

K.M.A. testified in his own behalf. On March 23, 1999, the teacher had given the class some free time and he was bored so he took a few minutes to change the computer's shutdown screen message. He was merely showing off for a friend and intended no menace. Later that morning he was taken out of French class and brought to the principal's office. There, Mr. Misek confronted him and asked if he had initiated a bomb scare, which he denied. Principal Misek then accompanied him to the computer lab and showed him the message, at which point he understood what the principal was talking about and agreed that he had typed in this message. He never told Mr. Misek that he wrote some message, but not that one. When he typed in the words "blow up," he simply meant that the hard drive would be deleted, or that the computer wouldn't work. He did not set the computer to crash if it were shut down. He offered to change the message, but Mr. Misek said that was not the point. Principal Misek said that he feared there might be a bomb in the computer, which caused K.M.A. to laugh. The police arrived and he was arrested and placed in a cell for two or three hours. K.M.A. testified that he hopes to have a career in computers and would like to go to college. K.M.A. conceded that he was aware there had been bomb threats in the district before he transferred in, and one of his friends was expelled for making a bomb threat before the incident at bar.

Paul M. Kingery holds a doctorate in community health and was admitted as an expert in school safety and discipline. He is the director of the Hamilton Fish National Institute on School Violence, which is associated with George Washington University. Dr. Kingery felt that the authorities had overreacted. Control is a necessary part of running a school, but overcontrol leads to rebellion. The zero-tolerance policy at work here has its origins in the prison system and

reflects a crackdown kind of mentality. It is destructive in a school setting and is used to promote public relations. No published studies support zero-tolerance policies. Dr. Kingery testified that it is important for districts to create measured policies that allow students to predict the consequences of wrongful conduct. Due process must be clear, explanations must be heard, and mitigating circumstances must be fairly evaluated. Police should only be summoned for criminal violations. This would be the best practice based on what has been tested and appears in the literature.

Dr. Kingery testified that the level of school violence has not increased significantly in recent years, but people are taking notice now in the face of a few high-profile cases. Dr. Kingery testified that even if K.M.A. had made an actual bomb threat, expulsion without alternative schooling is not the answer; it merely transfers the problem into society. Dr. Kingery disagreed with the judgment of a recently published federal report entitled "A Guide to Safe Schools," which recommends zero-tolerance policies for drug and alcohol offenses (R-1).

Dr. Kingery testified that as a college professor he supervised a computer lab and is familiar with computer language. Terms like "blow up" and "kill" commonly refer to rendering a computer inoperative. At worst, the language K.M.A. used was ambiguous and school authorities ought to have been sure of his meaning before proceeding further. Dr. Kingery acknowledged that he has never spoken to K.M.A., the family, or any district personnel about the case. Dr. Kingery has never been a school administrator.

James Misek was the principal in Collingswood High School during the 1998/99 school year and he has been an educator for twenty-three years. On March 23, 1999, just before noon, a teacher came to him and asked that he view a computer screen in one of the math labs. On seeing the message "if you turn me off i will blow up," he sent for his two assistant principals and Joseph Myles, the supervisor of technology, to plan a course of action. Initially, they all took K.M.A.'s message as a bomb threat. Mr. Misek testified that he is familiar with computers and it never occurred to him that the words "blow up" might mean crash. Once Mr. Myles began examining the computer it became clear there was no actual danger. Mr. Myles found the computer time stamp, which revealed when the message was entered, and then they perused the schedule to identify the staff member who taught that class. She was summoned and recalled

that K.M.A. was using the terminal in question. K.M.A. was located and brought to the principal's office. Mr. Misek testified that he asked K.M.A. about the message and K.M.A. admitted changing the shutdown screen, but denied writing the language at issue. K.M.A. did not actually admit to writing this message until a few days later when he sent a letter of apology. The student who sat next to K.M.A. was found and he confirmed that he saw K.M.A. write the statement on the screen. At that point Principal Misek called K.M.A.'s mother and the police. The police were at the school for a few hours and took the matter seriously. The lab was closed for the rest of the day.

Mr. Misek testified that there were some thirteen bomb threats in the district during November and December 1998. Initially, the administration automatically evacuated buildings in response, but this was highly disruptive. They consulted with the police and county prosecutor, and decided to assess the threat in each instance before taking further steps. The threat here appeared limited to one computer and Mr. Misek did not feel it necessary to evacuate the building.

Assistant principal Keith Land is in charge of discipline at the high school. He was sent to locate the teacher of the morning class and he found the boy who was sitting next to K.M.A. in the computer lab. Mr. Land testified that when he saw the message on the computer screen he took it as a bomb threat. Later he realized there was no danger.

James Bathurst has been superintendent in the Collingswood district since 1995 and has been an educator his entire career. There was a series of bomb threats in the district beginning in November and December 1998, and the automatic evacuation policy was not working. Meetings with the County Prosecutor and police resulted in a plan not to evacuate buildings immediately, but first to make a threat assessment. They received some training in how to do this. Mr. Bathurst testified that he also adopted a zero-tolerance policy toward bomb scares. When an offender was discovered, barring some handicapping condition, he always recommended expulsion. His first concern is school safety and zero tolerance is intended to reclaim the school buildings from that minority of students who are obstructing the learning process. Mr. Bathurst testified that his policy was informed by the experience of a neighboring district, the Lower Camden Regional School District. Some seventy-seven bomb threats were received there in an

eighteen-month period and he did not want to go down that road. Mr. Bathurst believes that the policy was successful. There were only three or four bomb threats in January 1999, none in February 1999, and none since the March incident at bar.

Mr. Bathurst testified that in late August 1999, when petitioner asked the Board to readmit K.M.A., the Board agreed to allow him to attend an alternative high school, primarily intended for students with truancy and discipline problems. One reason the Board would not accept K.M.A. at the regular high school is that he had not undertaken the counseling program that it had directed.

Mr. Bathurst testified that the Board was aware of his zero-tolerance policy, but it considers each case on its own merits and did so here. He conceded that the letter sent to parents about zero tolerance was mailed in December 1998, before K.M.A. transferred into the district. Neither is the zero-tolerance policy mentioned in the disciplinary code. Mr. Bathurst did not believe K.M.A. when, at their meeting of April 13, 1999, he said that the words "blow up" meant "crash." This is the substance of the record.

The Board argues initially that this matter is moot because K.M.A. is no longer domiciled in Collingswood, a precondition of its obligation to educate him. *See Oxfeld v. New Jersey State Bd. of Educ.*, 68 *N.J.* 301 (1975). I do not agree. The price of jurisdiction cannot be that K.M.A. remain in the district to accept a punishment he challenges. Our circumstances call into play cases that serve as exceptions to the general rule requiring moot cases to terminate. *State v. Gartland*, 149 *N.J.* 456 (1997); *J.A. v. Board of Educ. for South Orange*, 318 *N.J. Super.* 512 (App. Div. 1999); *Student Members of Playcrafters v. Board of Educ. of Teaneck*, 177 *N.J. Super.* 66 (App. Div. 1981).

On the substantive question, boards of education enjoy wide policy-making discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Board of Educ. of Morris*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. Board of Educ. of West Orange,* 60 *N.J. Super.* 288, 294 (App. Div. 1960). Although petitioner has made a series of legal arguments, we must first determine whether K.M.A.'s expulsion contravened this standard. Initially, there is a small fact dispute as to whether K.M.A. was immediately truthful when

confronted. Mr. Misek testified that he asked K.M.A. whether he had written the offending message and the boy denied it. He admitted writing some message, but not the one the principal was talking about. K.M.A. believes this was a misunderstanding. Mr. Misek asked whether he had made a bomb threat and he said no. Later he was taken to the computer lab and shown his statement and acknowledged typing it. Mr. Misek had a good recollection of events and no reason to fabricate. I accept his recitation. Although not crucial, K.M.A.'s account begins with a deception.

What then should be made of the phrase "if you turn me off i will blow up"? The school officials first confronted with this message, Principal Misek and Assistant Principal Land, testified that they understood it as a bomb threat and acted accordingly. On review, Superintendent Bathurst came to the same conclusion. K.M.A. says that he was merely showing off his computer skills and his joke was meant to convey that the computer would crash, not that it would explode. Dr. Kingery accepts this because of his familiarity with computer slang, although he has never actually spoken to K.M.A. I am not persuaded that K.M.A. typed in "blow up" but meant "crash." He did not give this explanation on the day of the incident, nor does his letter of apology two days later assert this. It appears this may be a *post hac* creation. Having said this, K.M.A. is a mere lad and everyone involved in this case has probably given his message far more thought than he did on the day in question. To some extent he probably was just showing off for a friend, but using the words "blow up" was part of that. I expect that hijinks is a factor in many student bomb threats. Moreover, if K.M.A. intended no more than to impress a classmate, he could have accomplished this without a ripple by deleting the message before departing class.

Having correctly determined that this was a bomb threat, school officials investigated, located K.M.A., talked to him, found his denials wanting, and called his mother and the police. Although Mr. Misek soon realized there was no actual bomb, K.M.A. nonetheless caused a significant disruption. Dr. Kingery felt that Mr. Misek and his aides ought to have probed K.M.A.'s purpose more carefully and moved to deescalate the situation. Although Dr. Kingery brings high academic qualifications to bear on this question, he has never operated a school. I cannot say that administrators seeking to discourage bomb threats acted incorrectly by calling in law enforcement and immediately suspending K.M.A.

Mr. Bathurst testified that he began enforcing a zero-tolerance policy for bomb threats in December 1998, when he realized this was an emerging problem. He consulted with the County Prosecutor and police as well as with other districts and came away with a tough and certain response. Once satisfied that the conduct took place, he would always recommend expulsion. That approach is a legitimate reaction to an acute problem. In effect, all violators would be put before the Board to face the ultimate penalty in school discipline.

It is important to distinguish, however, between Mr. Bathurst's recommendation and the Board's decision. Petitioner has spent much effort attacking zero tolerance and ascribing that policy to the Board. There is no evidence for such a finding and this appeal is from the Board's action. Both Mr. Bathurst and Mr. Misek testified credibly that Board members probe the individual circumstances of each case and that this was specifically done at K.M.A.'s hearing. Petitioner has not provided a transcript of that proceeding.

On the assumption that the Board takes each case on its own merits, it appears that in this instance expulsion was too harsh a remedy. The Board itself probably recognized this when it indicated that K.M.A. could apply for readmission in the 1999/00 school year, if he underwent counseling over the summer. K.M.A. had never been in trouble at any school before this incident and it does not appear he was motivated by a nefarious purpose. For his lack of forethought he was arrested and pled guilty to making a false alarm, he was out of school from March 23, 1999, until the end of the school year, and because he was not reinstated at the beginning of this school year, has relocated out-of-state to live with his non-custodial parent. That is a considerable price. K.M.A. was evaluated by a psychiatrist during the summer of 1999, and the Board had the doctor's report before it denied readmission. The Board quibbles when it suggests that K.M.A. did not comply with its direction to obtain counseling, as the record reflects no specific instructions from the Board on this score (P-4). I have no quarrel with the discipline until the end of the 1998/99 school term, whether styled as a suspension or expulsion subject to readmission in September. I can understand also that the Board might not want to readmit K.M.A. in the midst of litigation asserting the denial of various constitutional rights. Nonetheless, his mischief did not warrant permanent expulsion from the mainstream and to take such action was arbitrary and capricious.

Petitioner makes a series of constitutional arguments. First she believes that her son's right to a "thorough and efficient education" under art. VIII, sec. 4, par. 1, of the New Jersey Constitution has been abridged. Petitioner seeks an analogy to the school funding cases that culminate with *Abbott v. Burke*, 153 *N.J.* 480 (1998). Just as the State may not delegate its fiscal responsibilities to local districts in a way that creates substantial inequality, neither may it devolve unguided power over discipline, for this too leads to distortions. Petitioner points specifically to zero tolerance and to the absence of criteria for alternative education. Moreover, given the constitutional proportions of the deprivation, punishment must be narrowly tailored and incorporate best practices. Dr. Kingery felt that zero-tolerance policies were counterproductive and unsupported by any research.[3] Petitioner argues also that zero tolerance violates the equal protection clause of the New Jersey Constitution, because it classifies by district, arbitrarily subjecting students to differential treatment based on residence. Moreover, the Legislature has set standards under the Zero Tolerance for Guns Act, *N.J.S.A.* 18A:37-8, which grants students suspected of weapons offenses greater safeguards, including individualized discipline, than are afforded students who may run afoul of other zero-tolerance policies. Finally, petitioner argues that due process and fundamental fairness were violated because K.M.A. was not specifically notified of the zero-tolerance policy in advance.

As I agree with petitioner that expulsion violated existing school law principles, it is not necessary to treat her constitutional arguments at length. Nonetheless, they appear to proceed upon a false premise. From this record the Board does not follow a zero-tolerance policy and it appears K.M.A. had a full hearing below. The Board might have offered alternative education at an earlier point. Nevertheless, this is not a case in which it was clear from the beginning that alternative education would be necessary. Petitioner used the May/June period to seek reinstatement *via* an emergent relief application to the Commissioner. The Board was not petitioned for readmission until the week before school began in September 1999. In rendering a decision the Board knew that K.M.A. was planning to attend school in North Carolina. Thus, the question of placement in alternative education was not really explored by either side.

[3] Dr. Kingery's strong opposition to zero tolerance is apparently not shared by the federal government (R-1).

Based on the foregoing, it is my conclusion that expulsion was too harsh a penalty in this instance and it is **ORDERED** that K.M.A. be suspended from the date of his offense until the end of the 1998/99 school year. His records shall reflect that he was eligible for reinstatement thereafter and he shall be reinstated upon request.

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

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

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

2/2/00
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Feb. 2, 2000
DATE

D. M. Cantanoritis/lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 3 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

/caa

List of Witnesses

For Petitioner:

V.A.
K.M.A.
Paul M. Kingery

For Respondent:

James Misek
Keith Land
James Bathurst

LIST OF EXHIBITS

For Petitioner:

P-1 Letter to V.A. from Thomas A. Sheridan, dated March 30, 1999
P-2 Letter to V.A. from Keith W. Land, dated March 23, 1999
P-3 Letter to V.A. from James H. Bathurst, dated April 20, 1999
P-4 Letter to V.A. from James H. Bathurst, dated April 29, 1999
P-5 Results and recommendation of Camden County Division of the Fire Marshall
P-6 Psychiatric Evaluation Summary from Stephen G. Underwood, M.D.
P-7 Letter to Mr. Misek from K.A., dated March 25, 1999
P-8 Résumé of Paul M. Kingery
P-9 Affidavit of James H. Misek
P-10 Curriculum Vitae of Stephen G. Underwood, M.D.
P-11 Suspension and Expulsion File Code 5114 for Collingswood Board of Education
P-12 Letter to Craig Bailey from J. Shane Creamer, dated September 9, 1999

For Respondent:

R-1 Booklet: A Guide to Safe Schools
R-2 Letter to J. Shane Creamer from Craig D. Bailey, dated September 2, 1999
R-3a Pamphlet for Gloucester County Special Services School District
R-3b Agreement of Gloucester County Alternative High School
R-3c Handbook from Gloucester County Alternative High School

OAL DKT. NO. EDU 2799-99
AGENCY DKT. NO. 97-5/99

V.A., on behalf of minor child, K.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, which included transcripts of the hearings conducted at the OAL on August 31, 1999 and September 21, 1999, the Commissioner affirms the Administrative Law Judge's (ALJ) conclusion that the Board's expulsion of K.M.A. cannot be upheld. Like the ALJ, the Commissioner finds that the Board considered K.M.A.'s case on its own merits, rather than mechanically applying a "zero tolerance" policy. In addition, the Commissioner concurs with the determination of the ALJ, based upon a full evidentiary record and an assessment of the credibility of witnesses, that the Board did not act reasonably when it concluded, under the particular circumstances of this matter and where K.M.A., due to the timing of his arrival in the District, was unaware of the applicable policy in regard to actions of the type at issue herein, that the appropriate sanction for K.M.A.

was to sever permanently his entitlement to a free public education in its District. This is so notwithstanding that the Board later offered him, once this litigated matter was well under way and he was already enrolled in school in North Carolina, the opportunity to attend an alternative education program, a compromise which could be viewed as "subject to revocation or revision." *C.S. v. Township of Piscataway*, 97 *N.J.A.R.* 2d (EDU) 573, 577, *aff'd* State Board April 1, 1998.

Accordingly, the Initial Decision of the ALJ is adopted, as set forth herein. K.M.A.'s record shall reflect that he is entitled to reinstatement for the 1999-2000 school year, and, should K.M.A. request readmission to the Board's District pursuant to *N.J.S.A.* 18A:38-1, the Board shall conduct a full and fair evaluation in order to determine whether a return to the regular school environment or an alternative placement is warranted for K.M.A.'s subsequent education in the District.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 20 2000

Date of Mailing: MAR 20 2000

[1] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

Corrected Copy

95-00

K.W., on behalf of minor child, CC., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent challenged the Board's decision to expel her son, C.C., for telephoning a bomb threat to the high school.

The ALJ found that the Board had adopted and communicated its "zero tolerance" policy, which provides for the expulsion of any pupil who committed the act of a bomb threat. Petitioner admitted that C.C. telephoned the threat to get out of class and that it caused disruption to the educational process of the students, endangered the safety and welfare of the students staff, and cost considerable expense. Moreover, C.C. was afforded a due process hearing prior to the expulsion. Noting that the record demonstrated the Board's policy was communicated to all students in the school, the ALJ concluded that petitioner failed to carry her burden of proving by a preponderance of credible evidence that the Board's actions were arbitrary, capricious or unreasonable concerning the expulsion of C.C. The ALJ also concluded that C.C.'s enrollment in a school in Ohio, to the extent that his reinstatement was at issue, rendered that issue moot. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own with modification. The Commissioner did not agree that C.C.'s enrollment in school in Ohio rendered the matter moot since, presumably, the reason for attending school elsewhere was his expulsion.

March 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6129-99

AGENCY DKT. NO. 139-6/99

K.W. ON BEHALF OF MINOR CHILD, C.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,

Respondent.

K.W., petitioner, *pro se*

Barry Chatzinoff, Esq., for respondent (Weinberg, McCormick, Chatzinoff and Paul, attorneys)

Record Closed: December 22, 1999 Decided: February 4, 2000

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, K.W., appeals from a determination by the Board of Education of the Lower Camden Regional High School District No. 1 (Board) to expel her child, C.C., from its schools.

The Board answers the Petition of Appeal of K.W. by asserting, among other things, that C.C. was responsible and admits that he committed the act of telephoning a bomb threat to the Edgewater Senior High School (Edgewater) which caused a disruption in the educational process to all students attending Edgewater and also caused the safety and welfare of all the students and staff to be endangered. The Board admits that it promulgated and adopted a Policy of Discipline Procedure which provides the appropriate penalty for a student's commission of a bomb threat to be expulsion from its schools, subject to a due process proceeding and in accordance with *N.J.S.A.* 18A:37-1 to –5.

The matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education (Commissioner) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. A prehearing conference was held on October 4, 1999, at which, among other things, the issue to be determined by this administrative tribunal was agreed upon and set forth on the record. The matter was heard on December 22, 1999, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on December 22, 1999.

ISSUE

The sole issue to be determined by this administrative tribunal, as agreed upon by the parties, is whether or not the Board's action to expel pupil C.C. from its school was arbitrary, capricious and/or unreasonable.

FINDINGS OF FACT

Based upon the pleadings and other evidence adduced at the hearing I **FIND** and **CONCLUDE** that the facts in this matter are neither contested nor in dispute. Therefore, the following constitutes my **FINDINGS OF FACT.**

Petitioner, K.W., who has the burden of proof, by a preponderance of the credible evidence, produced no witnesses on her behalf. Rather, she concedes that her son, C.C., on March 29, 1999, telephoned a bomb threat to Edgewater for the reason that he wanted to get out

of his eighth period math class. Petitioner further concedes that the Board had experienced a number of bomb threats, which caused disruption to the educational process of the students and also endangered the safety and welfare of the students and staff during the 1998-99 school year. Petitioner admitted that these bomb threats cost the Board not only education lost but, also, considerable expense.

Petitioner denies that she knew or was aware of the Board's Policy/Discipline Procedures, which incorporated a "Zero Tolerance" Policy, and called for the pupils' expulsion from its schools as the appropriate penalty for a pupil's commission of a bomb threat. Notwithstanding petitioner's denial of her awareness of the Board's Zero Tolerance Policy, the record demonstrates that the Policy had been communicated to all pupils enrolled at Edgewater. Petitioner admitted on the hearing record that C.C.'s conduct was criminal. She also concedes that C.C. was afforded a due process hearing before the Board prior to the Board's having taken action to expel C.C., pursuant to its Zero Tolerance Policy concerning bomb threats. Petitioner argues, however, that expulsion of C.C. is too harsh a penalty.

PETITIONER'S LEGAL ARGUMENT

In support of her argument that C.C.'s expulsion from the Board's schools was too harsh, petitioner cites the matter of *W.W., Sr., on behalf of Minor Child, W.W. v. Board of Education of Penns-Grove-Carneys Point Regional School District*, 1998 *S.L.D.* -----, (OAL DKT. NO. EDU 2059-98, Initial Decision April 8, 1998), where the administrative law judge (ALJ) cited the matter in *Scher v. Bd. of Ed. of West Orange*, 1968 *S.L.D.* 92, and where the ALJ asserted the Commissioner stated that:

> Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy, which should be employed only when no other course is possible. It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school it may likewise create a host of others involving not only the pupil but the community and society at large. The commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child

> comes under the aegis of another agency able to deal with the problem. The commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation. (1992 *S.L.D.* 96-97) (P.2)

Petitioner asserts that C.C. is now enrolled in a school in the State of Ohio.

THE BOARD'S POSITION

The Board propounded on oral motion to dismiss the instant matter on two grounds. First, petitioner failed to meet her burden of proof by a preponderance of any evidence. Second, the matter is now moot given the fact that C.C. is presently enrolled in a school and, therefore, afforded the opportunity for an education.

CONCLUSIONS

In the matter of *G.F. v. Bd. of Ed. of Washington Twp., Gloucester County*, 1980 S.L.D. 20, the Honorable Daniel B. McKeown, ALJ, observed that Art. VIII, Sec. XV, Para. 1, of the *New Jersey Constitution* (1947) provides for a ". . . system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." Judge McKeown continues to state that:

> The Legislature has recognized this constitutional mandate at *N.J.S.A.* 18A:38-25 which requires the attendance at school of pupils between six and sixteen, and at *N.J.S.A.* 18A:38-1 which provides that such attendance shall be free of charge.
>
> A pupil's constitutional right to attend public schools, free of charge, is not unbridled. Pupils are subject to the authority of those over them and are required to obey the rules of the school. *N.J.S.A.* 18A:37-1. Those pupils who refuse to recognize the authority of those over them, or who refuse to obey the established rules, are subject to disciplinary measures as set forth at *N.J.S.A.* 18A:37-2. This statute provides for a pupils suspension or expulsion from further school attendance if found to be, *inter alia*, defiant, disobedient, or violent. (1980 *S.L.D.* at 29)

The facts in the instant matter are neither contested nor in dispute. The undisputed facts demonstrate that on March 29, 1999, petitioner's son, C.C., telephoned a bomb threat to Edgewater High School. In the matter of *H.A. v. Bd. of Ed. of Warren Hills Reg. Sch. Dist.*, 1976 *S.L.D.* 336, the Commissioner had the following to say about bomb threats:

> . . . The Commissioner finds that the fundamental fact herein is that the Board and its administrators were faced with an incident of the highest magnitude on October 8, 1975, wherein an inherent danger to the safety and well-being of the pupils under its jurisdiction was threatened. At the time of the incident the school administration was left with no other alternative but to consider the telephoned bomb threat a potentially dangerous occurrence of incalculable dimension with respect to the imminent peril of injury, destruction and loss of life which might result if, indeed, a bomb were present in the building. In the Commissioner's judgment actions of pupils who perpetrate such incidents, notwithstanding the fact that the incident itself is subsequently found to be false, cannot go unpunished. A board of education has the authority and the responsibility pursuant to the aforementioned statute to deal swiftly and effectively with pupils who wittingly or unwittingly jeopardize the safety and well-being of a pupil population and school staff. All pupils are accountable for their actions to school authorities and the authority for the school administration to require such accountability of pupils is clearly set forth at *N.J.S.A.*. 18A:25-2. . . (1976) *S.L.D.* at 340)

Thus, the Commissioner and the law provides for a local board of education to punish a pupil who commits the act of telephoning a bomb threat to a public school. The herein Board adopted and communicated its "zero" tolerance policy which provides for the expulsion of any pupil who has committed such an act. The expulsion is effective only after a due process hearing, which was also provided to petitioner's son, C.C.

Having carefully reviewed and considered the entire record before me, I **CONCLUDE** that the petitioner has failed to carry her burden, by a preponderance of the credible evidence, that the Board's actions were arbitrary, capricious and/or unreasonable concerning the expulsion of her son, C.C.

I Further **CONCLUDE,** given the fact and circumstances of this matter that the Board's action to expel petitioner's son from its schools was an appropriate punishment under its announced and communicated "Zero" tolerance policy concerning bomb threats.

I Finally **CONCLUDE** that petitioner's son's enrollment in a school in a foreign State, to the extent that his reinstatement is at issue, now renders that issue moot. See *Carolyn Henry, Bd. of Ed. City of Wildwood*, 1975 *S.L.D.* 1, 5.

I **CONCLUDE** that petitioner's Petition of Appeal is without merit and must be dismissed.

ORDER

Accordingly, for the reasons expressed above, the herein Petition of Appeal is hereby **DISMISSED.**

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

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

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

February 4, 2000
DATE

Lillard E. Law by JR Tarrson ALJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/4/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

WITNESSES

For petitioner:

None.

For respondent:

None

DOCUMENTS IN EVIDENCE

For petitioner:

P-1	Three handwritten letters
P-2	*Scher v. Bd. of Ed. of West Orange*, 1968 *S.L.D.* 92
P-3	Teacher's Evaluation

For respondent:

None.

OAL DKT. NO. EDU 6129-99
AGENCY DKT. NO. 139-6/99

K.W., on behalf of minor child, CC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner has failed to establish that the Board's decision to expel C.C. was arbitrary and capricious, or otherwise contrary to law. In so concluding, however, the Commissioner does not agree that C.C's enrollment in school in Ohio necessarily renders this matter moot, since, presumably, his reason for attending school elsewhere is his expulsion from the Board's District, and C.C. remains unable to return to the District's high school, as his mother wishes.

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

therein, as modified above. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 20 2000

Date of Mailing: MAR 20 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY ALLEGRETTI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent French teacher, based on accusations of sexual misconduct, including that he displayed a condom in class and commented that it was too small for him, made a condom into a balloon-type giraffe, discussed aspects of his personal sex life with students, made inappropriate comments of a sexual nature to female students, taught his students profane words in French and used a book to tap a female student on the buttocks.

Based on the evidence presented at the hearing, the ALJ concluded that the Board had established, by a preponderence of the relevant credible evidence, that the allegations serving as a basis for the tenure charges were true. The ALJ further found that respondent's actions did not warrant termination in light of his prior lengthy and unblemished record of service, and because he did not appear to exhibit the type of predatory conduct typically evident in sexual misconduct cases. Therefore, the ALJ recommended that the penalty imposed be the forfeiture of 120 days salary and loss of salary increments respondent would have earned had the charges not been brought against him. The ALJ further recommended that respondent be examined by a psychologist or psychiatrist prior to reinstatement to his position.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred that the charges proven did not warrant dismissal, but stressed that respondent's behavior cannot be countenanced in the school environment and increased the ALJ's recommended penalty to loss of six months salary plus increments for 1999-2000 and 2000-2001. The Commissioner also ordered respondent to be examined within 60 days by a psychologist or psychiatrist of the Board's choosing and expense.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6408-99

AGENCY DKT. NO. 127-5/99

SCHOOL DISTRICT OF THE

CITY OF TRENTON,

Petitioner,

v.

HENRY ALLEGRETTI,

Respondent.

Thomas W. Sumners, Esq., for petitioner (Sumners, George & Dortch, attorneys)

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

Record Closed: January 6, 2000 Decided: February 4, 2000

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 27, 1999 the Trenton Board of Education ("The Board") instituted tenure charges against Henry Allegretti ("respondent") a tenured teacher of French assigned to the Arthur J. Holland Middle School. The charge essentially is one of conduct unbecoming. Allegretti has been employed by the Board since 1989 and has been a full-time teacher in New Jersey for approximately twenty-seven years. The Board suspended Allegretti from his position without pay for 120 days pending resolution of these charges. The "tenure" charges are as follows:

CHARGE ONE

On or about March 26, 1998, respondent used inappropriate language and actions during his French class. According to witnesses, respondent discussed aspects of his sex life in class and displayed a condom in class, commenting that it was too small for him.

CHARGE TWO

On or about March 27, 1998, respondent made inappropriate comments of a sexual nature to a female student in his class, T.K., by saying to her, "it depends on how you do it to me." Additionally, respondent made a comment regarding a student's buttocks and was accused of looking through a slit in another female student's skirt.

CHARGE THREE

Some time during March of 1998, respondent hit a female student, M.C., on the buttocks with a book and commented how nice her butt was and that she had a pretty shape. Respondent also allegedly commented to M.C. about the way she makes him feel, which she interpreted as a sexual remark.

CHARGE FOUR

On or about March 26, 1998, respondent made inappropriate comments of a sexual nature to a minor student in his class, B.R., who also stated that respondent displayed a condom in his class and said that it was too small for him. B.R. also said that respondent taught his students profane words in French.

CHARGE FIVE

On or about March 27, 1998, respondent made inappropriate comments of a sexual nature to P.T., a minor student. According to P.T., respondent made comments regarding her buttocks and told her "she keeps him going" and "the things that she does to him." P.T. stated that these comments were meant in a sexual manner.

CHARGE SIX

On or about March 26, 1998, respondent made inappropriate sexual comments to A.S., a minor student. According to A.S., respondent told boys in his class that he and his cousin undressed each other when they were younger and touched each other in a sexual manner. Respondent also allegedly told his students that he made a balloon giraffe out of a condom.

. . . . . .

On March 27, 1998, the Division of Youth and Family Services (DYFS) received an allegation of sexual and emotional abuse concerning the foregoing charges. After conducting an investigation, DYFS issued a finding on December 15, 1998 concluding that sexual abuse was unfounded in relation to respondent's actions. In particular, DYFS concluded that respondent did not make inappropriate physical contact with the student known as M.C., as was alleged in Charge 3.

Similarly, DYFS also concluded that the allegations of emotional abuse against respondent were not substantiated. DYFS did find, however, that there was evidence respondent made inappropriate comments to female students concerning sexual situations and by making reference to various body parts such as the buttocks. DYFS recommended that respondent be returned to the classroom, that he be counseled regarding his actions, that this should be documented in his personnel file and that his actions should be closely monitored. In addition, DYFS recommended that respondent receive a written reprimand regarding the inappropriateness and unprofessionalism of his actions.

Based on the foregoing charges, the Board recommended that respondent be suspended without pay for 120 days during the pendency of the tenure charge proceedings before the Commissioner of Education and that his employment with the Board should be terminated for engaging in conduct unbecoming of an employee.

Respondent submitted an Answer to the charges on June 15, 1999 (postmarked June 14, 1999) and, subsequently, filed a second Answer on June 17, 1999 (postmarked June 16, 1999). Respondent essentially denied all the allegations and asserted that his privacy and confidentiality rights were violated by the inclusion of reports of the Division of Youth and Family Services in the charges.

On July 7, 1999, the Commissioner of Education granted summary judgment to the Board on the grounds that respondent filed untimely Answers as they were not filed within fifteen days from the date the charges were certified to the Commissioner.[1] On July 16, 1999, the Commissioner vacated his July 7, 1999 order and decided to accept respondent's untimely Answer. On August 10, 1999, the matter was referred to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. Following a prehearing conference the matter proceeded to hearing on November 18 and November 30, 1999. Thereafter at the request of counsel posthearing submissions were provided concurrently. On January 5, 2000 I received the Board's submission and on January 6, 2000, the date on which the record in these proceedings closed, I received Mr. Barrett's submission.

ISSUE

The fundamental issue in this case is whether the respondent school district can demonstrate that Mr. Allegretti committed one or more of the charges alleged against him as part of the proceedings to remove him from his teaching position. If *arguendo* one or more of the charges are sustained the issue remains to be decided as to whether the appropriate sanction in this matter is terminating Allegretti from his tenured teaching position or if a lesser sanction is reasonable, appropriate and consistent with law.

THE FACTS

The various charges alleged emanate from events testified to by former students of Allegretti's and occurred during the 1997-98 school year. In my judgment, and even assuming

[1] Respondent was served with a copy of the charges on May 27, 1999. In accordance with the calendar calculations, the Answer was due on Friday, June 11, 1999.

that all of the allegations as alleged were accurately and credibly described by the students, the assertions do not rise to a level sufficient to terminate Allegretti from his position. Allegretti's conduct was clearly inappropriate, in bad taste and, on occasion, may have bordered on the obscene. However, this conduct did not rise to a level of prurience, licentiousness or salaciousness one would associate with sexual misconduct. His professional history is devoid of any experiences which would undercut that inference. What one has here, in my view, is a sophisticated French teacher being a bit too cavalier in his language, a bit too sophisticated in his humor, a bit too candid in response to questions placed to him of students and perhaps as well a bit too free to touch students in a non-sexual manner. A host of students were called to testify about a variety of incidents that occurred. These students were in various classes taught by Allegretti during the period at issue.

P.T., currently a tenth grader in Trenton Central High School, was a student of Allegretti's in her seventh and eighth grades. She testified in respect to remarks allegedly made by Allegretti while she was in eighth grade, on or about March 27, 1998, in the school assembly. Allegretti is a large man and apparently there was a difficulty in seating himself, as well as the students. In the course of being seated near P.T. he apparently was required to brush past her and in so doing allegedly uttered something to the effect that "you do something to me." P.T. interpreted this to be an overture of a kind and also indicated that he "said something about my butt or behind."

Allegretti testified that during the assembly the principal accidentally pushed him into the aisle against P.T.. In response he indicated that he tried to make a joke out of the matter by alluding to the lyrics of a well-known Cole Porter song "You Do Something To Me." Allegretti also recalled that during that same day in the classroom it was his recollection that P.T. had been seated on the window sill and after apparently repeatedly requesting that she remove herself from that spot and didn't, he asked her to "get your butt off the window sill" denying making any further reference to P.T.'s physical appearance. P.T. also noted in her testimony that on the following day Allegretti made a reference to her "keeping him going." There was no context to that remark and P.T. indicated that it bothered her to the point where she decided to complain. She acknowledges never being touched by Allegretti and Allegretti denies any recollection of making the latter comments on the following day. I found P.T. to be a very bright, credible and

articulate witness. She plans to go to college, reiterated her embarrassment as a result of what occurred and reaffirmed that she had no regrets in providing the testimony that she did.

B.R., currently a student at Morrisville High School, testified to an incident that occurred when she was in eighth grade on March 27, 1998. She indicated that the respondent touched another student's "butt" and said that "he couldn't help it because it was a nice butt." In her statement (P-2) Rosa refers to Allegretti's conduct as "hitting" another student's butt.

Allegretti testified that at one point in respect to the student at issue whom he described as a "disciplinary problem" he used a book to push her away from an overhead projection machine. He denies that the touching was in anyway salacious and I believe him.

B.R. also noted in her testimony that Allegretti would, on occasion, talk about sexual activities. At one point she noted that he took a condom out (apparently condoms were distributed at that time to male students as part of a sexual orientation class) and said it was too small to place on his penis. He also, according to her testimony, in response to questions placed to him by some students in his French class, translated various obscene words into French. Her statement (P-2), while not exactly identical to her testimony, is entirely consistent. Allegretti denies making any remarks in respect to his genitalia; his only recollection was that he recalled seeing a condom in the classroom which, he testified, he threw into the wastepaper basket. He acknowledges commenting that when he was a child he made a play animal out of a condom but denies another allegation which suggested that he blew the condom up into the shape of an animal. Allegretti acknowledges that, in response to questions asked of him in class concerning the lyrics to a rap song, he did translate the words "bitch" and "f—k" into French. B.R. also asserted that during the course of the class on March 27th Allegretti discussed a sexual incident which occurred when he was younger which she felt was highly inappropriate. Allegretti indicated that he never discussed his personal sex life except he did acknowledge that he discussed an incident that occurred when he was two years old with a cousin. B.R. concluded her testimony by indicating that she was "glad it was all over" and indicated, and I believe her, that there was no revenge or any pleasure derived by making the allegations that she did against her former teacher.

T.K. was in Mr. Allegretti's homeroom and had him for her French in her eighth grade. She testified that Allegretti at one point told her to dress sexy and to "get an attitude." In her written statement (P-3) she refers to an alleged remark Allegretti made concerning another female student's dress wear. Apparently the student was wearing a skirt with a high slit and the statement goes on to indicate that "the further the spilt [sic] goes that's how far [I'm] going to look."

Allegretti testified that he never said what P-3 indicates that he said. He recollects that he sent the pupil with the split skirt to do some board work and after noticing what he felt to be inappropriate dress he told her "things like that will make eyes wander." He indicated that there was nothing sexual about it but rather it was indicative of his way of advising the young woman that her dress was inappropriate.

A.S. is a seventeen year old male student who is currently in the National Guard Education Program. He was a student of Mr. Allegretti's in his eighth grade French class. A.S. testified that as a male student it was his view that the actions that were taking place in class "shouldn't be happening in the classroom." A.S. noted that Allegretti spoke about his sexual activities when he was young and, on one occasion, he did indicate that Allegretti shaped a condom into a balloon-type giraffe. A.S. also indicated that he was a witness to the incident involving P.T. concerning alleged references about her behind. In A.S.'s view, while Allegretti might have been joking, the subject matter was not something to joke about. As will be recalled Allegretti denies utilizing a condom in any inappropriate fashion in the classroom.

A.P. was the last student to testify against Mr. Allegretti in these proceedings. The respondent taught French in her eighth grade. A.P. wrote a letter to a supervisor at the school following her observation of various incidents, of a generalized nature, which she characterized in her testimony. She noted that, in her view, both the comments and the conduct of Allegretti, during the relevant time frame, were inappropriate for a teacher and required accountability.

As I stated earlier, many of the allegations made against Allegretti have been admitted to others-specifically displaying a condom in class as a balloon animal and inappropriate touching-were unambiguously denied by Allegretti. In my judgment the resolution of the factual

differences in this matter are not terribly significant. On the whole I would have to say that, based upon their credibility, their lack of motivation to in any way harm Mr. Allegretti or falsify, I believed the kids. This is not to say that I thought Allegretti lied; he may over time have embellished in his own memory what he may, or may not, have done. Nevertheless the prefatory remarks that I made should be reiterated at this time. Nothing that was alleged against Allegretti, in my judgment, even interpreted in a fashion most deleterious to him, was undertaken in a prurient, salacious, or licentious manner. Allegretti is married. His wife attended the entire course of the proceedings. He has been married for twenty-eight years. He also noted that in May of 1997 he was taking medication (Phen-Phen) to lose weight and, as a consequence, suffered heart failure in November of 1997. Since then he remains on a variety of medication, including Prozac, which he indicated he was taking for weight loss, which is also a psychotropic medication often utilized for a variety of emotional problems. Whether, at the time of these incident, the use of the medications and/or his state of mind had an effect upon his unusual and-bizarre for him-inappropriate behavior is unclear indeed. Counsel for Mr. Allegretti never made the argument that any mental deficiency or emotional deficiency resulted from his dieting or his eventual heart condition. It is also noted that, in my view, no touching of a significant sexual nature was established; no sexual overtures were made.

Respondent's Arguments[2]

Respondent points out that in reaching the ultimate question of termination from employment, the Commissioner must consider the totality of respondent's record in the district. (Rb9). To that end, respondent emphasizes that he has never been subject to any prior disciplinary action during his twenty-seven years of teaching in the New Jersey public schools. Furthermore, respondent contends that none of the comments attributed to him were meant to be sexually suggestive and that these statements were misconstrued or misunderstood by some of his students.

For example, respondent argues that he was trying to make light of an uncomfortable situation when he made the comment at issue in the fifth charge. He claims he accidentally bumped into the student, P.T., and he jokingly started to sing lyrics from a Cole Porter song-

[2] Rb refers to respondent's brief

bumped into the student, P.T., and he jokingly started to sing lyrics from a Cole Porter song- "You Do Something To Me . . ." as a way of easing tension. (Rb3). Respondent also contends that P.T. did not offer any credible testimony in support of her interpretation of this event.

Respondent argues that the allegation in the third charge was also the result of a misunderstanding. He contends that he playfully tapped the student, M.C., on the buttocks with a book as a way of getting her to sit down and to stop being disruptive. He denies that the tap was either "assaultive or sexual in any way" and further denies making any inappropriate comments about M.C. (Rb4).

With respect to the first charge, respondent states that it was a male student who initially displayed a condom in class and that any comments respondent made were in jest. Respondent acknowledges that he probably should not have answered the question posed by a male student about respondent's early sexual experiences, which led to his awkward remark at issue in the sixth charge about playing "doctor" with a female cousin. (Rb8). Respondent also admits that he probably should not have translated an obscene rap lyric into French for a student, which was the basis for the allegation contained in the fourth charge.

Respondent also attributes the allegation raised in the second charge concerning a comment he made about a slit in the skirt of one of his students to a misunderstanding. He denies saying he was looking at the slit in the skirt. Instead, he claims to have said the reason these types of skirts are prohibited is because "eyes will wander". In support of this interpretation, respondent points out that he sent the student in question, J.D., to the office that day because he felt her skirt violated the dress code.

Respondent points out that the Board has the burden of proving its claims by a fair preponderance of the evidence. He concludes his argument by alleging that "the Board has fallen woefully short of sustaining this burden." (Rb9).

The Board's Arguments[3]

The Board contends that all five of respondent's former students testified consistently in describing petitioner's misconduct. According to the Board, there was nothing suspect about any of their accusations to indicate a motivation to fabricate allegations against respondent. As a result, the Board concludes that the students' testimony was credible and that respondent's misconduct warrants termination of his employment..

By contrast, the Board portrays respondent's explanation of events as lacking credibility. For example, the Board contends that respondent failed to explain why it was appropriate for a French teacher to engage in conversations with eighth grade students regarding sexual behavior and to make comments that were unequivocally replete with sexual innuendo. (Bb9). With respect to the fifth charge, the Board contends that it was inappropriate for a teacher to refer to song lyrics as a way to excuse himself from bumping into a student. The Board reaches a similar conclusion with respect to the third charge as it deems it inappropriate for a teacher to use a book to hit a student on the buttocks to prod her to get into her seat. (Bb9).

Furthermore, the Board rejects respondent's explanation for talking about his early sexual experiences, which form the basis for the sixth charge. The Board states that it is "difficult to believe" that respondent could recall an incident occurring at such a young age. (Bb7). The Board does not specifically refute respondent's explanations for the remaining charges as it simply reiterates the testimony of the students.

The Board was not persuaded by respondent's contention that all these allegations were simply the result of misunderstandings as it notes that eighth grade students are particularly susceptible to misinterpreting these types of statements. (Bb10). The Board argues that to sustain tenure charges against respondent would send a clear signal to students, as well as teachers, that teachers must conduct themselves in a professional manner. The Board concludes

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[3] Bb refers to the Board's brief

by stating that, under the proper standard of review, its decision should stand because it was neither arbitrary nor capricious.[4]

Legal Discussion:

The dismissal or reduction in compensation of tenured persons in the public school system pursuant to *N.J.S.A.* 18A:6-10 is warranted for "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10(b) (emphasis added). While unbecoming conduct is not specifically defined in the statutes or regulations, the ALJ in *In the Matter of the Certificate of John Fargo*, 91 *N.J.A.R.*2d (EDE) 1, stated that this determination is discretionary and should be made on a case by case basis. Lack of fitness to remain a teacher is best demonstrated by a series of incidents, but might be shown by a single incident if sufficiently flagrant. *Redcay v. State v. Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326, 327 (E & A 1944); *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967). Further, the nature of the offense, any mitigating circumstances, and the teacher's record must also be considered when determining unbecoming conduct. *In the Matter of the Tenure Hearing of Boyd*, 93 *N.J.A.R.*2d (EDU) 445, 452.

Sexual Misconduct Cases:

Teachers found guilty of sexual misconduct have traditionally received harsh penalties. The rationale for this approach was explained in *Tenure of Sammons*, 1972 *S.L.D.* 302: "Teachers . . . are professional employees to whom the people have entrusted the care and custody of . . . school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. *Id.* at 321.

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[4] The Board seems to be applying the incorrect standard of review. While it is true that decisions by school boards regarding the certification of tenure charges against teachers are entitled to presumption of correctness and will not be upset unless there is a showing that a decision was arbitrary, capricious or unreasonable, *Thomas v. Morris Twp. Bd. Of Educ.*, 89 *N.J. Super.* 327, 328 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966), the certification of tenure charges is not at issue here. Rather, the issue is the resolution of those charges at an OAL hearing, which, in the absence of statutory or case law to the contrary, is conducted *de novo* using a preponderance of the evidence standard. *Sprowl v. P.F.R.S.*, 95 *N.J.A.R.*2d (TYP) 201, 205.

Typically, however, the sexual misconduct at issue is more serious than that alleged here. In *In the Matter of the Tenure Hearing of John Hovington*, EDU 4318-95S & 225-96S (consolidated), Final Decision (August 5, 1997), *adopted*, State Board (January 21, 1999) http://www.state.nj.us/njded/legal/index.html, for example, a physical education teacher and coach of the women's track team was dismissed from his tenured position for unbecoming conduct for engaging in an inappropriate relationship with a student and for inappropriately touching another student. The Commissioner found that the teacher's behavior constituted unbecoming conduct based on the finding that he had sexual contact with a student on a repetitive basis. The sexual contact in *Hovington* involved kissing a student on the mouth. By contrast, the only contact alleged in the present case was that respondent hit a female student on the buttocks with a book, an action which has been subject to divergent interpretations.

Dismissal was also the penalty in *In the Matter of George McClelland*, No. A-152-83T2 (App. Div. Jul. 20 1984). Here, a tenured teacher was dismissed for conduct unbecoming based upon "his habitual flagrant conduct in touching, caressing and hugging minor female students in his charge." The teacher argued that dismissal was too severe a penalty in light of his outstanding reputation. The ALJ agreed and determined that the teacher should be penalized by a loss of salary. The Commissioner, however, concluded that the teacher should be dismissed, noting that his "proclivities . . . far exceed the bounds of good judgment and restraint". *Id.* at 3. The Appellate Division, while describing the Commissioner's penalty as "harsh", nevertheless affirmed that decision on the grounds that "we cannot say that it lacks substantial support by credible evidence in the record." *Id.* at 6.

A somewhat more analogous fact pattern to the present case occurred in *Old Bridge Township Board of Education v. Wagner*, 1988 S.L.D. 1257. In this case, a gym teacher/track coach with no prior misconduct during his sixteen years of teaching was found to have made sexual comments about some of his students and to have placed his hands on the buttocks of several female students outside of the class. *Id.* at 1278-79. The ALJ held that the teacher's long record of employment, "otherwise unblemished but for the incidents herein", demanded mitigation of the ultimate sanction of dismissal. Furthermore, the ALJ noted that the school had long tolerated the practice of male athletic coaches using physical contact, such as tapping students on the buttocks, as a means of encouraging female athletes. *Id.* at 1281. Viewing the

circumstances in their entirety, the ALJ concluded that a fair and reasonable penalty to impose upon the teacher was a reduction in salary in an amount equal to 120 days of salary together with the loss of salary increments the teacher would have earned had the charges not been brought against him. *Ibid.*

The relatively benign nature of the physical contact in *Wagner* can be analogized to the present case. In *Wagner*, however, this contact occurred repeatedly while all of the allegations in the present case concerned a two-day period. Thus, it is difficult to justify dismissing respondent given that the teacher in *Wagner* received a lesser penalty.

Profanity:

While most of the allegations in the present case concern sexual misconduct, respondent is also alleged to have taught his students profane words in French. The use of profanity by a teacher in a class room was found to constitute conduct unbecoming a teacher in *In the Matter of the Tenure Hearing of Juanita Zielenski*, 1977 *S.L.D.* 786, 793. The one incident of profanity in *Zielenski*, coupled with findings of inefficiency, was found to warrant the teacher's forfeiture of her rights to tenure in the school district. *Id.* at 794.

Removal was deemed too harsh a penalty in *In the Matter of the Tenure Hearing of Earmond DeMarco*, 1980 *S.L.D.* 204, where the teacher used profane and vulgar terms to threaten bodily harm to a pupil during an off-campus ski trip. The Commissioner distinguished *Zielenski* from DeMarco's situation on several factors. The removal in *Zielenski* was predicated upon several instances of inefficiency as well as the profanity; the profanity occurred in a classroom where a teacher should have better control as opposed to the less structured circumstances of a ski trip; and the children were younger, 9 and 10, than those under DeMarco's control who were 14 and 15. DeMarco's conduct was found inexcusable, nonetheless, and he was denied any salary adjustments or increments to which he might have been entitled during the course of his suspension.

In the present case, respondent admitted that he made a mistake when he translated obscene rap lyrics for a student. Like the allegations of sexual misconduct, this incident appears

to have been an isolated incident during a two day period of aberrant behavior. When coupled with all the other allegations, however, respondent should be held accountable for displaying such bad judgment in several different instances.

Lesser Penalties Than Removal:

The following cases involve OAL EDU decisions in which the ALJ determined that sanctions such as removal and loss of tenure were too harsh and instead recommended a lesser penalty, such as suspension, denial of an increment, or reduction in pay.

Board of Educ. of the City of New Brunswick v. Murphy, 92 *N.J.A.R.*2d (EDU) 527

Respondent was brought up on charges of unbecoming conduct when it was alleged that she hit students on two separate occasions. The two instances occurred a little over one year apart. The ALJ concluded that respondent did physically strike or touch students on those two occasions but found she "did not willfully and deliberately act in a manner calculated or intended to inflict pain and suffering and injury to the child. While the conduct was inexcusable, it nevertheless appears to be an isolated manifestation in an otherwise highly commendable career." *Id.* at 536.

The penalty imposed by the ALJ was that respondent "be reinstated to her teaching position at the same annual salary that she was paid during her suspension, without benefit of any adjustment or increment which might otherwise pertain." *Ibid.* The Commissioner adopted the ALJ's findings of fact and conclusions of law, except that he directed the punishment to be that "in addition to the employment and adjustment increments recommended by the ALJ, respondent shall forfeit the 120 days' pay withheld from her during her suspension . . ." *Id.* at 537. The State Board of Education affirmed the decision of the Commissioner. 93 *N.J.A.R.*2d (EDU) 134.

In the Matter of Tenure Hearing of Boyd, 93 *N.J.A.R.*2d (EDU) 445

Respondent was brought up on tenure charges alleging corporal punishment of pupils. The ALJ concluded that "the respondent inappropriately touched [a student] . . ., that she inappropriately discussed the event with pupils on at least two occasions, and that she removed

from class a pupil whom she questioned about spreading rumors concerning the incident." *Id.* at 452. The ALJ did not recommend termination, in part due to her 25 years of service, and because "[t]he respondent already has paid a very heavy penalty as a consequence of these charges. She has suffered professional and personal embarrassment and has lost 120 days' salary. She will have to work with careful and unremitting attention to all her actions to restore her professional reputation. *Ibid.*

The ALJ further concluded that, "the respondent's actions were rash but not premeditated, cruel or vicious. While there undeniably was a ripple effect from the incident, nothing in the record shows that the respondent's actions had any lasting effect on the operation of the school or on the pupils involved." *Ibid.* The Commissioner affirmed the decision of the ALJ.

In the Matter of the Tenure Hearing of Feinsod, 93 *N.J.A.R.*2d (EDU) 590

Tenure charges were brought against respondent alleging "conduct which is unprofessional, does not demonstrate good behavior and is unbecoming a teaching staff member. *Id.* at 591. The ALJ sustained the following charges against respondent: she humiliated a student by informing her of her failing grade within the hearing of others; she used an inappropriate tone of voice that frightened a student; and she displayed an extreme lack of sensitivity by keeping a student in a kneeling position next to a file cabinet in view of a large number of students during a conversation in which the child was crying. *Id.* at 597-98.

The ALJ's recommended punishment was the forfeiture of 120 days of salary, which had already been withheld. The subsequent year's salary and adjustment increments were to be withheld, although, in the Board's discretion, this could be returned at a later date. Finally, the ALJ recommended that "the Board provide for, and [respondent] participate in, a program of continuing education and/ or in service training including but not limited to, child development, behavioral management and psychology of learning, so as to improve her ability to understand the needs of different types of children and better comport her own behavior and expectations to them." *Ibid.* The Commissioner affirmed the decision of the ALJ.

Conclusion:

Reviewing the totality of circumstances in the present case, in conjunction with the determination that the students were credible, as was respondent but for the likelihood that he has a poor memory and was in some denial, the harsh penalty of removal is not warranted. Respondent displayed poor judgment and used inappropriate language during the two day period at issue here but this behavior was an aberration from an otherwise unblemished teaching career. Moreover, respondent seems to have been guilty mostly of handling certain encounters with his students in an awkward manner rather than exhibiting the type of predatory conduct typically evident in sexual misconduct cases.

For example, it is difficult to categorize respondent's singing the lyrics from a Cole Porter song, "You Do Something To Me . . ." after bumping into a student as anything other than an awkward attempt to ease tensions on his part. While the Board might be right in describing his choice of words as inappropriate, this incident hardly seems to constitute serious misconduct. Similarly, respondent's decision to discuss his early sexual experiences with his students was misguided but also does not rise to the level of serious misconduct. In addition, respondent's comments about the slit in the skirt of one of his students simply seems to have been misinterpreted given that respondent apparently reported this student for violating the school dress code with this dress.

Respondent's use of a book to a tap a female student on the buttocks represents perhaps the most serious allegation here as it indicates inappropriate touching. This action seems analogous with the behavior by the track coach at issue in *Wagner, supra*, 1988 *S.L.D.* 1257 in that it does not seem to have been sexually suggestive. Nevertheless, respondent's action was inappropriate and merits punishment. Respondent also displayed similarly poor judgment in translating obscene French lyrics for a student.

The penalty imposed on the gym teacher/track coach in *Wagner* can be used as a benchmark for arriving at the proper penalty in the present case given the similarity of the misconduct at issue. In that case, the ALJ concluded that a fair and reasonable penalty to impose upon the teacher was a reduction in salary in an amount equal to 120 days of salary together with

the loss of salary increments the teacher would have earned had the charges not been brought against him. *Id.* at 1281.

Here, respondent was suspended without pay for 120 days at the outset of these tenure proceedings. The record does not reflect whether this suspension was extended after the expiration of the 120 day period.[5] In any event, the loss of salary experienced by respondent as a result of this suspension, together with the loss of salary increments which he would have earned had the charges not been brought against him, when coupled with the personal and professional embarrassment respondent has undoubtedly suffered, would seem to constitute a sufficient penalty. A more severe penalty, such as dismissal, is not warranted by the facts of the case.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has established, by a preponderance of the relevant credible evidence, that the allegations serving as a basis for the tenure charges be and are hereby **SUSTAINED**. Nevertheless, the nature of the charges themselves and the nature of the respondent's conduct cannot, and should not, sustain a termination from employment following a twenty-eight year professional record which is untarnished. Accordingly, it is **ORDERED** that the determination of respondent Board which terminated the petitioner be and is hereby **REVERSED**. It is further **ORDERED** that the petitioner be reinstated to his position , after he is determined to be fit by a psychologist or psychiatrist to be selected by the Board, with no back pay resulting from his suspension and no accrual of any salary increments which he would have earned had the charges not been brought against him. This consequence, coupled with the personal and professional embarrassment Mr. Allegretti and his family have suffered constitutes, in my view, a sufficient penalty. Any further conduct by Mr. Allegretti of a similar nature would of course warrant his dismissal.

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[5] Respondent was suspended for 120 days as of May 24, 1999. Thus, the suspension was due to end on September 21, 1999.

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

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

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

Feb 4, 2000
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

Feb. 8, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

P.T.

B.R.

T.K.

A.S.

A.P.

For Respondent:

Henry Allegretti, respondent

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Statement of P.T., dated March 27, 1998

P-2 Statement of B.R., dated March 27, 1998

P-3 Statement ofT.K., dated March 27, 1998

P-4 Statement of A.P., dated March 27, 1998

For Respondent:

None

OAL DKT. NO. EDU 6408-99
AGENCY DKT NO. 127-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY ALLEGRETTI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

The record of this matter[1] and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondent's reply exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

The Board's exceptions contest the conclusion of the Administrative Law Judge (ALJ) that the nature of the charges themselves and respondent's overall professional record do not warrant termination of employment. While acknowledging that in those cases where a tenured teacher was terminated, the conduct was more egregious than in this instance, the Board contends that termination is the appropriate penalty because the ALJ sustained six separate charges involving the use of inappropriate language and inappropriate conduct against respondent. The Board argues that students should not be exposed to this type of behavior from teachers, and that the penalty of a 120-day suspension without pay and the loss of an increment is a mere slap on the wrist. (Board's Exceptions at 2, 3)

The Board agrees with the ALJ's assessment that respondent should be required to undergo a psychological or psychiatric examination before being permitted to return to work,

[1] The parties did not provide the Commissioner with transcripts of the hearings in this matter.

assuming that the Commissioner upholds the ALJ's determination, but suggests that there should be some incentive for respondent to be examined as soon as possible. (*Id.*)

In his exceptions, respondent objects to the ALJ's references in the Initial Decision to related determinations made by the Division of Youth and Family Services.[2] Respondent also reiterates his argument that all of the incidents that were alleged to have occurred were during a two-day period when all the female students in the school were attending a family planning seminar in which sexual issues were discussed. It is respondent's position that many of the comments attributed to him were misconstrued, misinterpreted or embellished by students who were sensitive to sexual issues because of the seminar being held at that time. Respondent argues that the charges speak in terms of sexual misconduct and that, while ALJ found that he acted injudiciously in regard to some of the incidents, the judge did not find him guilty of sexual misconduct. Thus, he reasons, the penalty imposed by the ALJ was too severe. (Respondent's Reply Exceptions at 1, 2)

Upon review, the Commissioner determines to affirm the decision of the ALJ with modification as noted below. Initially, the Commissioner concurs that respondent's use of inappropriate language and his inappropriate conduct with his students is conduct unbecoming a teacher. Although the ALJ's findings turn on the credibility of witnesses, the Commissioner is satisfied, based on the record before him, that the ALJ appropriately measured the plausibility of content in deciding the credibility of witnesses and the proper weight to assign to testimony in

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[2] *N.J.S.A.* 9:6-8.10a, which limits the release or disclosure of child abuse records, reports and information obtained by DYFS in investigating such reports, was specifically modified in 1996 to authorize the Office of Administrative Law to disclose such records:

> b. The division may *** release the record and reports referred to in subsection a., or parts thereof, *** to:
> (6) A court or the *Office of Administrative Law*, upon its finding that access to such records may be necessary for determination of an issue before it, and such records may be disclosed by the court or the *Office of Administrative Law* in whole or in part to the law guardian, attorney or other appropriate Person upon a finding that further disclosure is necessary for determination of an issue before the court or *Office of Administrative Law* ***. (emphasis added)

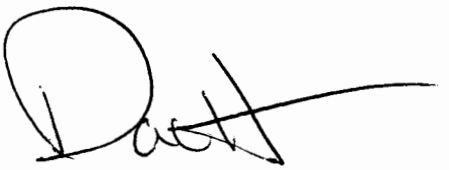
reaching his factual findings and conclusions. It is noted that credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is especially true, where, as here, transcripts of the proceedings were not provided to the Commissioner. However, even *excluding (arguendo)* the students' testimony and statements, and accepting *all* of respondent's testimony as true, the Commissioner's conclusion is unaltered.

As to the appropriateness of the recommended penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically that behavior of the type evinced by respondent cannot be permitted in the school environment. The Commissioner agrees with the ALJ that, in view of all the facts in this matter, including respondent's prior unblemished history, that the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also agrees with the Board that no student should be exposed to this type of behavior from a teacher, and that respondent's use of inappropriate language and conduct as seen here is a serious infraction deserving a harsh penalty. (Board's Exceptions at 3) The Commissioner therefore finds the penalty imposed by the ALJ, the loss of 120 days salary and loss of salary increments respondent would have earned had the charges not been brought against him, insufficient to impress upon respondent the seriousness of the charges proven in this matter, which include: displaying a condom in class and commenting that it was too small for him, making a condom into a balloon-type giraffe, discussing aspects of his personal sex life with students, making inappropriate comments of a sexual nature to female students, teaching his students profane words in French and using a book to tap a female student on the buttocks. Rather, the Commissioner modifies the penalty to include a loss of salary for six months plus the withholding of salary increments for the 1999-2000 and 2000-2001 school years.

Although respondent did not offer a medical defense, the Commissioner concurs with the ALJ that, given the apparently uncharacteristic behavior of respondent over a two-day period, respondent is to be reinstated to his position only after he is determined to be fit by a psychologist or psychiatrist to be selected and paid by the Board. Such examination is to be completed within 60 days of the date of this decision.

Accordingly, the Initial decision of the OAL is affirmed for the reasons expressed therein, except as modified above with respect to penalty.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: MAR 22 2010

Date of Mailing: MAR 22 2010

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

96-00

EDU #6408-99
C # 96-00
SB # 26-00

IN THE MATTER OF THE TENURE HEARING :

OF HENRY ALLEGRETTI, SCHOOL DISTRICT : STATE BOARD OF EDUCATION

OF THE CITY OF TRENTON, MERCER COUNTY : DECISION

Decided by the Commissioner of Education, March 22, 2000

For the Petitioner-Appellant, Sumners, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

For the Respondent-Respondent, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We stress in so doing that the respondent's reinstatement was not automatic, but, rather, was expressly conditioned by the Commissioner upon a determination by a psychologist or psychiatrist that the respondent was fit to be reinstated to his position.

August 2, 2000

Date of mailing AUG 04 2000

97-00

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA HAGOPIAN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

March 22, 2000

OAL DKT. NO. 1078-00
AGENCY DKT. NO. 388-12/99

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA HAGOPIAN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY	:	

For the District, Gregory G. Johnson, Esq.

For the Respondent, Robert J. Candido, Esq.

This matter having been opened before the Commissioner of Education on December 17, 1999 through certification of tenure charges of unbecoming conduct against a tenured administrator (Director of Research, Planning and Evaluation), Dr. Gloria Hagopian, by the State-operated School District of the City of Paterson; and

An Answer to the charges of unbecoming conduct having been filed by respondent and this matter having, thereafter, been transmitted to the Office of Administrative Law (OAL); and

Respondent, before the OAL, having withdrawn her Answer by letter of her counsel dated February 16, 2000[1]; and

[1] Respondent's counsel indicates that "respondent Gloria Hagopian hereby withdraws her Answer to Tenure Charges filed with the Commissioner's Office on or about December 27, 1999. The respondent has been advised that the withdrawal of her Answer removes any opposition or defense to the charges. Further, the respondent understands that Your Honor may enter an Order that the charges are uncontested resulting in a loss of tenure employment." (Candido's Letter of February 16, 2000)

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that respondent, on or about July 1999, misappropriated District funds by causing the owner of Tamboer Travel Agency to issue a refund check in the amount of $1,086.42 to her personally, after a principal attending a seminar in Jacksonville, Florida changed hotels, despite the fact that the costs for the original hotel were prepaid by the District, and, also, submitting a voucher for expenses totaling $831.99 for the second hotel, since respondent paid those costs with her credit card (Charge One); on or about September 1998, respondent engaged the services of Evaluation and Assessment Services for Education (EASE), a business owned by her husband, to conduct workshops for District staff, concealing the fact that her husband owned and operated EASE, failing to obtain approval from the State District Superintendent to retain EASE, and causing the District to pay EASE approximately $6,630 for services (Charge Two); on or about September 1998, respondent participated in a scheme with her husband to defraud the District by submitting false receipt reports to secure payments to EASE for workshops which were *not* conducted by EASE (Charge Three); on or about September 1998, after improperly retaining the services of EASE, respondent directed members of her staff to copy promotional materials and workbooks on District time and using District supplies for the benefit of EASE (Charge Four); on or about July 1999, respondent engaged the services of Computer Technical Services (CTS), a business owned by her son, to install computers for a student data base, having concealed the fact that CTS was owned by her son, and failing to obtain the requisite District approval for same (Charge Five); on or about June/July 1999, respondent initiated requisitions and caused purchase orders to be issued for CTS in the amounts of $14,950 and $10,120, having failed to obtain the requisite District approval for same, and caused the District to pay CTS approximately $13,800 for

installing computers (Charge Six); on or about June/July 1999, respondent falsified receipt reports in that CTS did not render the services paid for, yet respondent caused the District to pay $13,800 for installing computers (Charge Seven); on or about June/July 1999, respondent engaged in a fraudulent scheme to compensate her son as an employee and a vendor for the same work when she received approval to hire her son as a summer intern/employee to essentially install computers in the District, submitting time reports totaling 99 hours at $7.50 per hour, while, at the same time, CTS, her son's company, was retained to install computers (Charge Eight); while on suspension in September of 1999 pending an investigation into allegations of conduct unbecoming an employee, respondent requested that a District employee process the purchase orders for CTS in the amount of $10,120 for installing computers, which paperwork was ultimately halted by the District (Charge Nine); on or about November 1998, respondent engaged the services of In-Class Collaborative, a business owned by her husband, to conduct training workshops for District staff, without requisite District approval, and caused the District to pay to In-Class Collaborative approximately $3,500 (Charge Ten); on or about November 1998, respondent retained In-Class Collaborative to conduct a training workshop for District staff, caused a requisition to be issued for In-Class Collaborative, and signed a purchase order voucher indicating that services had been rendered, notwithstanding that her husband submitted an invoice for $3,500 indicating that another vendor provided the services, and the District issued a check for $3,500 to Project Charlie, a business operated by respondent's husband (Charge Eleven); during the 1998-1999 and 1999-2000 school years, respondent retained the services of Project Charlie, a business owned by her husband, to conduct workshops and supply training materials to the staff, concealing the fact that Project Charlie was owned by her husband and failing to obtain requisite District approval, causing the District to pay Project

Charlie $8,325 for services and materials (Charge Twelve); during the 1998-99 school year, respondent knowingly participated in a scheme to defraud the District to pay for services not rendered by causing the District to pay Project Charlie approximately $1,800 for workshops which were actually conducted by another consultant, who was also paid by the District (Charge Thirteen); during the 1998-99 school year, respondent caused to be ordered manuals from Project Charlie, a drug abuse prevention program based in Minnesota, and knowingly allowed her husband to conduct business in the District under the same name, having no affiliation to the drug abuse prevention program (Charge Fourteen); on or about April 7, 1999, respondent ordered office furniture from the Corner Office Store in Bayonne totaling $2,593.18 without District authorization or approval, causing a requisition and purchase order to be issued for same, and, changing the delivery address of the furniture to a non-district facility (the Arabic Civic Center), respondent signed for the furniture, falsely representing that this Center was a District educational program (Charge Fifteen); on or about May 5, 1999, respondent entered into a contract in the amount of $202,065 with Keystone Information Systems, Inc., to develop a student data base computer system without the requisite authorization from the District (Charge Sixteen); and during the 1998-1999 and 1999-2000 school years, respondent violated the School Ethics Act, *N.J.S.A.* 18A:12-24, by entering into several business transactions with members of her immediate family, retaining, on various dates, four companies: EASE, CTS, Project Charlie and In-Class Collaborative (Charge Seventeen); and

Deeming such charges to be admitted pursuant to *N.J.A.C.* 6:24-1.4(e), the Commissioner finds that respondent's actions constituted unbecoming conduct, warranting her dismissal from her tenured position; now, therefore

IT IS ORDERED this 22nd day of March 2000 that summary judgment shall be granted to the District, and Gloria Hagopian shall be dismissed from her tenured position as a Director of Research, Planning and Evaluation in the District's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAR 22 2000

Date of Mailing: MAR 22 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

98-00E

R.L. AND U.L. on behalf of minor child, R.L.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

March 23, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CONSENT ORDER
FOR EMERGENCY RELIEF
OAL DKT. NO. EDU 1732-00
AGENCY DKT. NO. 65-2/00

R. L. AND U.L. ON BEHALF
OF MINOR CHILD, R.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY
OF EAST ORANGE, ESSEX COUNTY,
Respondent.

This matter, having been opened to the Office of Administrative Law, on transmission from the Bureau of Controversies and Disputes, Department of Education upon the application of petitioners for emergent relief, Ellen M. Boylan, Esq. and Elisabeth Yap appearing pursuant to *N.J.A.C.* 1:1-5.4(a)4, appearing on behalf of petitioners (Education Law Center) and Marvin L. Comick, Esq., appearing on behalf of respondent (Love & Randall, attorneys), and, following an informal conference with the parties, the parties advised the Court that they had reached an agreement regarding the matters raised by petitioners' emergent application and requested that the terms of the parties' agreement be memorialized in a Consent Order, which terms are more particularly described below.

It is on this 10th day of March, 2000, **ORDERED**, upon the consent of the parties, as follows:

1. That respondent immediately conduct an assessment of the exact curriculum and instruction that R.L. missed during the period of his suspension, particularly in the subject areas of language arts, math, science, and social studies. The respondent shall inform R.L.'s parents of the assessment results.

2. That the Board develop, as soon as possible and no later than ten (10) days from the date of this Consent Order, a written plan to address the provision of compensatory education services to R.L., for the education he missed during his suspension and to provide him an opportunity to receive grades and credit for completing the eighth grade. R.L.'s parents will participate in the development of the plan.

3. That the Board provide the services documented in the plan.

4. That nothing herein contained shall be construed as a resolution of the remaining claims asserted in the Verified Petition.

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

March 10, 2000
DATE

MARGARET M. MONACO, ALJ

I hereby consent to the form and entry of the within Consent Order which memorializes the agreement reached between the parties concerning the emergent application filed by petitioners.

ELLEN M. BOYLAN, Esq.
Attorney for petitioners

MARVIN L. COMICK, Esq.
Attorney for respondent

md

RICHARD MARKOWSKI,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CAPE MAY COUNTY SPECIAL SERVICES SCHOOL DISTRICT, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member who was riffed from his position as social studies teacher on April 28, 1998, alleged that the Board reduced his position from full-time to part-time while essentially retaining the same teaching duties for another individual in violation of petitioner's tenure and seniority rights. Petitioner had declined the offer of "part-time" employment to accept full-time employment in another public school district. Petitioner contended the Board assigned the less senior replacement teacher to more time than had been assigned to petitioner prior to his RIF.

The ALJ found that the matter was ripe for summary judgment. The ALJ found that subsequent to the Board's action to abolish the social studies teacher position and create a three-fifths, part-time position in its stead, the replacement teacher taught social studies on a *full-time* basis from September 1998 until about April 1999. Taking into consideration the number of student contact hours involved in the position, the ALJ concluded that the Board failed to reduce the position of social studies teacher from full-time to part-time, as authorized by its action on April 28, 1998. Rather, it retained a full-time social studies position in its schools from September 1998 until about April 1999. The ALJ concluded that petitioner was entitled to that position for that period pursuant to his tenure and seniority status with the Board. The ALJ ordered the Board to provide petitioner with the salary and other emoluments to which he was entitled between September 1998 and April 1, 1999, less mitigation. The ALJ ordered that the Board maintain petitioner on its seniority list for the position of social studies teacher and that he be so advised when and if a position becomes available.

The Commissioner concurred with the ALJ, finding that the matter was ripe for summary judgment and determining that the Board had not, in reality, effectuated a RIF until April 1999. Agreeing that petitioner's tenure and seniority rights were violated during the period at issue, the Commissioner granted summary judgment to petitioner as recommended by the ALJ.

March 24, 2000
Date of Mailing 3/27/00

March 24, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 00390-99

AGENCY REF. NO. 539-11/98

RICHARD MARKOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CAPE MAY COUNTY SPECIAL SERVICES SCHOOL DISTRICT, CAPE MAY COUNTY,

Respondent.

Steven Cohen, Esq., for petitioner (Selikoff & Cohen, attorneys)

John Barbor, Esq., for respondent

Record Closed: November 12, 1999 Decided: February 4, 2000

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Richard Markowski, who was subject to a reduction in force (RIF) by the Board of Education of the Cape May County Special Services School District (Board) alleges, among other things, that while the Board reduced his tenured teaching position from a full-time

to part-time position, it retained a teaching staff to replace petitioner and assigned the replacement teacher to more time that had been assigned to petitioner prior to his RIF. Petitioner seeks an order from the Commissioner of Education (Commissioner) declaring the Board's action to be in violation of petitioner's tenure and seniority rights and reinstating petitioner to a full-time position as a teacher of social studies or any other full-time position held by a non-tenured teacher or less senior teacher for which he possesses the necessary certification and/or experience effective retroactively to September 1, 1998.

The Board denies the allegations and seeks the dismissal of the Petition of Appeal.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Prehearing conferences were held where, among other things, the sole issue to be determined by this tribunal was agreed upon by the parties. It was further agreed that the parties would cross-move for summary decision, pursuant to *N.J.S.A.* 1:1-12.5.

The parties positions and legal arguments are set forth as follows:

PETITIONER'S POSITION

Statement of Uncontested Facts

Respondent Board specifically admits each of the allegations of the first seven paragraphs of the petition of appeal:

(1) From January 1, 1995 through June 30, 1998, when he was subjected to a RIF petitioner was employed by respondent as a teaching staff member. Petition & Answer, ¶¶1.

(2) Respondent Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and

administration of the Cape May County Special Services School District. Petition & Answer, ¶¶2.

(3) Petitioner is the holder of an instructional certificate with endorsements as a teacher of social studies and as a teacher of elementary education, all of which were issued by the State Board of Examiners in May, 1666. Petition & Answer, ¶¶3.

(4) During the course of his employment with respondent, petitioner was considered a full-time employee, whose assignment primarily consisted of teaching social studies. Petition & Answer, ¶¶4.

(5) At all times material herein, petitioner held the appropriate certificate and endorsement for each of his assignments. Petition & Answer, ¶¶5.

(6) As a consequence of his employment and certification, petitioner acquired tenure with respondent, which tenure includes all subjects that he is authorized to teach under his teaching certificate and endorsement. Petition & Answer, ¶¶6.

(7) Subsequent to his placement on a preferred eligibility list petitioner was offered what respondent termed a "part-time" position as a teacher of social studies. Petitioner declined the offer of "part-time" employment to accept full-time employment in another public school district. Petition & Answer, ¶¶7.

The only other paragraph of the petition that sets forth factual allegations is paragraph eight. Specifically, the eighth paragraph alleges:

> In or about October 1998, petitioner learned that the "part-time" position that had been offered to him by respondent had been filled by another teaching staff member, and that while the other teaching

> staff member is being paid as a "part-time" teaching staff member, the amount of time he is actually teaching social studies (4.5 hours) is fifteen minutes more than petitioner taught as a full-time teacher during the 1997-98 school year (4.25 hours). Petition, ¶8.

The Board's Answer admits that the other teacher has "comparable classroom contact time." Answer, ¶8.

The Board's answer to interrogatory 8(a) explains the factual basis for this admission. The interrogatory asked:

> 8. As to paragraph 8 of your answer in which you state "comparable classroom contact time is admitted."
>
> (a) provide the complete schedule of instruction for the position (including name of instructor, periods taught, precise length of periods taught and day and time taught); *See* Exhibit 1, p. 2.

The Board responded "[s]ee attached" (Exhibit A, p. 4) and then attached several grids and schedules. The first gird was labeled "8(a)"and provided:

Year	Schedule	Teach Time
1997-98		
Markowski-Full Time		4 hours 15 minutes
1998-99		
Part Time Teachers	Schedule A	4 hours 30 minutes
(Aftanis, *Trombetta,* Smith)	*Schedule B*	4 hours 30 minutes
	Schedule C	4 hours 30 minutes
	(As of 12-7-98 to current)	
Full Time Teacher	Schedule A	4 hours 30 minutes
(Tracey Staab)	Schedule B	4 hours 30 minutes

Schedule C 4 hours 30 minutes

(As of 12-7-98 to current)

Exhibit A, p. 5 (emphasis supplied).

Next, the Board attached the underlying schedule as backup for the 4 hours 15 minutes of teaching time in the 1997-98 school year as set forth on the first grid. Exhibit A, p. 6. The schedule provides:

Time	Class	Room
8:30-9:15a	Connections	Each teacher had a class
9:15-10:00a(Period 1)	LA/SS	Team-Teaching
10:00-10:15a	Break time	
10:15-11:00a(Period 2)	SS/LA	Team-Teaching
11:00-11:45a(Period 3)	LA/SS	Team-Teaching
11:45-12:15p	Lunch	
12:15-1:00p(Period 4)	SS/LA	Team-Teaching
1:00-1:30p	Projects	Each teacher had a class

Staff

. . . ***Mr. Markowski*** – History . . .

Ibid. (emphasis supplied).

In summary, the 1997-98 untitled schedule provides for 4.25 hours of teaching time over 6 instructional periods per day or a total of 21.25 hours of teaching time over 30 instructional periods per week. *Ibid.*

Next, the Board furnished Schedule B for the 1998-99 school year (Exhibit A, p.7) as backup for the teaching time indicated for the 1998-99 school year on the first grid. (Exhibit A, p. 5). Schedule B provides in pertinent part:

8:30-9:15 9:15-10[sic] 10:15-11[sic] 11:1145[sic] 12:15-1: 00 1:00-1:45

Mr. Trombetta	US I	US II	Holocaust	US I	US I	World Cultures

Exhibit A, p.7. In summary, the schedule provides for 4.5 hours of teaching time over 6 instructional periods per day or a total of 22.5 hours of teaching time over 30 instructional periods per week. *Ibid.*

In short, paragraph 8 of the Board's Answer and the Board's answer to interrogatory 8(a), plainly demonstrate that following the purported RIF, ***Mr. Trombetta is actually teaching the same number of periods per week and is teaching 1 hour 15 minutes more per week than Mr. Markowski was teaching before the purported RIF.*** *Cf.* Exhibit A, pp.2 and 4-7. Based upon the decisional law of the Commissioner, the purported RIF is not proper because it purports to reduce the position to part-time while, at the same time, assigning the holder of the position to essentially the same duties and hours.

LAW AND ARGUMENT

Petitioner Markowski is Entitled to Summary Decision

A. The Legal Standard for Summary Decision

The case of *Brill v. Guardian Life Ins. Co.,* 142 *NJ* 520 (1996) has clarified legal standard for summary judgment and, hence, summary decision.

In *Brill,* the New Jersey Supreme Court adopted the federal standard for summary judgment. *Brill* requires the trial court to engage in evaluation, analysis and sifting of evidence as if the court had before it a motion for involuntary dismissal under *R.* 4:37-2(b). Thus, under *R.*46-2, summary judgment motions are to be decided by determining whether the competent evidence presented, when viewed in the light most favorable to the non-movant, is still sufficient to permit a rational fact finder to resolve the disputed issue in favor of the moving party. The judge is not to weigh the evidence and determine the truth of the matter, but to determine only whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* at 249, 106 *S. Ct.,* 2505, 91 *L.Ed.* 2*d.* 202 (1986).

In deciding such motions, *Brill* requires that only those disputes go to trial, which are "substantial" and not "imaginary" or "unreal." 142 *N.J.* at 529. In this connection, the court said that the "essence of the inquiry" is "whether the evidence presents a *sufficient* disagreement to require submission to a jury . . ." *Id.* at 533. "[W]here the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." *Id.* at 529 (citations omitted). An award of summary judgment is appropriate when "the *competent evidential materials* presented . . . when viewed in the light most favorable to the non-moving party [are not] sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Brill,* 142 *N.J.* at 540 (emphasis supplied).

B. Mr. Markowski is Entitled to Summary Decision

The facts in this case are clearly not in dispute. The only question in this case is a legal one:

> Has the Board violated Mr. Markowski's tenure and seniority rights by failing to retain him on a full-time basis while, at the same time, having Mr. Trombetta, who is unquestionably less senior that Mr. Markowski, teaching the same number of periods and 1 hour and 15 minutes more per week, claiming that the position is now a part-time position?

Under the decisional law of the Commission, the Board's action plainly violates Mr. Markowski's tenure rights.

Specifically the tribunal's attention is directed to the case of *Diglio v. Board of Education of the River Dell Regional School District,* 1980 *S.L.D.* 547 (Comm'r. of Ed. *6/5/80*), which is directly on point. In *Diglio*, the petitioner was a health education specialist who taught health in the junior and senior high school and who developed the health curriculum for grades seven through twelve. 1980 *S.L.D.* at 548. In the 1974-75 school year, he worked 35 duty periods week. *Id.* at 551. Included among them, he taught 20 to 22 classes per week (depending on the marking period), worked two periods per day on curriculum, one conference period per day and

there was a dispute as to whether he also had an outside duty. *Id.* at 548. The board offered the petitioner reemployment for the 1975-76 school year for 80% of full-time salary. *Ibid.* However, when the school year began, his schedule was revised to 34 duty periods, including four to six classes per day of eighth grade pupils, one class of special education pupils one day a week and an additional assignment of continuing work on the curriculum. *Id.* at 548. *Cf. id.* at 551. On this record, the hearing examiner found that the petitioner was employed on a full-time basis during the 1975-76 school year. *Id.* at 549-50. In deciding the case, the hearing examiner looked primarily to the nature of the duties performed, not the number of duty periods. *Ibid.* The Commissioner adopted the findings of the hearing examiner's report, although he explored independently the reasons for his decision. *Id.* at 551. Specifically, the Commissioner explained that *the number of duty periods was the critical issue upon which he based his decision,* finding:

> *However, it is the total number of duty periods that determines the extent to which a teaching staff member is committed.* And when examined from this broader perspective the evidence in this case indicates that the number of periods assigned for conferences and outside duty did not remain constant from one year to the next. It is this data that persuades the Commissioner to conclude that petitioner's schedule was in fact modified in such a manner as to eliminate the reduction in duty for which petitioner had accepted a reduced salary. When the periods of curriculum work (10 per week) are added to the periods of classroom teaching, which ranged from 19 to 21 depending upon the marking period and averaged 20 per week, and 5 conference periods per week, *petitioner's duty periods for the 1974-75 school year totaled 35 per week. The total periods of assigned duty in the 1975-76 were 34. . . .*
>
> > From this summary it clearly appears that the elimination of periods assigned to curriculum development did not in fact reduce the number of periods during which petitioner was assigned duties. Of the 10 periods that had been devoted to curriculum work, 9 were devoted instead to conferences and outside duty. *In view of the foregoing, the Commissioner concludes that petitioner was, in fact, called upon to perform the services of a full time teaching staff member during the 1975-76 academic year and he should have been compensated accordingly.* The Board is directed to forward to petitioner an amount equal to the difference between the part- time salary he was paid and the full-time salary he should have been paid for the 1975-76 school year.

Id. at 551-52 (emphasis supplied). In short, *Diglio* stands for the following propositions:

> (1) In determining whether a position is truly full- or part-time, the decision will turn upon a comparison of the actual duty periods in the full-time year and the purported part-time year.
>
> (2) A board of education may not legitimately require an employee to work the same amount of duty periods which it previously recognized to be a full-time load for less pay simply by calling the full time employment "part-time."
>
> C. Where a board attempts such a sham, it is appropriate for the Commissioner to place the employee in the same position as she or he would have been if the board had acted properly by reinstating the employee to full-time employment and awarding the employee the wages she or he has lost as a consequence of the Board's wrongful conduct. *Ibid.*

Applying *Diglio* to the present case, a comparison of the actual duty periods in the 1997-98 school year (which the Board labeled full-time employment) and the actual duty periods in the 1998-99 school year (which the Board now attempts to label as part-time), reveals that *the number of duty periods did not change.* Both years, the teacher in question worked 30 periods per week. Exhibit A, pp 6-8. Even more compelling than *Diglio*, is the present case, during the 1998-99 school year, *the amount of duty time actually increased* by an hour and a quarter a week. *Ibid.* Under the circumstances and under the principles articulated by *Diglio*, the Board's offer of purported "part-time" employment to Mr. Markowski and subsequent appointment of Mr. Trombetta to the position on a "part-time" basis, was a sham in derogation of Mr. Markowski's tenure and seniority rights. Under the circumstances, he should be compensated for the salary and emoluments he lost as a result of the Board's wrongful conduct and should be reinstated to full-time employment.

Petitioner's Conclusions

For the foregoing reasons, petitioner, Richard Markowski, requests that Your Honor issue an order:

a. finding and declaring that respondent's action to deprive petitioner of a full-time teaching position was in violation of his tenure and seniority rights;

b. directing respondent to recognize petitioner's tenure and/or seniority rights by reinstating him to a full-time position as a teacher of social studies or any other full-time position held by a non-tenured teacher or less senior tenured teacher for which he possesses the necessary certification and/or experience, effective immediately and retroactively to September 1, 1998;

c. directing respondent to provide petitioner with all salary, benefits and emoluments he is entitled to by law and under the negotiated agreement in force and effect in the Cape May County Special Services School District, retroactive to September 1, 1998.

d. attaching both pre-and post-judgment interest to any back pay award as permitted by law;

e. directing respondent to take all actions necessary to assure that petitioner receives proper pension credit retroactive to September 1, 1998, and

f. granting such relief as is deemed appropriate.

THE BOARD'S POSITION

Statement of the Issue

The essence of the instant petition of appeal is the issue of what constitutes full-time employment as a teaching staff in the Cape May Special Services School District. Petitioner asserts that, at least with respect to himself, the only fact that is relevant is the number of hours during which he provided pupil instructional services in the year prior to his reduction in force. The respondent asserts to the contrary that the status of full-time employment is not determined on an individual by individual basis but rather is established under statute and rule, for teaching staff members as a class. The respondent further asserts that such a status, in this school district has been established at six and one half (6.5) hours per day and thirty two and one half (32.5) hours per week during five consecutive work days.

COUNTER STATEMENT OF FACTS

Uncontested Facts

Respondent concurs that the allegations of the first seven paragraphs of the Petition of Appeal were admitted by it and hence, the facts asserted therein are uncontested.

However, additional, uncontested and material facts were left out of the Petition of Appeal and Petitioner's Brief in support of Petitioner's Motion for Summary Decision. Those additional uncontested facts are as follows:

1. The respondent, Board, operates a County Special Services School District which, other than in the Alternative Education Program, accepts only students who are classified under state law as being in need of special education services based upon having an educational handicapping condition.

2. Assignments to all classroom instructional positions in the educational program outside of the Alternative Educational Program are required by state law to hold a Teacher of the Handicapped Endorsement.

3. Petitioner did not hold nor was petitioner eligible to hold an endorsement as a Teacher of the Handicapped at the time of the RIF. Hence, petitioner did not possess the necessary and required certification for bumping to any position other than in the respondent's Alternative Education Program.

4. There are not currently any teaching staff members employed in the respondent's Alternative Educational Program as elementary teachers, or under Elementary Teacher Endorsements.

5. Since petitioner neither held nor was eligible to hold a Teacher of the Handicapped endorsement at the time of the RIF, and hence is not legally qualified to hold an elementary teacher position in the Board, the question of whether or not petitioner possessed an Elementary Teacher endorsement by itself is immaterial to the instant matter.

6. For the 1999-2000 school year there are no teaching staff members employed in the respondent's Alternative Educational Program solely as social studies teachers or solely under Social Studies Teacher endorsements. The only social studies appointment is held by Mr. Trombetta, whose work time is split between a social studies assignment and a substance abuse counselor assignment. Petitioner, at the time of the RIF did not hold a substance abuse endorsement and has expressly turned down a part-time social studies appointment.

7. There are no teaching positions in existence for the 1999-2000 school year for which petitioner holds the required certification/endorsement credentials. Hence, there is no position in existence for the 1999-2000 school year to which petitioner can claim any entitlement.

8. There is, and has been at all times relevant to the instant matter, a collectively negotiated contract between the respondent and the majority representative, "Services School District Staff Association" (SSSDSA). That collectively negotiated contract is for the period of July 1, 1996 – June 30, 1999. That contract covers all positions and personnel involved in or at issue in the instant matter. That contract provides in material part that:

(2) In Article IX, WORK DAY – WORK WEEK- OVERTIME, IX ¶A:

(3) The work day will be defined as follows:

1. 6.5 hours for certified staff . . ..

B. In Article IX, ¶B:

(1) The work week will be defined as follows:

1. Certified staff, . . . 5 consecutive work days comprised of 32.5 hours.

C. In Article XI, Health Benefits ¶G:

G. Beginning July 1, 1997, the number of hours required to work in order to receive benefits will increase to 26 hours. All current contracted employees will be grandfathered.

D. In Article XVI, Teacher Employment, ¶A&B provide:

(1) It shall be the policy of the Board to employ on the instructional staff, only those persons who hold . . . an acceptable State Teacher's Certificate.

(2) Certification

1. All instructional personnel shall have teaching certificates, duly recorded with the Superintendent of Schools, that legally qualify them for the work to which they are assigned.

E. Article XVIII, Miscellaneous, ¶A & F, provide:

(1) The Board reserves itself sole jurisdiction and authority over matters of policy and retains imposed the right, subject onl to the limitations by the language of this Agreement, in accordance with applicable laws and regulations.

1. to direct employees of the school district;

(1) to hire, rehire, promote, transfer, assign or retain employees in positions in the school district;

(2) to maintain efficiency of school district operations entrusted to them, . . .

F. Article XXI, Fully Bargained Provisions, provides:

Any individual contract between the Board and an individual employee, heretofore, or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this

Agreement, this Agreement, during its duration, shall be controlling.

A True Copy of the Pages of the Collectively Negotiated Agreement from Which the Preceding Were Taken is Attached to This Brief Exhibit A

(1) On or about August 18, 1998, the respondent Board and the SSSDSA negotiated a supplementary side bar agreement to their Collectively Negotiated Agreement that provided in material part that:

A. Article VII: Salaries – Section A-3

ADD: Part-time employees shall have their salaries pro-rated off of the appropriate step of the salary guide. Employees contracted on a yearly basis shall be pro rated according to the percent of employment. Part-time employees contracted on a per diem basis shall have their daily salary calculated on an hourly basis multiplied by the number of working days.

A True Copy of the Supplement to the Collectively Negotiated Agreement from which the Preceding was Taken is Attached to this Brief as Exhibit B.

(1) Based upon educational and fiscal criteria, the respondent Board, in the spring of 1998 to hire a full-time English and math teacher for the Alternative Educational Program and to reduce the history position to part-time. The educational basis has been explained, in part, by the respondent as follows:

The State of New Jersey had mandated an extensive testing program through the HSPT, the HSPA, and the GEPA tests. The students are tested in English and math subjects only, not in history. Many of the students involved must be remediated in English and math. At one time we were responsible solely for the high school testing. Now, we conduct the eighth

grade math and English tests as well as administering the HSPA twice yearly. The state mandated four years of English and three years of math.

The complete statement concerning the fiscal and educational reasons for the reduction in force was provided as attachment "10.(a)(b)(c) to respondent's answers to petitioner's interrogatories.

Potentially Contested Facts

11. In the Table inserted at page three of petitioner's brief, in the eighth box from the top, petitioner asserts that "Schedule C" for the 1998-99 school year for Mr. Trombetta, the teacher who took the position for 1998-99 that petitioner rejected contained "4 hours 30 minutes" of teaching time. Petitioner asserts that this Table was supplied as a document by respondent in answer to petitioner's interrogatories, and that said document is attached as Exhibit A, p.5 to petitioner's brief. However, it is clear from a mere glance at that attached documentary exhibit that the correct time for this entry is "3 hours and 45 minutes," not "4 hours and 30 minutes." This correct figure of "3 hours and 45 minutes" is, in fact, less time than petitioner was assigned to teach during the years that petitioner was employed by respondent.

12. The standard work day and work week for teaching staff members in the CMSSSD is the 6.5 hours per day and 32.5 hours per week during five consecutive work days as specified in the above quoted portions of the collectively negotiated contract.

Legal Argument

Point I

The Local Board of Education Has the Authority To Determine the Number of Hours of Employment that Constitute Full-Time Employment for Teaching Staff Members.

N.J.S.A. 18A:29-5 establishes minimum salaries for full-time teaching staff members employed by local school districts and educational services commissions in New Jersey. That statute specifically defines "full-time teaching staff member" as follows:

> Full-time means the number of days of employment in each week and the period of time in each day required by the regulations of the State board to qualify a person as a full-time teaching staff member.

The State Board of Education has promulgated *Rule N.J.A.C.* 6:3-3.1 "Full-time employment of teachers," that provides:

> The period of time in each day required for full-time employment shall be the number of clock hours prescribed by the district board of education but shall not be less than four clock hours.

In addition, prior to and during a portion of the 1998-99 school year *N.J.A.C.* 6:20-5.6(b), which had been promulgated by the State Board of Education in 1986, was in existence. That rule was repealed by *R.* 199*d.* 2, *see, NJR* 3613(a), 31 *NJR* 36(a). While in existence, that Rule provided, in material part, that:

> Full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule.

In the instant matter, the respondent Board, has through the collective negotiations process, established both the work day and the work week for full-time teaching staff members. As quoted above, those provisions establish:

(1) In Article IX, Work Day – Work Week – Overtime, IX, ¶A:

(2) The work day will be defined as follows:

1. 6.5 hours for certified staff . . .

(3) In Article IX, ¶B:

The work week will be defined as follows:

1. Certified staff, . . . 5 consecutive work days comprised of 32.5 hours.

A. Article VII: Salaries – Section A-3

> Add: Part-time employees shall have their salaries pro-rated off of the appropriate step of the salary guide. Employees contracted on a yearly basis shall be pro rated according to the percent of employment. Part-time employees contracted on a per diem basis shall have their daily salary calculated on an hourly basis multiplied by the number of working days.

Likewise, through the collective negotiations process, the respondent Board has expressly established that any individual employment contract of a specific employee, irrespective of its individual terms, is subservient to the terms contained in the collectively negotiated contract.

It is clear, from this statute and these rules and collectively negotiated contract provisions, that the time requirements for being a full time teaching staff member in the Cape May County Special Services School District have been legitimately and uniformly established at 6.5 hours per day and 32.5 hours per week during 5 consecutive work days. Petitioner's assertion to the contrary, that as to him and for the position he previously held, some lesser and different number of hours per day have now been established, by reason of a prior practice, has no basis in law or fact. In addition to the fact that such an asserted personal right arising from an individual

employment contract is specifically rejected by the express provisions of the collectively negotiated contract, as a matter of law the assertion of such a claim has been soundly rejected. *See,* Point II of this brief for the authorities in support thereof.

The question of what constitutes "full-time" employment in a local public school district is not a question of first impression in New Jersey. In *Rupakus v. Board of Education of the Caldwell-West Caldwell School District* OAL Dkt. No. EDU 6440-87 and EDU 7943-87 (Consolidated); *C.D.* 231-88, 24 Aug. 88; *aff'd State Board* Dkt. #46-88, 4 Jan. 89; *aff'd App. Div.* No. A-2768-88T, 10 Oct. 89, while addressing this specific issue, the Commissioner expressly held:

> *N.J.S.A.* 18A:29-5 defines 'full-time' as meaning 'the number of days of employment in each week and the period of time in each day required by regulations of the State Board to qualify a person as a full-time teaching staff member. *See also, N.J.A.C.* 6:20-5.6(b).
>
> * * *
>
> As noted by the ALJ, case law has further clarified the definition of full-time in the State Board of Education decision in *Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission,* decided January 7, 1987. Therein, as noted by the ALJ, the State Board decided that a full-time teacher is one who works the number of hours required by the Board for full-time employment. The State Board held on page 19:
>
> > Accordingly, we conclude that the question of whether they were full-time teaching staff members during the relevant period requires a determination of whether they were employed for the number of *hours* required for full-time employment. (emphasis added) [emphasis added in the Commissioner's decision].
>
> The Commissioner would stress the word 'hours' in the State Board decision above. That is to say, the duties performed or not performed are not the gauge in determining whether a teacher is full time. Rather, *hours spent* at school is the measure.

On the basis of *Rupakus, Id.,* alone, it is clear that petitioner's asserted claim in the instant matter must be rejected.

Likewise, in *Papailiou v. Hazlet Township Board of Education, C.D.* 265-88, 27 Sept. 88, the Commissioner sustained the action of the local board of education that abolished a full-time position and established a part-time position in its place with a commensurate establishment of a pro-rata salary for the part-time position based upon the hours of work and the salary for a full-time position.

In *Bassett v. Board of Education* 223 *N.J. Super.* 136 (*App. Div.* 1998), the Appellate Division specifically reviewed how full-time or part-time service would be evaluated and paid for under the tenure laws of New Jersey. At page 143, the Appellate Division defined the issue involved therein as:

> With respect to the cross-appeal, the basic dispute is the manner in which petitioner's part-time salary should be calculated in order that it be proportionally commensurate with the full-time salary.

Therein, the Court expressly turned to the applicable collectively negotiated contract between the local board of education and its respective teachers' union. The Court stated, at page 140, that in that district, "the regular school day has six periods." Furthermore, "The contract, as we have pointed out, defines a part-time teacher solely in terms of compensation, that is a part-time teacher who is paid on the basis of the full-time teacher's salary guide." *See* page 143.

The Court held on this issue that:

> Since reference to the salary guide as the compensation determinant is the definitional essence of a part-time teacher, it necessarily follows, as a tautological matter, that petitioner must be paid as if she were a part-time teacher rather than an hourly-rate teacher. We, therefore, conclude that for the years in question, petitioner is entitled to 1/6 of the full-time salary designated for her step for every period taught.

Note that in *Bassett, Id.* that petitioner's only work time was teaching time, but the Court specifically compared such time to the entire school work day, and did not limit its comparison to solely teaching time.

Petitioner's brief relies upon just one decision in support of petitioner's claim of a personal right to shorter full-time day than is generally established in the school district. That decision is *Diglio v. Board of Education of the River Dell Regional School District,* 1980 *S.L.D* 547 (*C.D.* 6/5/80). Note that *Diglio* predates *Rupakus, supra; Middlesex County Educational Services Commission, supra; Papailiou, supra.; and, Bassett, supra.,* but is neither mentioned nor relied upon in any of those subsequent decisions.

The respondent agrees that this decision has some significance to the instant matter, but does not agree that it "is directly on point" as asserted in petitioner's brief at page five. While petitioner has accurately quoted portions of that decision, petitioner has significantly misunderstood and misapplied the Commissioner's holding in *Diglio.*

The decision in *Diglio*, actually requires the denial of petitioner's claim in the instant matter and the granting of the respondent's instant cross-motion for summary decision. In the instant matter full-time employment is clearly established as being 6.5 hours per day and 32.5 hours per five day week. Petitioner concedes that the work time for the contested position at issue ranges between 3.75 hours to 4.5 hours per day which represents a corresponding range of 18.75 and 22.5 hours per week. These actual work time figures are not such as to mandate a designation as full-time status.

Petitioner's error in attempting to rely upon *Diglio* arises form the fact that petitioner focuses solely upon teaching time while *Diglio* expressly focuses upon *all applicable duty time* and not merely teaching time. Generally, teaching staff members as a class, in respondent's district, as in all districts perform many duties in addition to teaching assignments. The fact that petitioner may not have personally previously had such assignments does not create a perpetual personal right to such a lesser time commitment required from petitioner to be accorded full-time

status. In *Diglio* while there is no specific discussion of *N.J.A.C.* 6:3-3.1, *N.J.A.C.* 6:20-5.6(b), or *N.J.S.A.* 18A:29-6, it is clear, that the Commissioner expressly rejected focusing solely upon the number of teaching periods to which a specific individual is assigned, but rather expressly directed that it is the totality of the time commitment that must be considered. This focus, although it predates *Rupakus, supra.; Middlesex County Educational Services Commission, supra.; Papailiou, supra.;* and *Bassett, supra.,* it nonetheless, is in accord with those decisions. In the instant matter a time commitment of 6.5 hours per day and 32.5 hours per 5 day week has lawfully been established for full-time status. Petitioner's claim to a personally applicable lower hourly work level for petitioner to qualify as "full-time" must fail.

The Board's Conclusion

Point I

The petitioner's attempt to establish multiple designations of what constitutes full-time employment based upon an individual by individual basis must be rejected. The State Board has delegated, to the local board of education, by specific Rule, the authority to designate the time commitment that will constitute full-time employment of teaching staff members in a respective local school district. This rule specifically speaks in a general, collective perspective with respect to such an establishment. It clearly contemplates a district wide standard and does not provide for an individual by individual varying right. A local board of education's exercise of that delegation of authority is superior to the claim of an individual teaching staff member, that as to him a lesser level has been established by means of a personal past practice. Petitioner's asserted claim to the existence of such a personal past practice must be rejected.

Point II

In Resolving Questions Regarding What has been Established as Constituting Full-Time Status Versus Part-Time Status Under *N.J.A.C.* 6:3-3.1, the Local Collectively Negotiated Contract Between the Board of Education and the Teachers Union is Controlling

Under the above statute and rules, the focus becomes a question of whether or not there has been an exercise of the delegated authority by the local board of education. There are various potential avenues for such an exercise of the delegated authority. However, when that authority is exercised through the statutorily established collective negotiations process, such an exercise controls any of the other potential avenues of its exercise. In the instant matter, it is clear from the above quoted provisions from the collectively negotiated contract and its addendum, that the delegated authority has, in fact, been fully exercised through the collective negotiations process.

It has long been established that where a collective negotiations relationship exists under *N.J.S.A.* 34:13A-1 *et seq.,* working hours are generally mandatory matters for collective negotiations. *Englewood Bd. of Ed. v. Englewood Teacher's Ass'n.* 64 *N.J.* 1, 7-8 (1973). The goal of the *Employer-Employee Relations Act, N.J.S.A.* 34:13A-1 *et seq.,* was to foster labor peace by compelling collective negotiations in public employment relationships, as a public policy, which goal includes local school districts. *Cf., Galloway Tp. Bd. of Ed., v. Galloway Tp. Ass'n. of Ed., Sec'ts,* 78 *N.J.* 1, 16 (1978). The test for what matters constitute "mandatory matters for collective negotiations' under *N.J.S.A.* 34:13A-1 *et seq.,* when there are state statutes and State Administrative Agency Rules intermingled was established in *State v. State Supervisory Employees Ass'n.* 78 *N.J.* 54, 81 (1978). *See also, Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed.,* 78 *N.J.* 144, 162 (1978), wherein the Court differentiated between "mandatorily negotiable terms and conditions of employment and non-negotiable matters of governmental policy." Specifically, where such a statute or rule delegates the exercise of authority to a local governmental entity, the exercise of that authority is generally subject to collective negotiations obligations, unless it is designated as a managerial right, and so long as such negotiations do not contravene an express mandate as to a minimum or maximum contained

within that delegation. Except with respect to the minimum "four clock hours" restriction, the authority for establishing the number of hours which constitute "full-time" employment status pursuant to *N.J.S.A.* 18A:29-5, *N.J.A.C.* 6:3-3.1, and *N.J.A.C.* 6:20-5.6(b), come within that collective negotiations obligations.

Note that under petitioner's asserted method of only counting teaching time, there are only 3.45 hours worked in the contested petition. Hence, the Rule itself would prohibit the classification of that position as a full-time assignment.

In the matter of *In re Maywood Board of Education,* 168 *N.J. Super.,* 45, 58-60 (*App. Div.* 1979), the Court held that while working hours are generally mandatory matters for collective negotiations, when a dispute involving working hours develops and a collectively negotiated contract exists, its terms must first be considered. In reviewing an existing collectively negotiated contract, the focus is to determine whether or not that obligation has already been complied with and whether or not provisions exist therein governing the dispute. In the instant matter the local collectively negotiated contract demonstrates compliance and its provisions control the instant dispute.

In *Randolph Township Board of Education and Randolph Education,* PERC No. 83-41, October 7, 1982, the Public Employment Relations Commission (PERC) specifically held that in the precise area of the work day and periods of instruction, an express contract term in the collectively negotiated contract takes precedence over an alleged right arising from past practice. PERC held that a local board of education could modify these working conditions at will without being bound by any individual rights to a lesser work time so long as it remained within the collectively negotiated contract parameters. Likewise, in *Bound Brook Board of Education v. Bound Brook Education Association,* PERC No. 83-11, July 20, 1983, the PERC held that where the collectively negotiated contract established a maximum work day for teachers, local board of education may unilaterally increase classroom time within the limitations set by that contract. *See also, Carlstadt Board of Education and Carlstadt Education Association* PERC No. 91-72, February 27, 1991; *South River Board of Education and South River Education Association,* PERC No. 83-135, April 19, 1983; and, *Sussex-Wantage Regional Board of Education and Sussex-Wantage Education Association,* PERC No. 86-57, October 17, 1986.

This same concept that a local board had wide discretion in establishing hours of work so long as it did not contravene the maximums contained in a collectively negotiated contract or require work on public holidays, was adopted by the Commissioner of Education and affirmed by the Appellate Division of Superior Court in *Penns Grove-Carneys Point Education Association v. Penns Grove-Carneys Point Regional Board of Education*, 83 S.L.D. 1022, aff'd State Board of Education, 85 S.L.D. 1981; aff'd 209 *N.J. Super.* 115 (*App. Div.* 1986).

Hence, it is well established, as the public policy in New Jersey, that hours of work are generally mandatory matters for collective negotiations between a local school board and the local union representing the teaching staff members. Further, it is expressly established that where such hours are, in fact, established in a resulting collectively negotiated contract, the terms of such a contract are binding on the local board, the local union, and individual teaching staff members represented by that union. In the instant mater, the hours of work for full-time status are established in the collectively negotiated contract at 6.5 hours per day and 32.5 hours per 5 day week. Petitioner's claim of a personally applicable lesser standard must fail in light of this contract and the decision cited above. Furthermore, the August 1998 addendum, being a part of the collectively negotiated contract is just as binding upon petitioner. That addendum, as quoted above, expressly establishes that the salary for a teaching staff member who works less than the 6.5 hours per day and 32.5 hours per 5 day week full-time standard shall be pro-rated off of the full-time salary.

The Board's Conclusion on Point II

The authority for setting the number of hours of work that qualifies a teaching staff member employed by respondent as a "full-time" employee has been delegated to respondent by both Rule and Statute. Respondent has exercised that authority through the collective negotiations process. The collective negotiations process has resulted in a collectively negotiated contract that combined with the addendum thereto specify the number of work hours necessary to qualify as a full-time teacher and the result if a lesser number of hours are in fact worked. The position contested in the instant matter is assigned a lesser number of hours than the full-time standard. Petitioner's assertion of a personal entitlement to a personal "full-time" designation for

such a lesser level of hours is at odds with the collectively negotiated contract, the addendum, and applicable law and therefore must be rejected.

Point III

Petitioner Factually Errs in Alleging that the Position Contested had Identical or More Hours of Work Assigned to it in the 1998-99, as Compared to the Position Held by the Petitioner During the 1997-98 School Year

Petitioner consistently alleges that petitioner taught for 4.25 hours per day during the 1997-98 school year and that the contested position had 4.5 hours of teaching time assigned to it for all of the 1998-99 school year. As set forth in the "Potentially Contested Facts" section of this brief, that assertion is factually inaccurate. The sole factual basis advanced by petitioner for that claim is the material supplied by respondent in answer to petitioner's interrogatories. The specific document that petitioner relies upon is attached as Exhibit A, p. 5 to petitioner's brief. It is clear from a mere glance at that attached exhibit that the correct time of work for that position under "Schedule C" is shown as "3 hours and 45 minutes". This correct figure of "3 hours and 45 minutes" is in fact less teaching time than petitioner was assigned to teach during the 1997-98 school year.

The Board's Conclusion on Point III

Petitioner relies upon an inaccurate fact as the sole basis for the claim presented. That error of fact is fatal to petitioner's claim. Hence, on this basis alone, petitioner's claim must be dismissed and respondent's instant cross motion for summary decision must be granted.

POINT IV

Petitioner Factually Does Not Have the Necessary Certification/Endorsements to Fill any Existing District Position for the 1999-2000 School Year.

Petitioner holds only Social Studies and Elementary Teacher endorsements. Petitioner does not hold a Teacher of the Handicapped endorsement.

All current elementary positions in the district require the holding of dual certifications of Elementary Teacher and Teacher of the Handicapped. The petitioner does not qualify to hold any elementary position in the district.

Only the social studies position in the Alternative Educational Program where petitioner previously taught did not require the dual holding of a Social Studies and Teacher of the Handicapped endorsements. All other social studies positions require such dual certification. Petitioner does not qualify for any social studies position other than in the Alternative Educational Program. There is no social studies position in the Alternative Educational Program during the 1999-2000 school year.

Currently, the only social studies position in the Alternative Education Program is a part time position where the holder's work day is split between assignment as a social studies teacher and assignment as the substance abuse counselor. Petitioner, as of the date of the RIF did not hold a Substance Abuse Counselor certification/endorsement. Petitioner has previously refused to accept a part-time assignment in social studies in the Alterative Education Program, and hence has no recall rights to such an admittedly part-time position.

Hence, there does not currently exist any position in the district for which petitioner holds the necessary certification/endorsement to which petitioner can assert any bumping rights. Therefore, there is no right that petitioner has to bump into any position in the Cape May County Special Services School District.

The Board's

Conclusion on Point IV

Petitioner does not hold the necessary certification/endorsements for employment in any existing position in the CMCSSSD during the 1999-2000 school year.

The Board's Overall Conclusion on the Brief

It is clear, under the facts of the instant matter and all applicable law, petitioner's claim must be dismissed and respondent's instant cross-motion for summary decision must be granted.

Petitioner's Response to
Counter-Statement Facts

The single issue in this case is whether the Board engaged in a sham RIF, retaining a less senior person (Mr. Trombetta) to work longer hours and more duty time per day in the 1998-99 school year than petitioner Markowski had taught during the 1997-98 school year.

The Board's contentions to the contrary, each of the material facts relative to the sham RIF are not in controversy:

> Fact-Mr. Markowski worked as teacher of social studies in the 1997-98 school year. During that year he had 4.25 hours of duty time per day and a total of 21.25 hours of duty time per week. Petition, ¶8; Board's Interrogatory Answer 8(a), grid 8(a) and Schedule B attached thereto and incorporated therein. (See Mr. Markowski's Initial Brief on this motion, Exhibit A, pp. 5-7) ("Initial Brief" or "Pb.")
>
> Fact-The Board considered Mr. Markowski to be a full-time employee. Petition and Answer, ¶ 4.
>
> Fact-The Board took formal action to eliminate the full-time Social Studies Teacher position formerly filled by Mr. Markowski and, at the same time, acted to create what it called a 'three-fifths part-time Social Studies Teacher position." A true copy of the Board's Minutes is attached as Exhibit A to this Brief.
>
> Fact-The Board gave Mr. Markowski notice of a RIF and then the Board offered Mr. Markowski what it called "part-time employment." True copies of the notice and offer are attached as Exhibits B and C, respectively, to this Brief. Mr. Markowski declined the offer of part-time employment and sought out full-time employment in another district.

> Fact-The Board then retained another teacher, Mr. Trombetta, to teach the load it had offered to Mr.. Markowski. Contrary to the Board's representations, Mr. Trombetta was assigned to teach longer hours and more duty time per day in the 1998-99 school year than petitioner Markowski had taught during the 1997-98 school year. Board's answer to interrogatory 8(a), attached grid 8(a) and Schedule B thereto. (See Exhibit A to Mr. Markowski's Initial Brief)

The Board attempts to "take back" the admissions in its Answer and discovery responses under the guise of supplying "additional uncontested facts" in its Counter Statement of Facts. Bb2-7. In reality, substantially all of the material facts touted by the Board as "uncontested" in the Counter Statement are contested and are inconsistent with the facts as previously admitted by the Board in its Answer and its answers to interrogatories.

Specifically, the Board's Brief repeatedly claims that a "mere glance" at grid 8(a) and the supporting Schedule B[1] demonstrate that Mr. Trombetta has "3 hours and 45 minutes" of teaching time. Bb7, ¶¶ 11, 17. However, in its Answer, the Board specifically admits that Mr. Markowski and Mr. Trombetta had "comparable classroom contact time" Answer, ¶ 8. Moreover, the Board's responses to discovery admit that Mr. Markowski taught "4 hours 15 minutes" as a "full-time" teacher during the 1997-98 school year and that Mr. Trombetta taught "4 hours 30 minutes" in the 1998-99 school year as a "part-time" teacher. (See answer to interrogatory 8(a), grid 8(a) and Schedule B (all attached as pages 5 through 7 of Exhibit A to Mr. Markowski's initial brief)). Yet, the Board attempts to "take back" its admission as to "comparable classroom contact time" in the Answer, and the 4 hour 30 minutes of classroom contact time as specifically admitted by the Board in its interrogatory answers and supporting exhibits. *Compare* Answer, ¶ 8 and Initial Brief, Exhibit A, pp. 5 and 7 *with* Bb7, ¶¶ 11, 17.

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[1] In a typographical error repeated throughout the Board's Brief, the Board mistakenly indicates that Plaintiff's Initial Brief referred to and relied upon Schedule C attached to the Board's answers to interrogatories. To the contrary, Plaintiff's Initial Brief relies exclusively upon Schedule 8(a) and Schedule Bo to the Board's answers to interrogatories. See Pb 2-4 and Exhibit A, pp. 5 and 7.

Notwithstanding the Board's admission in its answer that it considered Mr. Markowski a full-time employee during the 1997-98 school year (Answer, ¶ 4), the Board claims that he was not really a full-time employee and that Your Honor should consider additional facts, including the terms of a collectively negotiated contract in determining-contrary to the Board's admission in its Answer that it considered him a full-time employee-that the Board really considered him as a part-time employee. Bb3-6, ¶¶ 8-9.

As a final factual matter, Mr. Markowski objects to the Board's attempt to misdirect Your Honor's attention by claiming that teachers outside of the Alternative Educational Program" are required to hold a teacher of the Handicapped Endorsement. The Board attempts to draw Your Honor's attention to the 1999-2000 school year. In the process, the Board simply ignores the fact that during the 1998-99 school year Mr. Trombetta's schedule indisputably consisted exclusively of duty time within the Alternative Education Program teaching courses substantially identical to those Mr. Markowski taught in the 1997-98 school year. See Pb., Exhibit A, pp. 5-7. The Board knows full well that such assignments fall squarely within the scope of Mr. Markowski's teaching certifications and endorsements –he taught these subjects in the past and the Board gave him the right of first refusal to "part-time" employment teaching these subjects during the 1998-99 school year. See Exhibit C to this Brief.

For the 1999-2000 school year, in its opposition to Mr. Markowski's motion, the Board raises-for the very first time in this case-the claim that Mr. Trombetta split his time between the social studies position and a substance abuse counselor position for which Mr. Markowski was not qualified. Bb3, ¶ 6. The Board's assertion in this regard is improper in two respects. First, the Board failed to raise it as a defense in its Answer. Second, the Board failed to disclose any factual basis for this defense notwithstanding the fact that it had been served with discovery which requested the factual basis for its defenses. Even if Mr. Trombetta's 1999-2000 assignment was not finalized as of the date of the Board's discovery responses (August 4, 1999), Mr. Markowski's discovery requests specifically explained that they were continuing in nature. Nonetheless, the Board failed to provide any discovery whatsoever as to any changes in Mr. Trombetta's schedule between the 1998-99 school year and the 1999-2000 school year. Had the Board properly supplemented its discovery responses and placed Mr. Markowski on notice of its new factual contentions in this regard, he would have had an opportunity to conduct further discovery on this issue and may very likely opted for a hearing on the merits of this issue to fully explore: (a) the Board's claims that Mr. Trombetta's schedule has been changed and (b) whether the change was made for legitimate reasons or as a litigation tactic. Mr. Markowski objects to the eleventh hour efforts of the Board to inject a defense not raised in the Answer into this proceeding without supplementing its discovery responses and without providing Mr. Markowski any notice of this change and an opportunity to conduct supplemental discovery concerning the purported scheduling change.

Law and Argument

Given the Facts as Admitted by the Board in its Answer and its Answers to Interrogatories Petitioner is Entitled to Summary Decision.

(1) **The Board is bound by the Admissions Contained in its Answer and Answers to Interrogatories.**

As set forth in the Statement of Facts in petitioner's Initial Brief and as outlined above, the Board specifically admitted that in the 1998-99 school year, Mr. Trombetta had "comparable classroom contact time" to that of Mr. Markowski in the 1997-98 school year. Answer, ¶ 8. This admission was further elaborated and explained in the Board's answers to interrogatory 8(a) which referred to and incorporated schedule 8(a), which specifically admitted that during the 1998-99 school year, Mr. Trombetta taught "4 hours 30 minutes" of "teaching time," and was further supported by Mr. Trombetta's teaching schedule, Board Schedule B. See petitioner's initial brief, Exhibit A at pp. 5 and 7.

Significantly, this tribunal gave the Board every opportunity to amend its Answer. In fact, when the Board's current counsel, John T. Barbour, Esq., replaced the Board's former counsel, Richard Goodkin, Esq., Your Honor held a prehearing conference call on March 5, 1999. At that time, Your Honor specifically gave Mr. Barbour two weeks' time to amend the Board's Answer if he chose to do so. Your Honor further noted that in the event that Mr. Barbour chose to amend the Board's Answer, petitioner would be given leave to supplement his discovery requests. This was not necessary as the Board chose not to amend its Answer. As a consequence, Your Honor subsequently entered a Prehearing Order dated March 10, 1999 and a Second Prehearing Order dated August 31, 1999, both of which provided identically "[n]o amendments to pleadings have been proposed." Orders at ¶ 7.

Now, after a summary decision motion has been filed and briefed based upon the admissions of the Board as set forth in its Answer and as supplemented by the Board's discovery response, the Board is shamelessly attempting to "take back" its admission of "comparable classroom contact time," though the submission of the Certification of Karalee Kutzwhite.

The Board's attempt is procedurally improper given its failure to amend its Answer after being given the opportunity to do so and giver Your Honor's two prehearing orders. The Board's attempt is also improper given the settled case law that affidavits are not pleadings and may not be used to expand the pleadings. For example, in *Carlini v. Curtiss-Wright Corp.*, 71 *N.J. Super.* 101 (*App. Div.* 1961), *certif. den.* 37 *N.J.* 133 (1961), a plaintiff who was defending against a motion for summary judgment attempted to use his affidavit in opposition to the motion as an opportunity to amend his complaint, alleging facts wholly outside of the allegations of the complaint. Recognizing the impropriety of such an affidavit, the motion judge granted the motion for summary judgment. The Appellate Division affirmed, reasoning:

> Plaintiff's attempt to rest his opposition to defendant's motion for summary judgment on allegations in his affidavit, which are foreign to the issue presented by the pleadings and not supportive of the allegations of the cause of action set forth in the complaint, is rejected. Affidavits are not pleadings. Plaintiff will not be permitted by the submission of such an affidavit as was here presented, to explain the scope of the cause of action he asserted in his complaint, or, as he has here done, to present any entirely new cause of action. Plaintiff was given an opportunity to amend his complaint. He elected not to avail himself thereof. He chose to rest on his original complaint and affidavit. To do so was his privilege, but that election did not give him the right, through the medium of the filed affidavit setting forth new allegations, to contend that because of the content of the affidavit, "genuine issues or material fact" were raised. 71 *N.J. Super.* at 108.

This reasoning applies to the present case. The allegations in the Kutzwhite Certification are foreign to and contradict the admission in the Answer that Mr. Trombetta had "comparable classroom contact time" to Mr. Markowski. In the March 1999 prehearing conference, Your Honor gave the Board a specific opportunity to amend its Answer. The Board elected not to amend its Answer, and instead chose to rest upon the admissions and denials contained in the Answer as filed. Given this choice, the Board does not have the right to file an affidavit attempting to "take back" the admissions the Board made in its Answer in an effort to create issues of fact.

Parenthetically, Mr. Markowski notes that even if Your Honor were to permit the Board to "take back" the admissions contained in its Answer, the Board's attempted reliance upon the Kutzwhite Certification is misplaced in any event. The Certification and Schedule C to which paragraph 11 of the Certification refers do not preclude the entry of Summary Decision in favor of petitioner. To the contrary, even if accurate, Schedule C merely stands for the proposition that *as of April 1999*, Mr. Trombetta's classroom contact time was reduced. Specifically, Your Honor's attention is drawn to the box at the top left of Schedule C which reads "Current Schedule 4/99." Accordingly, even if Your Honor were to consider Schedule C as creating a factual issue as to the continued accuracy of the Board's admission of "comparable classroom contact time," such an issue would only exist from April of 1999 to date. Therefore, an award of partial summary decision for the time period from September 1998 through March 31, 1999, would be appropriate in any event.

As a final mater on this point, the Board's Brief for the first time raises a defense which it failed to identify in its answer or to even allude to in its discovery response, that in the 1999-2000 school year, Mr. Trombetta divides his time between assignment as a substance abuse coordinator and part-time assignment as a social studies teacher. Under no circumstances should the Board be permitted to summarily "take back" admissions and cross-move for summary decision on the basis of new, previously undisclosed and contradictory positions in the absence of a formal amendment of its Answer and a full opportunity for discovery as to the factual basis for the Amended Answer. In the event that the Board were permitted to take back admissions in any respect, Mr. Markowski would be entitled to a complete evidentiary hearing as to each admission taken back and an opportunity to cross examine the Board's witnesses on the inconsistencies between the positions the Board took in its Answer and discovery responses and the positions it is now attempting to take in opposing Mr. Markowski's motion for summary decision.

(2) **Petitioner is Entitled to Summary Decision as a Matter of Law.**

The Board attempts to recast this case into something that it is not. The Board attempts to reformulate the issues in this case as turning upon Your Honor's decision of the universal issue of what constitutes full-time versus what constitutes part-time employment in the public schools.

Instead, this case deals with a very narrow issue. The question is whether a local Board of Education may engage in a sham reduction in force ("RIF"), by telling a tenured teaching staff member who works 5 clock hours and 4 hours 15 minutes of duty time per day that his full-time position is being eliminated and by then offering him supposedly part-time employment which he declines and which turns out to be 5 hours 15 minutes of clock time and 4 hours 30 minutes of duty time per day. With all due respect to the 25 pages of argument raised by the Board, such conduct plainly violates *N.J.S.A.* 18A:28-5 which prohibits boards of education from having tenured teaching staff members "reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause..." and then only by the Commissioner of Education in a manner consistent with the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-9 *et seq.*.

The Board's conduct in the present action plainly violated this statute. By letter dated April 30, 1998, the Board informed petitioner it was abolishing his position "full-time teacher of Social Studies," effective June 30, 1998. By letter dated May 7, 1998, the Board offered him a position as "part-time teacher of social studies."[2] He declined the supposedly "part-time" position because he needed full-time employment to support his family.

[2] Given that the Board first offered Mr. Markowski the very same position for which it hired Mr. Trombetta to fill during the 1998-99 school year and given that Mr. Markowski had taught the same position in the past, the Board cannot credibly contend that Mr. Markowski was not properly certified to file the position during the 1998-99 school year.

If the position that the Board offered Mr. Markowski had truly been "part-time," Mr. Markowski would have nothing to complain about. However, in reality, the RIF was a sham given that the Board actually assigned Mr. Trombetta to have fifteen minutes more classroom contact time per day and to work fifteen minutes longer per day. Without changing the duties of the social studies teacher one bit-and while actually increasing both classroom contact time and clock time-the Board attempted to reduce Mr. Markowski's compensation. Such a reduction in compensation plainly violates *N.J.S.A.* 18A:28-5.

On this point, the Board's efforts to distinguish *Diglio v. Bd. Of Ed. Of River Dell Reg'l. School Dist.*, 1980 *S.L.D.* 547 (Comm'r. of Ed. 6/5/80), are misplaced. Petitioner will not repeat the Commissioner's analysis in *Diglio*, outlined in his initial brief, Pb5-7. As to the Board's attempt to distinguish *Diglio* on the basis of teaching time versus duty time (Bb12), regardless of whether one uses duty time, teaching time or clock time, Mr. Trombetta was scheduled to work a longer day than Mr. Markowski had worked in the past. No matter how the Board attempts to "spin" *Diglio*, *Diglio* clearly stands for the proposition that a board of education may not legitimately require an employee to work the same or more duty periods which it previously recognized to be a full-time load for less pay simply by calling the full-time employment "part-time." This is exactly the type of subterfuge the Board has attempted in the present case and Your Honor must reject it.

Mr. Markowski also notes that none of the other Education Law decisions cited by the Board are applicable to the present case. Unlike the *Diglio* case, none of those decisions deal with a situation involving a sham RIF. *Compare Diglio, supra, with Rupakus v. Bd. of Ed. of Bor. of West Caldwell*, 1988 S.L.D. 1879, 1897.1; *Papailiou v. Hazlet Tp. Bd. Of Ed.* 1988 S.L.D. 2053 and *Bassett v. Bd. of Ed.*, 223 *N.J. Super.* 136 (*App. Div.* 1998).

As a final matter on this point, Mr. Markowski notes that Your Honor must reject the arguments made by the Board at Point II of its brief that the definition of full-time employment in the collectively negotiated agreement and a sidebar agreement somehow absolve the Board of any liability it may have to Mr. Markowski for engaging in a sham RIF. Tenure rights are statutory rights which may not be waived or forfeited as a mater of collective negotiations, *e.g., Spiewak v. Bd. of Ed. of Rutherford*, 90 *N.J.* 63 (1982).

Petitioner's Conclusion

Applying *Diglio* to the present case, a comparison of the actual duty periods in the 1997-98 school year (which the Board labeled full-time employment) and the actual duty periods in the 1998-99 school year (which the Board now attempts to label as part-time), reveals that the number of duty periods did not change. Both years, the teacher in question worked 30 periods per week. Initial Brief, Exhibit A, pp. 5-7. Even more compelling than *Diglio*, in the present case, during the 1998-99 school year, the amount of duty time actually increased by an hour and a quarter a week. *Ibid.* Under the circumstances and under the principles articulated by *Diglio*, the Board's offer of purported "part-time" employment to Mr. Markowski and subsequent appointment of Mr. Trombetta to the position on a "part-time" basis, was a sham in derogation of Mr. Markowski's tenure and seniority rights. Under the circumstances, he should be compensated for the salary and emoluments he lost as a result of the Board's wrongful conduct and should be reinstated to full-time employment.

For the foregoing reasons as well as the reasons expressed in his initial brief, petitioner Richard Markowski, requests that Your Honor issue an order:

(1) finding and declaring that the Board's action to deprive petitioner of a full-time teaching position was in violation of his tenure and seniority rights;

(2) directing the Board to recognize petitioner's tenure and/or seniority rights by reinstating him to a full-time position as a teacher of social studies or any other full-time position held by a non-tenured teacher or less senior tenured teacher for which he possesses the necessary certification and/or experience, effective immediately and retroactively to September 1, 1998;

(3) directing the Board to provide petitioner with all salary, benefits and emoluments he is entitled to by law and under the negotiated agreement in force and effect in the Cape May County Special Services School District, retroactive to September 1, 1998;

(4) Attaching both pre- and post-judgment interest to any back pay award as permitted by law;

(5) directing the Board to take all actions necessary to assure that petitioner receives proper pension credit retroactive to September 1, 1998, and

(6) granting such other relief as is deemed appropriate.

DISCUSSION AND CONCLUSIONS

The standard for granting or denying summary judgment has been set forth by our Supreme Court in the matter of *Judson v. Peoples Bank & Trust Company of Westfield*, 17 *N.J.* 67 (1954). The standard was subsequently modified by the Court in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). The *Brill* court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 (Motion for Judgment at trial) and *R.* 4:40-2 (Reservation of Decision on Motion: Motion for Judgment notwithstanding the verdict). The courts considering the motions for summary judgment are not required to engage in the same type of evaluation and analysis, or sifting of evidential material in light of the burden of persuasion that applies as if the matter goes to trial. The *Brill* court held that:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single unavoidable resolution of the alleged disputed issue of fact that issue should be considered insufficient to constitute a "genuine" issue of material fact for purpose of *Rule* 4:46-2. . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . . , the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

Having carefully reviewed and considered the pleadings, briefs and other documents offered by the parties, I **CONCLUDE** that the instant matter is ripe for summary decision.

I concur with petitioner and **CONCLUDE** that the Board is bound by its Admissions as contained in its Answer to the Petition of Appeal and its Answers to Interrogatories, pursuant to the holding in *Carlini*; *supra*, and as quoted by petitioner in his Response to Counter-Statement of Facts, 71 *N.J. Super. At 108*. Thus, pursuant to the Court's holding in *Brill.*

> If there exists a single unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact ... . When the evidence "is so one-sided that one party must prevail as a mater of law"... the trial court should not hesitate to grant summary judgment.
>
> *Id.* at 540

I **FIND** and **CONCLUDE**, therefore, that the allegations set forth by the Board, as found in the Kutzwhite Certification and in the Board's brief, are insufficient to constitute a genuine issue of material fact where the Board is bound by its Answers. *Brill supra.*

The herein record clearly shows that the Board considered petitioner to be a full-time employee during the 19987-98 school year, as a Social Studies Teacher in its Alternative Education Program. The record also demonstrates that the Board took action, on April 28, 1998, to abolish the full-time Social Studies Teacher position for the Alternative Education Program and create a three-fifths, part-time position in its stead. The Board's action was pursuant to its mandatory powers and duties under *N.J.S.A.* 18A:11-1c and d and *N.J.S.A.* 18A:27-4. As a consequence of the Board's action, it offered the part-time Social Studies position to petitioner, which he rejected in favor of full-time employment with another board of education. Petitioner, however retains his seniority for the position, pursuant to *N.J.S.A.* 18A:28-11.

From the record presented, the less senior teacher who assumed a full-time position subsequent to the Board's action to abolish the Social Studies Teacher position, taught social studies subject matter on a full-time basis from September 1998 until about April 1999, when his classroom schedule was changed. The period between September 1998 and April 1999, was comparable to petitioner former teaching assignment in terms of time and subject matter.

I **CONCLUDE**, therefore, that the Board failed to reduce the position of Social Studies Teacher from full-time to part-time, as authorized by its action on April 28, 1998. Rather, it retained a full-time social studies position in its schools from September 1998 until about April 1999. I **CONCLUDE** that petitioner was entitled to that position for that period pursuant to his tenure and seniority status with the Board.

I **CONCLUDE**, therefore, that partial summary decision should be entered on behalf of petitioner and that he is entitled to the salary and other emoluments he would have earned with the Board between September 1998 to April 1999, less mitigation.

ORDER

Accordingly, **Partial Summary Decision** is hereby **ENTERED** on behalf of **PETITIONER.** It is **ORDERED** that the Board of Education of the Cape May County Special Services School District provide petitioner with the salary and other emoluments to which he was entitled between September 1998 and April 1, 1999, less mitigation.

It is **FURTHER ORDERED** that the Board maintain petitioner on its seniority list for the position of social studies teacher and that he be so advised when and if a position becomes available.

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

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

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

Feb. 4, 2000
DATE

Lillard E. Law by JK Parsons RJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Feb. 8, 2000
DATE

D. N. Antanaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 2000
DATE

Barbara A Hernak
OFFICE OF ADMINISTRATIVE LAW

lmh/cad

101-00

C # 101-00L
SB # 27-00

FRED ENGLE, THE ESTATE OF PASQUALE RAIMONDO, PHILIP MARAVIGLIA AND TERESA CAPRIGLIONE,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 30, 2000

For the Petitioners-Appellants, Oxfeld, Cohen, LLC (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

The decision of the Commissioner of Education to dismiss the petition in this matter for failure to file in a timely manner, N.J.A.C. 6:24-1.2(c) [now codified at N.J.A.C. 6A:3-1.3(d)], is affirmed for the reasons expressed therein. We agree with the Commissioner that the December 14, 1998 letter from the counsel for the State-operated District to the counsel for the petitioners provided the petitioners with clear and adequate notice of the District's position. The only subsequent correspondence in the record is from the counsel for the petitioners, in which he attempted to modify the District's stance. Indeed, the petitioners did not file their petition until January 24, 2000,

Aug. 2, 2000

more than a year after the District had provided them with notice of its position and four months after their counsel had sent a final correspondence to another attorney at the law firm representing the District.

August 2, 2000

Date of mailing AUG 04 2000

102-00

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

March 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU11676-98
Agency Dkt. No. 519-11/98

MARTIN LASUS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Respondent.

Eugene G. Liss, Esq, for petitioner

Joseph Verga, Esq., for respondent

Record Closed: February 7, 2000 Decided: February 9, 2000

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on December 18, 1998 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a settlement agreement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

February 9, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

Feb. 15, 2000
DATE

D. M. Gentanaitis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 17 2000
DATE

Barbara A. Harris
OFFICE OF ADMINISTRATIVE LAW

cb

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Newark Area Office

1 Newark Center, 21st Floor
Newark, NJ 07102-5233
(973) 645-6383
TTY (973) 645-3004
FAX (973) 645-4524

MEDIATION SETTLEMENT AGREEMENT

CHARGE NUMBER: 171990643

CHARGING PARTY: Martin Lasus

RESPONDENT: Newark Public Schools

1. In exchange for the promises made by Newark Public Schools pursuant to Charge Number 171990643, Martin Lasus agrees not to institute a law suit under the Age Discrimination in Employment Act of 1967, as amended (ADEA) based on EEOC Charge Number 171990643.

2. Further the parties agree that submission of this agreement to EEOC will constitute a request for closure of EEOC Charge Number 171990643.

3. It is understood that this agreement does not constitute an admission by Respondent of any violation of the ADEA

4. Respondent agrees that there shall be no discrimination or retaliation of any kind against Charging Party as a result of filing this charge.

5. This document constitutes a final and complete statement of the agreement between the parties.

6. The parties agree that the EEOC is authorized to investigate compliance with this agreement and that this agreement may be specifically enforced in court by the EEOC or the parties and may be used as evidence in a subsequent proceeding in which a breach of this agreement is alleged.

6A. Charging Party acknowledges that s/he has been advised to consult with an attorney and has been given a reasonable time to consider the agreement before signing. (ADEA CLAUSE)

3a

7. As evidence of a good faith effort to resolve EEOC Charge Number 171990643, the parties agree as follows:

a) Charging Party agrees to retire from his position with the Respondent on September 29, 2000. Charging Party will not be required to report for work for the 2000/2001 school year, but will be compensated up to and including September 29, 2000.

b) Charging Party agrees to withdraw his appeal of the withholding of increment for the 1998/1999 school year.

c) Respondent agrees to restore the withheld salary increments and/or steps for the 1998/1999 and 1999/2000 school years. Respondent agrees to restore the Charging Party to the proper salary level or step on the salary guide. Respondent further agrees to pay to the Charging Party withheld monies from each of the above salary increment withholdings, minus proper deductions, including pension.

d) Upon reference request of prospective employers relating to the Charging Party, Respondent agrees to provide only dates of employment and title of last position held.

c) The parties agree to keep the terms of this agreement confidential. It is understood by the parties that information about this agreement may be shared with attorneys, tax advisors and immediate family members.

Respondent — Date: 11/15/99

Charging Party — Date: Nov. 10, 1999

In reliance on the promises made in paragraphs 1 through 7 above, EEOC agrees to terminate its investigation and to not use the above-referenced charge as a jurisdictional basis for a civil action under the ADEA. EEOC does not waive or in any manner limit its right to investigate or seek relief in any other charge including, but not limited to, a charge filed by a member of the Commission against the Respondent.

On Behalf of the Commission:

Eugene Weaver
Mediation Director — Date: 11/16/99

OAL DKT. NO. EDU 11676-98
AGENCY DKT. NO. 519-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 31 2000

Date of Mailing: MAR 31 2000

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS VARANELLI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	

March 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1674-99
AGENCY DKT. NO. 11-1/99

IN THE MATTER OF THE TENURE HEARING OF NICHOLAS VARANELLI, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY

Melvin C. Randall, Esq., for petitioner, School District of the City of Orange Township, Essex County
(Love and Randall, attorneys)

James M. Weinberg, Esq., for respondent
(Weinberg and Weinberg, attorneys)

Record Closed: January 21, 2000 Decided: February 9, 2000

BEFORE **ARNOLD SAMUELS**, ALJ:

In January 1999, the petitioner, School District of the City of Orange Township, Essex County, filed a Certificate of Determination and written charges against the respondent, Nicholas Varanelli, pursuant to *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1 *et seq.*, seeking his dismissal from his tenured position, because of unbecoming conduct or other just cause. Respondent subsequently filed an answer with the Commissioner

of Education. On February 9, 1999 the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A series of delays followed, and a prehearing conference was omitted, in an attempt to obtain compliance with the Tenured Employees Law, as amended. After several extensions for discovery purposes, a hearing was scheduled for December 15 and 16, 1999. The parties conferred for purposes of settlement on the above hearing dates, and an agreement was reached. Mr. Varanelli agreed, on the record and under oath, that he voluntarily and knowingly accepted the settlement. A written agreement, containing the terms of settlement in full, was signed by the parties on December 16, 1999. A copy of the agreement was filed in the OAL on January 21, 2000.

The settlement agreement specifically refers to an acknowledgement by the respondent that he has been advised of the duty by the Commissioner of Education, pursuant to *N.J.A.C.* 6:11-3.6(a)(1), to refer the matter to the State Board of Examiners for possible action regarding his teaching certificate. This acknowledgement by Mr. Varanelli indicates that the settlement terms comport with the *Cardonick Standards* for the review of settlements in tenure matters. *In Re Cardonick*, decided by the *Comm. of Educ.*, (Apr. 7, 1982), aff'd *St. Bd. of Educ.*, (Apr. 6, 1983), 1990 *S.L.D.* 842, 846.

The parties have agreed to settle this matter, in accordance with the attached agreement. I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures on the attached agreement.

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

3. The agreement conforms with the standards of *In Re Cardonick, supra*.

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

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

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

February 9, 2000
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Feb. 15, 2000
DATE

D. M. Buteraitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 17 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

sej

EDU 1624-99

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 21 11 11 AM '00

WHEREAS, Nicholas Varanelli is a tenured employee with the Township of Orange Board of Education as a teacher of Spanish, and;

WHEREAS, on or about January 28, 1999 tenure charges and evidence supporting same were referred to the Commissioner of Education, and;

WHEREAS, the Township of Orange Board of Education and Nicholas Varanelli have agreed to enter into the following settlement which will obviate the necessity of a trial, and;

WHEREAS, the terms of the settlement are set forth herein as follows:

1. Nicholas Varanelli shall immediately tender his resignation and release all tenure rights that he had with the Township of Orange Board of Education and the effective date shall be ~~January 31, 2000.~~ IT IS UNDERSTOOD THAT NICHOLAS VARANELLI WILL BE PAID THROUGH JAN 31, 2000
2. The Township of Orange Board of Education agrees to accept the resignation of Nicholas Varanelli at its next public meeting.
3. Pursuant to this Agreement it is agreed that Nicholas Varanelli will release the Board, its agent, servants and employees contemporaneously with the execution of this Agreement. The Agreement shall also release and discharge the Board and such individuals from any and all claims, liabilities and expenses, including claims for tenure and any contractual or statutory benefits which it or they may be subject to or which may have arisen from Nicholas Varanelli's employment with the Board.

4. Nicholas Varanelli, acknowledges and agrees that he has entered into this Agreement freely and voluntarily, without coercion or duress, and that he has had the opportunity to review the Agreement with legal counsel. He further acknowledges that he understands this Agreement and that he has been fully informed as to his legal rights and obligations.
5. Upon ratification of this Agreement by the Board, the Board authorizes its President and Secretary to execute the same on its behalf.
6. Nicholas Varanelli, specifically acknowledges that he has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6(a) (1), to refer the matter to the State Board of Examiners for possible action regarding his teaching certificate. This acknowledgement by Nicholas Varanelli indicates that the settlement terms comport with the Cardonick standard for the review of settlements in tenure matters. In re Cardonick, decided by the Commissioner of Education April 7, 1982, Affirmed State Board of Eduacation April, 1983, 1990 S.L.D. 842, 846.

12/16/94
Date

Nicholas Varanelli
Mr. Nicholas Varanelli

Witness

Date

Township of Orange
Board of Education

Rev. Reginald T. Jackson
Board President

Secretary

OAL DKT. NO. EDU 1674-99
AGENCY DKT. NO. 11-1/98

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS VARANELLI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE TOWNSHIP, ESSEX	:	
COUNTY.	:	

The record, settlement agreement, and Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon his careful and independent review of the record, the Commissioner cannot be satisfied that the proposed settlement meets the standards for review of settlements in tenure matters set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of New Jersey, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra*. Neither the Initial Decision nor

the settlement agreement sufficiently explains how the settlement in fact meets the *Cardonick* standards *particularly in light of the specific tenure charges filed with the Commissioner against respondent,* which include assaulting a student and loudly and abusively using expletives directed at a student in class.

As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that the terms of a proposed settlement in a tenure hearing matter call for the teaching staff member's resignation does not in and of itself assure that the *Cardonick* standards have been met, because the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.

Accordingly, the Commissioner directs that this matter be remanded to the OAL for expansion of, and revision to, the record and settlement agreement, as necessary, to address the concerns noted above. If the parties are unwilling or unable to agree to a settlement consistent with the decision herein, the matter shall proceed to plenary hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 31 2000

Date of Mailing: MAR 31 2000

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* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

104-00

ARTHUR REINERTSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT .	:	

SYNOPSIS

In a prior matter, petitioning tenured custodian alleged the Board violated his tenure rights by relieving him of his duties as head custodian without a tenure hearing for the 1997-98 school year. The Commissioner determined, and the State Board affirmed, that the Board could not reduce petitioner's salary without complying with the due process requirements of the tenure statutes and ordered the Board to compensate petitioner at the same rate he was receiving as head custodian and to reimburse petitioner the amount representing the difference between what he should have received and what he was actually paid after being relieved of his assignment as head custodian. In the present matter, petitioner disputed the regular custodian salary he was receiving for the 1999-2000 school year, maintaining that he should be paid the negotiated guide amount for head custodians.

The ALJ granted respondent's motion for summary decision, determining that the tenure statutes protect petitioner so that his salary can never be reduced below the amount he would have been paid if he had not been relieved of his position as head custodian, but the scope of the tenure statutes does not extend to protect future salary expectancy.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision for the reasons expressed therein. The petition was dismissed.

March 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 4554-99
AGENCY DKT. NO. 132-5/99

ARTHUR REINERTSEN,

Petitioner,

EAST BRUNSWICK
BOARD OF EDUCATION,

Respondent.

Brian W. Kronick, Esq., on behalf of petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Robin T. McMahon, Esq., on behalf of respondent (Martin R. Pachman, P.C., attorney)

Record Closed: January 3, 2000 Decided: February 10, 2000

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCDURAL HISTORY

This matter originates from a prior proceeding between the parties, whereby, I rendered an initial decision that was subsequently affirmed by the Commissioner of Education, as well as the State Board of Education. In the previous matter, petitioner alleged that respondent, East Brunswick Township Board of Education, violated his tenure rights by relieving him of his duties

as head custodian without affording him a tenure hearing[1]. Petitioner sought a determination mandating that respondent reinstate him as head custodian, and the restoration of his salary. It was held that although petitioner does not have tenure in the position of head custodian he remains tenured as a custodian. *Reinertsen v. Bd of Educ. of the Township of East Brunswick*, EDU 10328-99, Initial Decision, (May 27, 1998), *adopted*, Comm'r, (July 8, 1998) <http://lawlibrary.rutgers.edu/oal/> (hereinafter "May 1998 decision"). Thus, it was further ordered that respondent could not reduce petitioner's salary without complying with the due process requirements of the tenure statutes. *Ibid.*

On July 8, 1998, the Commissioner of Education affirmed the initial decision and ordered respondent to compensate petitioner "at the same rate and for no less then he was receiving as a head custodian, and to further reimburse petitioner for the amount representing the difference between what he should have received, pursuant to the decision, and what he was actually paid by the Board, after he was relieved from his assignment as head custodian." *Ibid.* Thereafter, on October 9, 1998, the State Board of Education affirmed the Commissioner's decision.

Petitioner was paid $20,700.00 for serving as a regular custodian during the 1997-98 school year and $22,126.00 for the 1998-99 school year.[2] If petitioner was not relieved of his duties as head custodian in 1997 he would have earned $23,480.00 for the 1997-98 school year. After the State Board affirmed the Commissioner's decision, respondent reimbursed petitioner for the difference between the amount he was paid for the 1997-98 school year and the amount he would have received as a head custodian. Additionally, instead of reimbursing the petitioner for the difference between $23,480.00 and the $22,126.00 he earned as a regular custodian for the 1998-99 school year, respondent erroneously paid petitioner the difference between his salary and what he would have received as a head custodian ($25,026.00 – 22,126.00). Petitioner is not disputing the amount of compensation he has received up until this point. Petitioner is, however, disputing the regular custodian salary of $25,480.00 he is presently receiving for the 1999-2000

[1] On September 2, 1997, petitioner was informed by his building principal that he was being reduced in rank from head custodian-to-custodian resulting in a reduction in his salary. Although it is unknown why petitioner was relieved of his duties as head custodian, it is clear that it was not a result of a reduction in force.

[2] The amount of compensation paid to petitioner between 1997 and 1999 is based on petitioner's brief and the affidavit of Catherine Schwartz, the president of East Brunswick Education Association. The actual amounts paid are not in dispute.

school year. Petitioner maintains that pursuant to the May 1998 decision he must be paid $28,508.00, the negotiated guide amount for head custodians.

On May 27, 1999, petitioner filed the instant petition of appeal alleging that respondent violated the May 1998 decision by not paying petitioner his full salary that the decision demands. Respondent filed its answer to the instant petition on June 10, 1999. Thereafter, on December 17, 1999 petitioner filed a motion for summary decision. Respondent submitted its opposition brief on December 28, 1999 and at the same time cross-moved for summary decision. The latter documents were received on January 3, 2000, the date the record closed.

The central dispute in the case involves a disagreement in the interpretation of the May 1998 decision. Petitioner maintains that pursuant to the decision, respondent is obligated to continue to pay the petitioner the negotiated guide amount for head custodians. Further, if respondent does not want to pay the petitioner the negotiated guide amount for head custodians, essentially reducing petitioner's salary, the board must comply with the due process requirements of the tenure statute. Respondent, on the other hand, contends that the May 1998 order only established that petitioner's salary could not be reduced below $23,480.00, the amount he would have been paid if he had not been relieved of his position as head custodian in 1997. Finally, respondent argues that the May 1998 decision did not concern any future salary increases that petitioner might have received had he continued to serve as a head custodian.

DISCUSSION

The Summary Decision Standard

The New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-1.1, -21.6) provide that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(b). In considering respondent's motion for summary decision, this tribunal must determine whether "the papers and discovery . . . together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1.1-12.5(b). This language is substantially similar to the standard for summary

judgment found in *R.* 4:46-2(c)[3], therefore, this standard may be relevant to resolving motions for summary decision.[4]

In this respect, the New Jersey Supreme Court has stated, "since there are pronounced similarities in the exercise of judicial and quasi-judicial powers . . . court-fashioned doctrines for the hearing of litigation do in fact have some genuine utility and relevance in administrative proceedings." *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). Additionally, the Court has recognized that the OAL performs many "quasi-judicial" or "adjudicative" functions and that in doing so, [j]udicial rules of procedure and practice are transferable to administrative agencies [i.e., the OAL] when these are conducive to ensuring fairness, independence, integrity and efficiency in administrative adjudications." *Matter of Tenure Hearings of Onorevole*, 103 *N.J.* 548, 554-55 (1986). Recently, the Supreme Court of New Jersey held that when deciding a motion for summary judgment under *R.* 4:46-2,

> [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Brill v. Guardian Life Ins. Co. of America, 142 *N.J.* 520, 540 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 533; *see also*, *N.J.A.C.* 1:1-12.5(b) (stating, "an adverse party [to a summary decision motion] in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding"). Therefore, through the application of summary

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[3] In pertinent part, *R.* 4:46-2(c) provides:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

[4] *See* 37 *New Jersey Practice, Administrative Law and Practice* § 194, at 90 (Patricia Prunty, Anthony Miragliotta and Steven L. Lefelt) (1997 Pocket Part) (stating "since the UAPR on summary decision, *N.J.A.C.* 1.1-12.5, closely track the court rules, it is anticipate that this standard will be applied by ALJs in deciding summary decision motions").

judgment, a legal issue may be quickly and inexpensively disposed of where there is clearly no genuine issue of material fact necessitating disposition at a hearing. *Brill, supra*, 142 *N.J.* at 540.

Cross Motions For Summary Decision

Resolution of this matter demands an understanding of the May 1998 decision as well as an assessment of the purpose surrounding the protections afforded to tenured employees.[5] *N.J.S.A.* 18A:17-3 is part of a statutory scheme providing tenure to certain enumerated employees of local boards of education. A public school custodian holds his employment under tenure during good behavior and efficiency and "shall not be dismissed, suspended or reduced in compensation, except for neglect, misbehavior or other offense." *N.J.S.A.* 18A:17-3. In order to impose a dismissal, suspension or reduction in compensation, the school district must proceed in the manner described in *N.J.S.A.* 18A:6-9, -29.

New Jersey's Supreme Court illustrated the importance of the tenure statutes stating, "tenure is an item that intimately and directly affects the work and welfare of public employees." *Wright v. Bd. of Educ. of the City of East Orange*, 99 *N.J.* 112, 118 (1985). "In the context of the public school teacher tenure statute, tenure 'prevents school boards from abusing their superior bargaining power . . . in contract negotiations.' It protects employees from dismissal for unfounded, flimsy or political reasons." *Wright, supra*, 99 *N.J.* at 118 (citing *Spiewack v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982)). The Court further acknowledged: "once the status of tenure is earned, it provides a measure of job security to those who continue to perform their jobs properly." *Wright, supra*, 99 *N.J.* at 118.

In the instant case it is not disputed that petitioner is afforded tenure in his position as a custodian, nor is it disputed that petitioner is not entitled to the specific title of head custodian. However, there is a disagreement between the parties concerning what exactly constitutes a reduction in compensation pursuant to *N.J.S.A.* 18A:17-3. Petitioner suggests that respondent's failure to pay him the salary available to a head custodian is not only a violation of the May 1998 decision, but it essentially amounts to a reduction in compensation without the due process

[5] It is essential to note that the purpose for entertaining the instant petition is simply to provide clarity to the relevant parties concerning the May 1998 decision. The OAL does not necessarily want to engage in the practice of interpreting prior decisions.

safeguards. Petitioner's assertion however contradicts the May 1998 decision, in addition to the statutory provisions encompassing tenure acquisition and tenure rights. The Commissioner's directive that the respondent "compensate Petitioner at the same rate and for no less then he was receiving as a head custodian" indicates that the respondent could not reduce petitioner's salary after the 1997-98 school year to a rate below that which he earned in 1997-98. In other words, petitioner's compensation for the 1998-99 school year and all subsequent school years could not be less than the amount he would have received in the 1997-98 school year had the respondent not relieved him of his duties as head custodian.

In a case discussing the prohibition against the reduction in compensation for tenured employees, the court held that the mandate did not entail salary expectancy. *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 154 (App. Div. 1980), *cert. denied*, 87 *N.J.* 306 (1981). In *Williams*, a tenured high school principal challenged a determination of the State Board of Education that the local board could properly transfer her from her tenured position to the position of elementary school principal.[6] *Id.* at 158-159. The petitioner argued that although she initially suffered no reduction in salary, there was a reduction in her future salary expectancy because the formula used by the local board to determine salary increments is a lower rate for elementary school principals then for high school principals. *Ibid.* The court affirmed the State Board decision holding that the prohibition against reduction in salary for tenured employees did not contemplate salary expectancy but rather referred only to the amount of compensation paid to the tenured employee at the time of the transfer. *Id.* at 158, 164. Finally, the court noted that there is "no statutory requirement that transferred tenured employees be paid in future years according to the same schedule of increments that were in force in the position from which the employee was transferred." *Id.* at 158.

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[6] The tenure statute controlling in *Williams* was *N.J.S.A.* 18A:28-5 (Tenure of teaching staff members). The statute contains language similar to *N.J.S.A.* 18A:17-3 concerning the protections afforded to the tenured employee. *N.J.S.A.* 18A:28-5 states in pertinent part:

> The services of all teaching staff members employed in the positions of . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . .

Ibid.

Although, the specific tenure statute governing the circumstances in *Williams* does not regulate tenured custodians, the tenure statutes all basically function analogously. The noteworthy distinction amongst the tenure statutes is that they apply to different types of employees. Like the statute involved in *Williams*, the parameters of the tenure statute regarding custodians do not extend to protect a custodian's expectancy of future salary increases. The statute simply precludes an immediate loss of salary as a result of petitioner's transfer to his tenure-protected position of custodian. The Commissioner expressed this notion by ordering respondent to compensate petitioner "at the same rate he was receiving as a head custodian". Petitioner is actually seeking a determination compelling his perpetual increase in compensation on the head custodian pay schedule while he is only serving as a custodian. Neither the May 1998 decision nor the statutory provisions governing tenured employees support this scheme.

To suggest that petitioner is entitled to continue to be compensated as a head custodian also defies logic. As a practical matter, why would respondent exercise its authority to relieve petitioner as head custodian if respondent has to continue to compensate him as if he was fulfilling that job description? There is no statutory provision mandating that the board is restricted from relieving petitioner of his duties as head custodian. It is clearly stated in the May 1998 decision: "he [petitioner] is *not* entitled to the specific title of 'head custodian' since no where in the statute does it provide for such rights ... The title 'head custodian' merely denotes a special assignment within the general classification of janitorial services ..." Therefore, it naturally follows that petitioner is not entitled to continue to be compensated as though he was serving as a head custodian. Logic demands the following deduction: if petitioner is not entitled to the title he is not entitled to the compensation associated with the title. It simply does not make sense to compensate petitioner as a head custodian when in fact he is only responsible for those duties expected of a regular custodian.

CONCLUSION

The conflict in this case stems directly from the May 1998 decision, and thus resolution of the matter essentially necessitates an explanation of the prior determination. Additionally because there are no facts in dispute, the case is ripe for summary decision. As previously indicated, it is important to note that a decision pertaining to this petition is simply to provide

clarity to the parties concerning the May 1998 decision. *N.J.S.A.* 18A:17-3 protects petitioner in that his salary can never be reduced below $23,480.00, the amount he would have been paid if he had not been relieved of his position as head custodian in 1997. The scope of the tenure statute, however, does not extend to protect future salary expectancy. Accepting petitioner's interpretation would be in contravention to the May 1998 decision as well as the function of the tenure statutes. Therefore, I **CONCLUDE** that the scope of the tenure statute does not extend to protect petitioner's future salary expectancy.

It is therefore **ORDERED** that the respondent's motion be and is hereby **GRANTED** and the petitioner's motion be and is hereby **DENIED.**

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

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

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

2/10/2000
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

Feb. 15, 2000
DATE

D. N. Antanaitis /jf
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 16 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 4554-99
AGENCY DKT. NO. 132-5/99

ARTHUR REINERTSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT .	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 31 2000

Date of Mailing: MAR 31 2000

105-00R

RAYMOND HILDEBRANDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

March 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3963-99

AGENCY DKT. NO. 382-8/98

ON REMAND OAL DKT. NO. EDU 9211-98

AGENCY DKT. NO. 382-8/98

RAYMOND HILDEBRANDT,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

Brian W. Kroncik, Esq., for petitioner (Oxfeld Cohn, attorneys)

Mary E. Hennessey, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: January 31, 2000 Decided: February 9, 2000

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

Petitioner, a tenured custodian employed by respondent, filed a petition with the State Department of Education (DOE) on August 13, 1998, requesting enforcement of a prior settlement agreement, return to the active payroll, payment of his salary as of July 24, 1998, and an award of counsel fees. Subsequent to prior proceedings, the DOE transmitted the matter on remand to the Office of Administrative Law on April 28, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were conducted throughout the proceedings. An executed Settlement Agreement was filed on January 31, 2000, on which date the record was closed. Attached herewith is a copy of the agreement.

The Settlement Agreement provides, in part, that respondent will place ten sick days in the "sick bank" of petitioner and pay petitioner the gross salary amount of $1400, minus standard and ordinary deductions, upon approval of the agreement by the Commissioner of the DOE. (Settlement Agreement, p. 1.) The gross salary amount represents petitioner's salary from the time the original Settlement Agreement in question, relevant to OAL Docket No. EDU 5471-97, was entered into until the time respondent voted to approve the original agreement and return petitioner to work

As reflected in the Settlement Agreement, the parties determined to reach an agreement to avoid the cost and time of continued litigation. Respondent, in addition, seeks to prevent a disruption of the education process by allowing potential witnesses to remain in their educational functions. Petitioner acknowledges in the agreement that he had the right and opportunity to discuss all aspects of the Settlement Agreement with his counsel prior to entering into it, that he did so, that he read and fully understands all provisions of the agreement, and that he entered into it knowingly and voluntarily.

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

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

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

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

February 9, 2000
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Feb. 15, 2000
DATE

D. N. Antonacci Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 17 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

\mvh

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 31 3 46 PM '00

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
(732) 747-2300
Attorneys for Respondent

RAYMOND HILDEBRANDT, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF THE STATE OF NEW JERSEY DOCKET NO. EDUOA 03964-99N SETTLEMENT AGREEMENT

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Raymond Hildebrandt ("Hildebrandt") to resolve all the litigation pending between them before the Commissioner of Education, Agency Docket No. EDUOA 03964-99N, as well as any litigation that could have been brought. The parties express their intent to enter into this Agreement to amicably resolve all disputes between them and to avoid the cost and time of continued litigation on the matters between them.

2. The Board agrees to place ten (10) sick days in the sick bank of Raymond Hildenbrant upon the approval of this Agreement by the Commissioner of Education. The Board further agrees to pay Mr. Hildebrandt the gross salary amount of $1,400.00 minus standard and ordinary deductions. The $1,400 sum represents Mr. Hildebrandt's salary from the time the original settlement agreement (OAL Docket No. EDUOA 05471-97N) in this matter was entered into until the time the Board voted to approve the original agreement and bring Mr. Hildebrandt back to work. The Board will pay the gross amount of $1400 to Mr. Hildebrandt upon the approval of this

3a

Agreement by the Commissioner of Education. The Board agrees to settle this matter in the best interests of the district. Such settlement avoids an expensive hearing at the Office of Administrative Law and prevents the disruption of the education process by allowing potential witnesses to remain in their educational functions.

3. Neither party makes any admissions in the settlement of this case.

4. Hildebrandt acknowledges that this Agreement is in settlement of disputed issues of fact and law, that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. In consideration for this Agreement, Hildebrandt irrevocably and unconditionally releases the Board and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Hildebrandt, his heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under this Agreement and any past Agreement entered into between Hildebrandt and the Board.

6. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education

MURRAY, MURRAY & CORRIGAN

Mary E. Hennessy

Mary E. Hennessy

Dated: 1/27/00

For Raymond Hildebrandt

BALK, OXFELD, MANDELL & COHEN

Brian Kronick

Dated: 1/26/00

Raymond Hildebrandt

Raymond Hildebrandt

Dated: 1/22/00

OAL DKT. NOS. EDU 3963-99 AND EDU 9211-98 (ON REMAND)
AGENCY DKT. NO. 382-8/98

RAYMOND HILDEBRANDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAR 31 2000

Date of Mailing: MAR 31 2000

106-00E

P.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 02187-00S

AGENCY DKT. NO. 95-3/00

P.C., ON BEHALF OF MINOR CHILD, M.C.,

Petitioner,

v.

MONROE TOWNSHIP BOARD OF EDUCATION,

Respondent.

BEFORE **JEFF S. MASIN**, ALJ:

This matter came before the Office of Administrative Law on an application for emergent relief transmitted by the Commissioner of Education. The Monroe Township Board of Education suspended M.C., a seventeen-year-old senior at Williamstown High School, based upon its determination that he had committed sexual harassment. A ten-day suspension was issued pursuant to the district's Student Discipline Policy No. 5600 and its Pupil Discipline Regulation No. 5600, which establishes that for a first offense of sexual harassment by a student in a high school or middle school, a ten-day out-of-school suspension and notification to the police is the designated penalty. In addition, the Williamstown High School Student Handbook for 1999-2000 notes at page seven that any student who is issued a total of ten days of suspension will not be eligible for his/her class trip, the junior-senior prom or certain other specified events.

Following M.C.'s suspension, which was issued on January 18, 2000, his parents, who received a letter advising of the suspension from Steven F. Stumpo, principal of the high school, appealed to Mr. Stumpo and met with him on January 19, 2000. Mr. Stumpo denied the appeal. Thereafter M.C. served the suspension from January 19 through February 1, 2000. However, his parents pursued the appeal of the suspension and the additional exclusions. The Board of Education takes the position that no appeal from the ten-day suspension could be made to the Board, however they do not contest that an appeal of that suspension could be made to the Commissioner of Education. In addition, the Board did consider an appeal from the exclusion from the prom and class trip and denied the appeal on March 7, 2000. Thereafter, Mr. and Mrs. C. filed a request for emergent relief with the Department of Education on March 20, 2000, and the matter was transferred to the Office of Administrative Law and a hearing held before this judge on March 30, 2000.

At the hearing the parties essentially agreed upon the facts. In summary, on January 18, 2000, a male student, R.D., exposed himself in homeroom. At some point during this incident M.C., another male student in the homeroom, made a statement to K.C., a female student who sat behind him and who is also a seventeen-year-old senior, stating "look at R." Apparently he pointed at R. and pointed down toward the exposed organ and also may have said to Ms. C. "look down" when she looked at R.'s face. In addition to this action, the parties also agree that at some time during this same homeroom period a group of obscene or pornographic photographs of R. engaged in some kind of perverse sexual activity was passed around the room. There is no evidence as to who started passing the photos around the room, who took the photographs, or how they got to the class. It is, however, not disputed that at some point the photographs came into the hands of M. as they passed around the room and that he handed them to Ms. C., seated behind him. Ms. C. testified that the photos were handed to her face down and that she did not look at them. The Board's charge of sexual harassment is grounded solely upon these particular actions, the statement to look at R., the pointing and/or statement to look down and the passage of the photographs to Ms. C. There is no evidence in the record that any other student or teacher in the room heard Mr. C. make these comments or saw him gesture or point, nor is there any evidence that Mr. C. passed the photographs to any other students or for that matter that any students actually looked at the photographs. However, for the purposes of this emergent relief application, it is assumed that some students viewed the actual content of the photographs, although they may have received them from the hands of other students.

At the hearing on the application for emergent relief K.C. testified that she did not believe that M.C. had harassed her. She had provided his name and advised what he had done only after repeated questioning on several occasions by Vice Principal Klemick regarding what had gone on in the classroom that morning. When asked during the investigation whether she had felt offended by M.'s comment, she advised that she had not. She did, however, indicate that she was offended by what R. had done in exposing himself. Ms. C. noted that she believed that the principal had suspended Mr. C. because he believed that Ms. C. felt victimized by his conduct, however, she did not feel victimized. When she learned of Mr. C.'s suspension, she was very upset and went home crying, advising her mother of what had occurred and indicating that she was very upset by the fact that Mr. C. had been suspended. (Her mother testified in corroboration of this testimony). At the hearing Ms. C. denied that she was forced to look at any photographs, that she was in any way forced or threatened to look at R. or that she had been in any way threatened or forced or intimidated to testify on behalf of Mr. C., who is not a friend of hers. She believes that Mr. C.'s comment was an innocent one and was not meant in any way to harass her.

In a statement presented as part of the appeal, Mr. C. agreed that he had made the statement and had pointed down, although he adds that he had first noticed what R. was doing and had said, "stop R., that's sickening." Mr. C. did not take the stand at the hearing and therefore was not cross-examined.

Mr. Steven Stumpo, principal of the high school, testified about having handled the appeal, which he denied. He noted that passing the photographs was inappropriate. He claimed that when he questioned Ms. C. the day after the appeal was heard, he asked her whether the action had made her uncomfortable and she said that it had. No other students were punished for their conduct in the homeroom that day as no other students were identified who had handled the photographs. There was "no evidence to prove anyone else guilty."

Initially, the standard that applies on an application for emergent relief was stated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). An applicant for emergent relief is required to establish that irreparable harm will be suffered if the requested relief is not granted, that the applicant is likely to prevail on the merits of the claim and that on balance of the interests of the parties, the

harm to the petitioners in denying the relief would be greater than the harm to respondent if the relief was granted.

The school board's allegation of sexual harassment is founded upon a definition of that offense contained in the board's most recent revision of its policy, 5751, adopted on July 21, 1998. This definition is apparently taken from that of the United States Department of Education, Office of Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997). That definition includes both a description of *quid pro quo* harassment and of hostile environment sexual harassment. The allegation in this matter is one of hostile environment sexual harassment. The definition provides that

> 2. Hostile environment sexual harassment is sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, or other favors, or other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another pupil, or by a third party that is sufficiently severe, persistent, or pervasive to limit a pupil's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive educational environment.

The policy states that sexual harassment will not be tolerated whether it involves harassment by school employees, other pupils or third parties.

An analysis of the evidence presented at this time on the application for emergent relief establishes that a student, R.D., was engaging in conduct in the homeroom on the day in question that clearly was completely inappropriate. Ms. C. indicated that he had engaged in this conduct on many occasions before this, that his conduct was well known to students generally, and that yet no one had complained to teachers or other authorities out of a combination of a desire not to become involved, fear of involvement, etc. Regardless of whether or not he had done this before, his conduct on the day in question was without doubt offensive in nature. Based upon the agreements from testimony and statements of counsel and of Mrs. C., I **FIND** for the purposes of the emergent relief application that M.C. did, upon observing Mr. D. exposing himself, make a statement "look at R." and that he gestured toward R.'s privates, and that he also said "look down" when he apparently saw that Ms. C., who sat behind him, was looking at R.'s face. In addition, I **FIND** that he did receive from some other unidentified student photos which

were being passed around and which had apparently been touched by more than one other student before they reached Mr. C. and that he then handed these photographs face down to Ms. C., who did not look at them. I also **FIND** that Ms. C., while she was clearly offended by what R.D. did, testified credibly and with the utmost sincerity that she was not offended by M.C.'s conduct and that she did not believe or understand that he had been attempting to harass or embarrass her. While she may have answered Mr. Stumpo's question on the day after M.C.'s parents appealed to him by indicating that "the action" made her uncomfortable, it is less than clear that she in fact intended to indicate that M.C.'s conduct had made her uncomfortable rather than that R.D.'s conduct had made her uncomfortable.

In determining whether sexual harassment occurred, one must be guided by the definition set forth by the Board in its policy as well as by the standards announced by the New Jersey Supreme Court in *Lehmann v. Toys'R'Us, Inc.*, 132 *N.J.* 587 (1993). That case dealt with hostile work environment sexual harassment and provided that in order to establish sexual harassment, a female plaintiff must show 1) that the conduct would not have occurred but for the employee's gender; 2) that it was severe or pervasive enough to make a 3) reasonable woman believe that 4) the conditions of employment are altered and the working environment is hostile or abusive. *Lehman, supra*, 132 *N.J.* at 603-604. The sexual harassment definition adopted by the Board of Education provides similarly that in the context of a school setting the conduct must be "sufficiently severe, persistent, or pervasive" and that such conduct must be such as to "limit a pupil's ability to participate in or benefit from an educational program or activity, or create a hostile or abusive educational environment." This latter is in the school context a rough equivalent of the fourth requirement of the *Lehmann* test.

Consideration of the evidence here leads to the conclusion that the petitioner has a reasonable likelihood of success on the merits in establishing that M.C. did not engage in sexual harassment. This is so because an examination of his conduct indicates that the language complained of, "look at R." is facially neutral. That is to say, there is no reason to conclude that that statement was made for the purpose of harassing, embarrassing or otherwise humiliating Ms. C. any more than that the statement was made out of an expression of shock, excited utterance, disgust, spontaneous response, or simply as a call to attention regarding unusual conduct occurring in the room, all without any harassing intent. More important, in light of the requirement that the objective test of the reasonable woman be used, the nature of what Mr. M.

said, without much more, cannot be said to be the kind of action that a reasonable woman would, by itself, indicate that she was being harassed. The fact that he then gestured or added the words "look down" when she did not look at exactly what he was intending to call to her attention does not add anything which is likely to suggest that he was harassing her or that she, as a reasonable female student, would have necessarily assumed that she was being harassed. The fact that she herself has indicated that she believed the remark was an innocent one strongly suggests that the reasonable reaction to what M.C. did was not to conclude that he was harassing her, but that merely that he was calling her attention to some outlandish conduct being performed by a teenaged student in a room full of teenagers. This is not to suggest by any means that if his conduct was more clearly suggestive of sexual harassment or was more clearly the type that a reasonable woman would see as harassing that he would not be properly held to account for it. Nevertheless, the facts do not point to the likelihood that the Board would sustain its position and therefore there is a reasonable likelihood of success on the merits by the petitioner. In addition, at least on the evidence now before me, the passing of the photographs, which were apparently being passed around the room through the hands of a number of persons, does not constitute a sufficiently severe, persistent or pervasive conduct to create a hostile or abusive educational environment or to limit Ms. C.'s ability to participate in or benefit from an educational program or activity. This is so even when the passing of the photographs occurred after Mr. C.'s remark and gesture.

If Mr. C. is prevented from attending the class trip there is no doubt that he will not be able to recover the experience of this trip taken in comradeship with his fellow classmates. While the right to go the trip may be a privilege, it nevertheless will be lost for good if the relief herein is not granted. Finally, given the nature of the conduct charged here and the proofs, it is clear that the balance of the interests of the parties is such that the harm to M.C. by the denial of this relief will be greater than the harm to the respondent if the relief is granted. While the respondent certainly has the responsibility to shield its students from sexual harassment and to punish those who engage in such conduct, the nature of the alleged conduct by M.C., equivocal as it is, is such that a denial of relief to him would engender a greater harm to him than that to the respondents if he is permitted to go on the class trip. The question of whether or not he will be permitted to attend the prom is one that can be resolved based upon the outcome of a plenary hearing, which is to be scheduled as soon as reasonably possible and before the prom, which is not to be held until May.

Perhaps M.C.'s conduct, particularly the passing of the photographs that no doubt he should have handed back to the person who gave them to him and not passed on to someone else, may have constituted inappropriate or boorish conduct that should not have occurred. However, given the definition of sexual harassment that is applicable in this matter, even that conduct does not rise to the level of the severe, persistent, or pervasive conduct which is the subject of the definition of hostile environment sexual harassment. While perhaps a different charge against M.C. might have led to the imposition of some degree of penalty, the only charge that was made was one of sexual harassment and, based upon the proofs as they stand at this time in this emergent application, I **CONCLUDE** that the petitioner has established that emergent relief should be granted based on the standards applicable thereto.

For the reasons expressed, it is **ORDERED** that emergent relief be granted and that M.C. shall be permitted to attend the senior class trip to Florida. It must be noted however, that this decision only addresses the legal impediment to his attendance and in no way addresses any practical logistic problems that may exist with respect to arrangements already made with respect to the trip. I understand that there may be some concerns with respect to logistics and have explained to Mrs. C. that I have no authority over those logistical issues. Nevertheless, it is assumed that the Board will act in good faith to accommodate M.C. if at all possible.

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

March 30, 2000
DATE

JEFF S. MASIN, ALJ

mjm

OAL DKT. NO. 2187-00
AGENCY DKT NO. 95-3/00

P.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner: Pat Christy, *Pro Se*

For Respondent Board: Robert P. Becker, Jr., Esq.

The audio tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on March 30, 2000 and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs that petitioner has satisfied the four-pronged standard set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) for obtaining emergent relief.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. This matter shall continue at the OAL for expedited hearing as recommended by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAR 31 2000

Date of Mailing: MAR 31 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

108-00

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SUSAN SETTLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, AND ROBERT PEDDLE, SUPERINTENDENT, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENCY RELIEF
OAL DKT. NO. EDU 2345-00
AGENCY DKT. NO. 109-3/00

SUSAN SETTLE,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF PENNSVILLE,
AND ROBERT PEDDLE,
SUPERINTENDENT, SALEM COUNTY,
Respondents.

Paul H. Schull, Jr., Esq., and **John Adams**, Esq., for the petitioner

Judith A. Karr, Esq., for the respondent (Karr & Salber, attorneys)

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by Susan Settle, the petitioner, requesting an injunction against the respondents, Board of Education of the Township of Pennsville (Board), and Robert Peddle, Superintendent, Salem County, as to the further consideration by the respondents of a grievance filed by the Pennsville Educational Association against the petitioner. The petitioner also asked for emergent relief seeking to enjoin the Board from continuing its consideration or rendering a decision as to the grievance prior to a determination as to the legal issues raised. These legal issues include whether the Board has jurisdiction to consider a

grievance filed against an elected board member which raises primarily ethical violations; if the Board has such jurisdiction, whether its consideration of the grievance is to be conducted at an open or closed session of the Board; what type of disciplinary action, if any, the Board can take against an elected school board member pursuant to the grievance procedure; whether the Board violated any of the provisions of the Open Public Meeting Act and whether this issue can be decided in this forum; and whether the Board acted correctly in prohibiting the petitioner's court reporter from recording its initial consideration of the grievance on March 27, 2000.

The petitioner has asked for emergent relief since the Board has scheduled the further consideration of the grievance for April 3, 2000.

The Pennsville Education Association (Association) through its attorney, Keith Waldman, Esq., contacted my office on March 31, 2000 shortly before I was to hear the oral arguments of the parties regarding the request for emergent relief. At that time, Mr. Waldman indicated that the Association has taken the position that it should be a participant in this matter. I indicated that I would give him the opportunity to speak to the Board's attorney, Ms. Karr, before I initiated the procedure as to the motion for emergent relief but that I was not inclined to grant an adjournment since the Board had scheduled the matter for April 3, 2000.

Having heard the oral arguments of the parties and considering the written submission by the petitioner as well as the exhibits admitted into evidence (P-1, P-2, P-4 and J-1) I granted the requested for emergent relief for the reasons stated on the record. A tape of the oral arguments of the parties as well as my oral decision is being submitted to the Commissioner concurrent with this order and the exhibits admitted into evidence.

Prior to dismissing the parties, I established a schedule for the filing of a motion to intervene or participate by the Association, the submission of a stipulation of facts, and the submission of legal briefs as to concurrent motions for summary decision. After considering these documents, I will render a initial decision as to whether a permanent injunction should be issued against the Board as to the consideration of the grievance filed against the petitioner and as well as rendering a decision as to the other issues raised by the petitioner.

OAL DKT. NO. EDU 2345-00

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

March 31, 2000
DATE

BEATRICE S. TYLUTKI, ALJ

cad

OAL DKT. NO. EDU 2345-00
AGENCY DKT. NO. 109-3/00

SUSAN SETTLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, AND ROBERT PEDDLE, SUPERINTENDENT, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, including the Administrative Law Judge's (ALJ) Order and an audio cassette tape of the hearing conducted at the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Assistant Commissioner, to whom this matter has been delegated for review, pursuant to *N.J.S.A.* 18A:4-34, concurs that emergent relief is appropriately granted petitioner.

Accordingly, the Board is temporarily enjoined from taking further action in consideration of the grievance filed against petitioner, pending review of the merits of this matter, which shall proceed at the OAL consistent with the ALJ's expedited briefing schedule.

IT IS SO ORDERED. *

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: APR 3 - 2000

Date of Mailing: APR 3 - 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

109-00

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN EILERT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF HAZLET, MONMOUTH	:	
COUNTY.	:	
	:	

SYNOPSIS

The Board certified a tenure charge of unbecoming conduct against respondent middle school teacher for allegedly allowing, and even encouraging, pupils to assault another pupil.

In light of testimony of witnesses and evidence in the record, the ALJ concluded that the charge against respondent was true and that the appropriate penalty for such egregious behavior was dismissal from employment. Even without considering observation reports that indicate long-standing deficiency in the area of pupil discipline, the ALJ concluded that the one incident of June 9, 1999 was sufficiently flagrant to demonstrate unfitness. (*Redcay*) ALJ ordered respondent removed from his position.

The Commissioner adopted the findings and determination in Initial Decision as his own and forwarded the matter to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

April 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8059-99

AGENCY DKT. NO. 269-9/99

IN THE MATTER OF THE TENURE HEARING OF BRIAN EILERT, SCHOOL DISTRICT OF THE TOWNSHIP OF HAZLET

Michael J. Gross, Esq., for petitioner (Kenney, Gross & Kovats, attorneys)

Julia S. Dasaro, Esq., for respondent (Chamlin, Rosen, Uliano & Witherington, attorneys)

Record Closed: January 5, 2000 Decided: February 14, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

In this matter, a board of education has preferred a charge of unbecoming conduct against a tenured teaching staff member. The Hazlet Township Board of Education alleges that Brian Eilert, a tenured teacher at its Union Avenue Middle School, engaged in conduct on June 9, 1999 so as to require that his employment be terminated.

The issues to be tried are whether Eilert engaged in conduct unbecoming a teaching staff member and, if so, if this conduct warrants removal from position or reduction in salary.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on September 30, 1999. Among other things, it was decided that hearing would be held on December 6 and 7, 1999, at the Office of Administrative Law facility in Trenton. Hearing was held and completed on December 6, 1999. Counsel timely filed posthearing submissions and the record closed on January 5, 2000.

The respondent does not challenge any procedural aspect of the case.

PAROL AND DOCUMENTARY EVIDENCE

The central charge here is that the respondent, upon noticing that pupil M.F. appeared to become entangled in his desk while attempting to pick up something from the floor, first told M.F. to sit up and, when it appeared that M.F. could not, the respondent told pupil J.B. to get up and kick M.F. J.B. did, in fact, go to M.F. and kick him twice, in the rib and shoulder area. Immediately after this, the respondent asked if anyone else wanted to kick M.F. Pupil J.P. raised his hand and then got up from his seat, walked to M.F.'s desk and kick M.F. once. All witnesses appear to agree that J.P. kicked M.F. harder than did J.B. The respondent did not say anything to J.P. He loudly told M.F. to get out of the chair.

M.F. testified that, after J.P. returned to his seat, the respondent asked, "Why don't we get [V.M.] to see what he can do." V.M. was the largest boy in the sixth grade at that time.

After the two pupils kicked M.F. and M.F. apparently could not extricate himself from his desk, two other boys in the class walked to M.F. and assisted him. They did so by turning over the desk. After M.F. was extricated, he asked if he could visit the school nurse because his shoulder hurt.

All witnesses including the respondent agree that the respondent remained at his desk during the entire incident. There is nothing to indicate that the respondent said anything to M.F. upon M.F.'s return from the nurse's office with an icepack applied. The testimony was less clear

as to whether M.F. had become entangled in his chair on previous occasions and whether J.B. had previously kicked M.F. in class. The respondent testified that a similar incident had occurred the previous day and that this involved J.B. kicking M.F. in a playful way.

There was extensive testimony concerning the respondent's evaluations over a period of approximately five years. The respondent testified he had been advised on previous occasions of a need to improve classroom management by issuing warning cards to disruptive students, a practice followed in the school. In the incident that is at the center of today's case, however, he did not issue a warning card to M.F. – or to anyone else for that matter – during or after the alleged kicking incident.

The Board introduced incident and accident reports, pupil statements to school officials, pupil statements to police, the respondent's statement to police, video tapes and transcripts of three pupil depositions and fifteen classroom observations or related documents. A hand-drawn diagram of the classroom, not to scale, is included in the record (J-1).

DETERMINATION AND ORDER

No essential facts are in dispute. Counsel presented their cases efficiently. All that remains is determination of an appropriate penalty.

The respondent argued that under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 through -18.1, a board of education can remove a tenured employee only by filing a written charge and only after hearing. There are, under the statutes, four different bases on which a board may certify tenure charges: inefficiency, incapacity, unbecoming conduct or other just cause. This is a correct statement of the law.

The respondent also argues that the Board chose to file charges based on conduct unbecoming a teacher. This, in turn, was based on a single incident of June 9, 1999. The respondent then argues that this judge must determine whether or not the Board has proven, by a preponderance of the credible evidence, that this incident does, in fact, constitute conduct

unbecoming a teacher and, if that is found, to determine whether the penalty of dismissal or salary reduction is appropriate. This, too, correctly states the law.

The respondent further argues that under *In Re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), this judge must decide not only whether the respondent is guilty of the charge, but must also determine whether the act was premeditated, cruel or vicious, done with the intent to punish and/or corporal in nature.

The Appellate Division does use this language, in *dictum*. The relevant passage is:

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd o.b.* 131 *N.J.L.* 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.

Much of this language directly applies to the present case. However, the underlying facts in *Fulcomer* are quite different. David Fulcomer went to a source of disturbance in his classroom, laid hands upon a pupil and, when the pupil ran toward the door in the rear of the classroom, he pursued the boy, again grabbed him and both fell to the floor. At no time did the teacher give commands to the pupil other than to resume his seat. 93 *N.J. Super.* at 420.

Not only are the underlying facts different, but I do not read the language cited above as does the respondent. The words in *dictum*, that there was no evidence that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment, are not exclusive. A teacher may demonstrate unfitness in many ways.

Upon careful consideration of the entire record, I **FIND**:

1. On June 9, 1999 the respondent was in charge of a sixth grade class at the Union Avenue Middle School in Hazlet during the last class period of the day;

2. A pupil, M.F., became caught in his desk which was the last seat in the third row;

3. The respondent told M.F. to sit up several times;

4. M.F. stated he could not sit up;

5. The respondent did not leave his place at the front of the room and determine whether M.F. could in fact extricate himself;

6. The respondent then told another pupil, J.B., that J.B. could kick M.F.;

7. J.B. left his seat, went to where M.F. was and kicked M.F. twice in the rib and shoulder area;

8. J.B. described and demonstrated his blows to M.F. as light;

9. After J.B. kicked M.F., the respondent asked if others wanted to kick M.F.;

10. Several pupils raised their hands, including J.P.;

11. J.P. then went from his seat at the front of the room to where M.F. was and kicked M.F. once;

12. J.P. testified that he wanted to hurt M.F. because of a prior incident between them;

13. The respondent said nothing to J.P.;

14. The respondent again loudly told M.F. to sit up;

15. The respondent then stated, "Why don't we get [V.M.] and see what he can do," the reference being to the largest boy in the grade;

16. Two other boys, M.M. and S.S., went to M.F. and helped him to write himself;

17. M.F. asked and received permission to see the school nurse;

18. When M.F. returned to class, he was wearing an icepack on the approximate place he had been kicked by J.P.;

19. The respondent left his chair at the front of the room at no time during the two kicking incidents;

20. There had been at least two disruptions in the same class prior to June 9, 1999;

21. M.F. had become caught in his desk the day before;

22. The respondent knew M.F. was taking a prescription drug for hyperactivity;

23. The respondent had given M.F. detention as a result of prior behavior.

Where Eilert's testimony differed from that of the pupils, I credited the pupil testimony. It was consistent without being identical and was consistent on salient points. The respondent's testimony, not unexpectedly, tended to minimize or downplay each of the facts set forth above.

When a fact finder must determine which party's version of an incident has the reasonable probability of truth, the interest, motive, bias or prejudice of a witness may affect his credibility and justify the trier of fact, whose responsibility it is to pass on the credibility of an interested witness, in disbelieving his testimony. *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), *certif. den.* 10 *N.J.* 316 (1952). Further, "[a] trier of fact may reject testimony

because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

The respondent's actions go beyond the merely ill advised. As the Commissioner of Education stated in *Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 303, 321:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job. . . .

The Commissioner of Education has also said:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions. [*Tenure Hearing of Herman B. Nash*, 1971 *S.L.D.* 284, 296.]

The determination that the charges against the respondent are true in fact is not taken lightly. The judge recognizes that the removal of a teacher from a tenured position makes future employment in education, particularly public education, unlikely. Nevertheless, the abandonment of decent judgment shown here is outrageous. Parents have a right not to expect such behavior in a teaching staff member. Nor should they have to submit their children to the care and control of a teacher who behaves in this manner. In reaching this **CONCLUSION**, I am mindful of the respondent's testimony that he stayed in his chair throughout the duration of the incidents and, even if his version of what he said at the time is accepted, he did say that J.B. could kick M.F. and he did say, "Who else wants to kick [M.]." He also stated that he spoke those words in jest

and that the words "just flew out." Nevertheless, the respondent did absolutely nothing while J.B. and J.P., in succession, actually kicked another pupil. I **CONCLUDE** that this is shocking to the conscience. I **FIND** and **CONCLUDE** that the appropriate penalty in these circumstances is removal from position and referral of the matter to the State Board of Examiners for such action as the Board may deem appropriate.

This decision finds that Brian Eilert engaged in conduct unbecoming a teaching staff member on June 9, 1999 and further finds that that conduct was of such nature as to require that his employment be terminated. In 1943, the New Jersey Supreme Court said in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), aff'd 131 *N.J.L.* 526 (E. & A. 1944):

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.

The respondent's observation reports indicate a long-standing deficiency in the area of pupil discipline. However, even without that predicate, I **CONCLUDE** that the egregious behavior demonstrated on June 9, 1999 constitutes an incident sufficiently flagrant to demonstrate unfitness. Accordingly, it is **ORDERED** that Brian Eilert be removed from position and that all of his tenure rights be extinguished.

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

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

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

FEB 14 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPELL, ALJ

Receipt Acknowledged:

2/17/00
DATE

Debbie Antanaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

J.B.

M.F.

J.P.

For respondent:

Brian Eilert

EXHIBITS

Petitioner's:

P-1 School Nurse daily log, June 9, 1999

P-2 Standard Student Accident Report Form, June 9, 1999

P-3 "Report on June 9, 1999 Incident Period 10 Mr. Eilert's Class" from J. Richard Sherman to Renea La Prete, June 10, 1999, 3 pp., with P-4, P-5, P-6 and P-7 attached

P-4 Written statement by pupil J.P., June 9, 1999

P-5 Written statement by pupil S.S., June 10, 1999

P-6 Written statement by pupil J.B., June 10, 1999

P-7 Written statement by pupil M.M., June 10, 1999

P-8 Hazlet Township Public Schools Police Incident Form, June 9, 1999

P-9 Witness Statement to Hazlet Township Police by M.F., June 11, 1999, 5 pp.

P-10 Witness Statement to Hazlet Township Police by J.B., June 11, 1999, 3 pp.

P-11 Witness Statement to Hazlet Township Police by J.P., June 11, 1999, 5 pp.

P-12 Defendant Statement to Hazlet Township Police by Brian Eilert, June 18, 1999, 6 pp.

P-14 Videotaped Depositions of J.B., M.F. and J.P., October 25, 1999

P-15 Transcript of Depositions of J.B., M.F. and J.P., October 25, 1999, 59 pp.

P-16 Instructional Observation Report, March 7, 1994

P-17 Classroom Observation Checklist, October 20, 1994

P-18 Classroom Observation Checklist, November 14, 1994

P-19 Classroom Observation Checklist, February 16, 1995

P-20 Classroom Observation Checklist, January 24, 1995

P-21 Evaluation Record, December 14, 1994

P-22 Professional Improvement Plan, June 14, 1995

P-23 Classroom Observation Checklist, September 18, 1995

P-24 Classroom Observation Checklist, October 19, 1995, 4 pp.

P-25 Classroom Observation Checklist, February 8, 1996, 2 pp.

P-26 Classroom Observation Checklist, October 21, 1996, 2 pp.

P-27 Classroom Observation Checklist, November 7, 1996, 3 pp.

P-28 Classroom Observation Checklist, February 6, 1997

P-29 Classroom Observation Checklist, November 3, 1997, 3 pp.

P-30 Classroom Observation Checklist, January 28, 1999, 2 pp.

Respondent's:

None

Joint:

J-1 Diagram of classroom, not to scale, hand drawn

OAL DKT. NO. EDU 8059-99
AGENCY DKT. NO. 269-9/99

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN EILERT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF HAZLET, MONMOUTH	:	
COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent takes exception to the Administrative Law Judge's (ALJ) conclusion that the appropriate penalty in the within matter is removal. Respondent argues, *inter alia*, that of the 23 findings of fact set forth by the ALJ, only two (numbers 6 and 9) illustrate that he engaged in acts of commission by arguably encouraging two students in the class to make contact with M. F., while two other findings of fact (numbers 5 and 19) involve, arguably, acts of omission. Respondent further contends that the remaining findings of fact pertain to background and/or elaborations relative to the consequences of the kicking incidents, *i.e.*, M.F. going to the school nurse and receiving an ice pack. As to this, respondent argues that the two acts of commission were spur of the moment responses which must "be contrasted with a factual backdrop and associated 'mens rea' that would be as egregious as rising to the level of the four categories as elucidated in the *Fulcomer, supra,* case," a level of culpability which he contends is

not present in the instant matter. (Respondent's Exceptions at p. 3) As such, respondent argues that termination is too excessive a penalty in light of the fact that at least one of the involved students, J.P., thought that respondent's comments relative to the invitation to kick M.F. were just a joke. (See Exhibit 9 at p. 5.)

Respondent also takes exception to the ALJ accepting evidence in the form of observation reports dating back to 1994, averring that when the instant tenure charge was submitted by the Board, it was based upon conduct unbecoming a teaching staff member as a result of the June 9, 1999 incident, not inefficiency relative to performance in class. Respondent maintains that there was never a hint that these observation reports would be introduced at the hearing and argues, *inter alia*, that the implication of such action by the Board is that it intended to inflame the ALJ by subtly, but strategically, placing the observation reports in the record. As to this, respondent asserts that had the Board alleged a charge of inefficiency, the observation reports would have been fair play for introduction into evidence and he would have had the ability to submit evidence of his own in defense of the charges, instead, he was blindsided by the extraneous observation reports.

The Board urges that the ALJ properly concluded respondent's actions in the instant matter constituted conduct unbecoming a teaching staff member and that the appropriate penalty is termination of his tenure status and removal from his teaching position. It contends, *inter alia*, that:

> Simply stated, Mr. Eilert permitted, and indeed encouraged, two pupils in his class to conduct an assault on one of their peers, M.F. His claim that it was somehow a joke rings hollow in light of two significant facts: (1) the fact that he never told the children it was a joke, and (2) the fact that he failed to move a muscle to prevent the attacks. When Mr. Eilert saw that the alleged joke had gone awry, he could have taken steps to rectify the matter and prevent further harm to M.F. He had the power - throughout this episode -

> to stand up, walk to the back of the room, and intervene to prevent, or at least to end, the attacks. Not only did he not do so, but he did not even attempt to do so. And after J.P. had kicked M.F., Mr. Eilert then stated, "Why don't we get [V.M.] and see what he can do, " referring to the biggest child in the grade.***
>
> It is difficult to imagine a moral compass more badly skewed, or a judgment more flawed, than Mr. Eilert demonstrated in this case. The administrative law judge's conclusion that Mr. Eilert's conduct was "shocking to the conscience" is more than borne out by the evidence; it is a conclusion with which no reasonable person could disagree.***(Board's Reply Exceptions at p. 4)

The Board also avers in its reply exceptions that the ALJ properly admitted evidence of respondent's prior record, including his observations and evaluations reports, arguing, among other things, that respondent's record of performance, as evidenced by such documents, does not warrant mitigation of the penalty of termination.

Upon a thorough and independent review of the record in this matter, the Commissioner agrees with and adopts as his own the ALJ's findings and conclusions that the charge of conduct unbecoming a teaching staff member certified against respondent by the Hazlet Board of Education has been sustained and that the conduct was of such a nature as to require that his employment be terminated. The Commissioner finds such penalty to be more than amply supported by the record, even if accepting *arguendo* that the observation and evaluation reports entered into evidence by the Board were a "red herring," as argued in respondent's post-hearing submission, or "extraneous" as alleged in his exceptions to the Initial Decision. As aptly stated by the ALJ, even without the predicate of the observation reports, the egregious behavior respondent demonstrated on June 9, 1999 constitutes an incident sufficiently flagrant to demonstrate unfitness warranting removal from his position and termination of his tenure rights. (*Redcay, supra)*

Accordingly, the Initial Decision issued by the OAL, directing that respondent be dismissed from his tenured teaching position, is adopted by the Commissioner for the reasons expressed therein. A copy of this decision shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 4/3/00

Date of Mailing: 4/3/00

[1] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

JUDITH MAHMOUD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

April 4, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU11345-99
AGENCY DKT. NO. 252-8/99

JUDITH MAHMOUD,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gail Oxfeld Kanef, Esq., for Appellant (Balk, Oxfeld, Mandell & Cohen, attorneys)

Mary E. Hennessy, Esq., for Respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: February 16, 2000 Decided: February 16, 2000

BEFORE **THOMAS R. VENA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 15, 1999, for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for January 18, 2000. At the time of the hearing a settlement was reached.

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

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

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

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

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

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

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

Feb 16, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

2-18-00
DATE

Debbie Antanaitis/pb
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 2000
DATE

Barbara A Hamak
OFFICE OF ADMINISTRATIVE LAW

pb

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
JUDITH MAHMOUD

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Judith Mahmoud ("Mahmoud") to resolve all the litigation pending between them in the Superior Court of New Jersey, Union County, Docket No. UNN-L-1358-99 and before the Commissioner of Education, Agency Docket No. 252-8/99, as well as any litigation that could have been brought.

2. The Board agrees to place Ms. Mahmoud on a paid Administrative Leave until November 1, 2000. Ms. Mahmoud agrees to submit, within five (5) working days from the approval of this Agreement by the Commissioner of Education, a letter of resignation which shall state it is effective on November 1, 2000.

3. Neither party makes any admissions in the settlement of this case.

4. The parties agree to execute a stipulation of dismissal ending the Superior Court Litigation with prejudice and without costs.

5. Mahmoud acknowledges that this Agreement is in settlement of disputed issues of fact and law, that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

6. In consideration for this Agreement, Mahmoud irrevocably and unconditionally releases the Board, and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown,

which Mahmoud, her heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions. However, nothing in this Settlement Agreement shall preclude Ms. Mahmoud from pursuing the Workers Compensation claims she may have against the Board.

7. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

8. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

9. Mahmoud has voluntarily and without coercion entered into this Agreement.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education :

MURRAY, MURRAY & CORRIGAN

Mary E. Hennessy

By: Mary E. Hennessy

Dated: 2-14-00

For Judith Mahmoud

BALK, OXFELD, MANDELL & COHEN

Gail O Kanef

By: Gail Oxfeld-Kanef

Dated: 2-11-00

Judith Mahmoud

Judith Mahmoud

Dated: January 15, 2000

OAL DKT. NO. EDU 11345-99
AGENCY DKT. NO. 252-8/99

JUDITH MAHMOUD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/3/00

Date of Mailing: 4/3/00

114-00

WILLIAM BUNNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

April 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6711-99

AGENCY DKT. NO. 208-7/99

WILLIAM BUNNING,

Appellant,

v.

LENAPE REGIONAL HIGH SCHOOL, DISTRICT BOARD OF EDUCATION,

Respondent.

Barbara E. Riefberg, Esq., for the petitioner (Baron & Riefberg, attorneys)

Louis L. Chodoff, Esq., for the respondent (Archer & Greiner, attorneys)

Record Closed: February 17, 2000 Decided: February 18, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the assertion of the petitioner, William Bunning, that the respondent, the Lenape Regional High School District Board of Education, failed to pay him full salary without loss of sick time for an injury sustained in the course of his employment, pursuant to *N.J.S.A.* 18A:30-2.1. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on August 24, 1999, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A telephone prehearing conference took place on November 17, 1999 and continued to December 17, 1999. The December 17 date was adjourned at the request of Mr. Chodoff and rescheduled for December 22, 1999. Prior to that date, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

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

February 18, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

2-23-00
DATE

Debbie Andamasty
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 24 2000
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, NJ 08033
(856) 795-2121

Attorneys for Respondent,
Lenape Regional High School District Board of Education

By: LOUIS L. CHODOFF, ESQUIRE
JOHN C. BARNOSKI, ESQUIRE

2007 FEB 17 P 4:20

WILLIAM BUNNING,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:	
	:	OAL DOCKET NO. EDU6711-99
v.	:	AGENCY REF. NO.
LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

This Agreement is made by and between Petitioner, William Bunning, and Respondent, Lenape Regional High School District Board of Education ("Lenape").

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education concerning the charging of absences to his vacation time; and

WHEREAS, Lenape denies each and every allegation made against it by Petitioner; and

WHEREAS, the parties hereto desire to amicably resolve and settle their differences without the need for further litigation;

NOW THEREFORE, in consideration of the mutual covenants and terms contained herein, the parties agree as follows:

1. Lenape agrees to restore four (4) days to the vacation account of Petitioner for utilization during the 1999-2000 school year in accordance with regular Lenape policies.

2. This Settlement shall act as a full and complete resolution of any and all claims specifically plead in the Petition of Appeal attached hereto, as well as any and all claims that could have been plead in the Petition of Appeal related to the incident on October 20, 1998, in which Petitioner allegedly sustained an injury during the course of his employment as a school bus mechanic. Provided, however, that this Settlement does not address or affect the Worker's Compensation claims which Petitioner has pending against Lenape in the Division of Workers' Compensation.

BARON & RIEFBERG, P.A.
Attorneys for Petitioner

Dated: 1/19/00

By: _____
BARBARA E. RIEFBERG, ESQUIRE

By: _____
WILLIAM BUNNING

Dated: 1/19/00

ARCHER & GREINER
A Professional Corporation
Attorneys for Respondent

By: _____
JOHN C. BARNOSKI, ESQUIRE

Dated: 2/17/2000

LENAPE REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

By: _____

Dated: 2/14/2000

681529-1

OAL DKT. NO. EDU 6711-99
AGENCY DKT. NO. 208-7/99

WILLIAM BUNNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 10 2000

Date of Mailing: APR 10 2000

115-00

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY, RESPONDENT.	:	DECISION

April 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3957-99

AGENCY DKT. NO. 40-3/99

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,

Petitioner,

v.

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

Respondent.

Mark T. Janeczko, Esq., for petitioner

Anthony P. Sciarrillo, for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: February 15, 2000 Decided: February 16, 2000

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 28, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing was scheduled for Monday, March 6, 2000. Prior to the prehearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

February 16, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

2-23-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 29 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED JAN 11 2000

OFFICE OF
ADMINISTRATIVE LAW
FILED

JAN 10 8 51 AM '00

LINDABURY, McCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Respondent, Moonachie Board of Education

WOOD-RIDGE BOARD OF EDUCATION, Petitioner, -vs- MOONACHIE BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDU-03957-99N AGENCY REF. NO. 40-3/99 **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted and settled by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, with no costs assessed to either party, pursuant to the following terms:

1. The WOOD-RIDGE BOARD OF EDUCATION shall receive from the BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE the sum of $80,000.00 as payment in full for any and all tuition charges and costs associated with any Moonachie residents attending school in the District of Wood-Ridge during the years of 1995-1996 and 1996-1997, which are the subject matter of *Wood-Ridge Board of Education v. Moonachie Board of Education,* OAL Docket No. EDU-3957-99N, Agency Ref. No. 40-3/99;

2. The WOOD-RIDGE BOARD OF EDUCATION agrees to dismiss with prejudice the Office of Administrative Law matter of *Wood-Ridge Board of Education v. Moonachie Board of Education,* OAL Docket No. EDU-3957-99N, Agency Ref. No. 40-3/99 and any and all claims related thereto against the BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE.

3. The MOONACHIE BOARD OF EDUCATION agrees to dismiss with prejudice any and all counterclaims, counter petitions, or other pleadings filed or otherwise related to the matter of *Wood-Ridge Board of Education v. Moonachie Board of Education,* OAL Docket No. EDU-03957-99N, Agency Ref. No.40-3/99 against the WOOD-RIDGE BOARD OF EDUCATION.

4. The parties hereby release, waive and forever discharge any and all past, present or future claims that they may have against each other which arise from this matter or which are in way related to the calculation of, demand for, and payment of tuition by the MOONACHIE BOARD OF EDUCATION for any students attending school in the WOOD-RIDGE SCHOOL DISTRICT during the 1995-1996 and 1996-1997 school years.

5. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final agreement in any and all issues relating to this matter.

6. This Agreement shall be governed by the laws of the State of New Jersey.

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

8. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

9. The terms and conditions of this Agreement are subject to the ratification and approval by the BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE and the WOOD-RIDGE BOARD OF EDUCATION.

10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

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

12. Both parties acknowledge that their agreement to settle this matter is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approvals are not given, this Agreement and all stipulations, releases and acknowledgments shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement with said litigation being reinstated.

13. It is agreed between the parties that the payment referred to herein shall be made no later than the 30th day following receipt of notification that this Agreement has been approved by the Commissioner of Education.

14. Nothing in this Agreement shall be deemed to constitute a past practice or precedent as to the rights or liabilities of the parties in any future dealings between the parties with regard to the issue of payment of tuition.

15. The parties acknowledge that the execution of this Agreement does not constitute an admission by either party of any: (a) violation of any statute, law or stipulation; (b) breach of contract, actual or implied; or (c) admission of any tort.

WOOD-RIDGE BOARD OF EDUCATION

BY: _____
(Please print name and title below signature)
Robert Talamini, President
Dated: December 15, 1999

MOONACHIE BOARD OF EDUCATION

BY: _____
(Please print name and title below signature)
Antonio Cirillo, President
Dated: December 15, 1999

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OAL DKT. NO. EDU 3957-99
AGENCY DKT. NO. 40-3/99

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY, RESPONDENT.	:	DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 10 2000

Date of Mailing: APR 10 2000

116-00

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE LONGO,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
LONG BRANCH, MONMOUTH COUNTY.	:	DECISION
	:	

April 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4550-99

AGENCY DKT. NO. 115-5/99

IN THE MATTER OF THE TENURE CHRISTINE LONGO, SCHOOL DISTRICT CITY OF LONG BRANCH, MONMOUTH COUNTY,

---

J. Peter Sokol, Esq., for petitioner, School District City of Long Branch (McOmber & McOmber, attorneys)

Kathleen A. Naprstek, Esq., for respondent, Christine Longo (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Record Closed: March 21, 2000 Decided: March 30, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges filed against Christine Longo. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on June 17, 1999, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A telephone prehearing conference took place on September 10, 1999, and the matter was scheduled for a hearing on October 7, 1999. The matter was heard on that day and was

scheduled to continue on December 20, 21, 22, 1999, and January 4, 2000. Prior to the December hearing dates, the parties informed me that the matter was settled. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

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

March 30, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

March 31, 2000
DATE

D. N. Antonantis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

SETTLEMENT AGREEMENT

THIS AGREEMENT is made this 15 day of February, 2000 by and between the Board of Education of the City of Long Branch, County of Monmouth ("Board") and Christine Longo ("Ms. Longo").

RECITALS

A. For a number of years, Ms. Longo has been employed as a secretary in the City of Long Branch school district and, as a result, achieved tenure as a secretary with the Board.

B. For a number of years, Ms. Longo's evaluations reflected satisfactory performance.

C. Since 1990, Ms. Longo's absence pattern has shown an increasing use of sick days and other contractually permitted days of absence including, but not limited to, family illness, death in the family and urgent business.

D. With her reassignment to the position of secretary in the Department of Pupil Personnel Services in July of 1997, her absences increased to the point where her absences exceeded 70 days for what were claimed as personal illness reasons. During that time, Ms. Longo supplied proof of illness through doctors' notes which referenced to Ms. Longo's asserted migraine headaches and other maladies, which notes the Board asserts were not satisfactory. The Statement of Evidence submitted in support of the tenure charges reflects the documented instances of absence during the 1997-98 school year. During the aforementioned time periods, the Board offered Ms. Longo opportunities for leaves of absence.

E. The Board asserts that many of Ms. Longo's absences were not properly noticed to the district, as is required by practice, policy and contract, and that, as a result, Pupil Personnel Services was often shorthanded.

F. The Board also asserts that while at work, Ms. Longo was evaluated as not productive for various reasons, including her lack of familiarity with personal computing and word processing which, in spite of assistance provided and offered by co-employees and the offer of seminars and workshops, her performance did not improve. Ms. Longo disputes the accuracy of those evaluations.

G. Ms. Longo attributed her absences and performance problems to medical conditions such as recurrent migraine headaches, as more specifically set forth in Ms. Longo's answer to the tenure charges.

H. Because of Ms. Longo's alleged lack of performance and alleged repeated failure to adhere to required procedures to report absences and ever increasing absences, the Board certified tenure charges on the basis of neglect, misbehavior, other offense, incapacity and unbecoming conduct and other just cause. Ms. Longo disputes the accuracy of those charges.

I. With Ms. Longo's suspension, which accompanied the certifying of the charges, counsel for Ms. Longo has reported that Ms. Longo's medical treatment was improved her condition to the point where she can return to work and work productively while at work.

J. Because of Ms. Longo's long service to the district, her allegations of a diagnosed medical condition, her present representations that her condition has

improved to the point where she can be present at work and work productively and her assurances through this Settlement Agreement that she shall comply with the Board's requirements for attendance, notification and documentation of illness, Ms. Longo and the Board have negotiated a tentative resolution of the tenure charges which will, in effect, avoid the extensive time-consuming and costly litigation and possible loss of Ms. Longo's income and position.

K. The Board has considered Ms. Longo's offer to settle and reached a consensus to approve the settlement provided the Commissioner of Education ("Commissioner") approves the terms and conditions of the settlement.

THEREFORE, in consideration of the mutual covenants contained herein, the Board and Ms. Longo agree as follows:

1. The Recitals are incorporated herein.

2. Ms. Longo shall tender her irrevocable resignation from employment with the Board effective July 1, 2001, which resignation shall be tendered with a signed copy of this Agreement for the Board's immediate acceptance upon the Commissioner's approval.

3. As a 12-month employee, Ms. Longo is permitted 12 paid sick days per year. In the event she utilizes any of those paid sick days, Ms. Longo shall produce a written doctor's note for each occasion of absence, regardless of length. In the event Ms. Longo exceeds 12 absences within a 12-month period of time for any reason other than a medically documented accident/ injury, catastrophic/serious illness or surgery as further provided in paragraph 4 below, or in the event she fails

to properly notify her designated supervisor of an absence, or in the event she fails to submit the necessary medical documentation of an absence within 48 hours after her return to work from that absence, her resignation shall take effect within five (5) days, provided however that none of the 12 absences activating her resignation shall be for a medically documented accident/ injury, catastrophic/serious illness or surgery. See 3a appended to end of agreement.

4. In the event that Ms. Longo suffers from an accidental injury or catastrophic illness or requires surgery, she will make an application for an unpaid medical leave of absence from employment properly supported by doctors' diagnosis and prognosis, as may be required by the Board, which the Board will not unreasonably deny provided the illness or injury is properly documented. In the event such leave of absence is granted, Ms. Longo will be permitted to purchase pension credit for the period of any such leave of absence immediately upon her return to work.

5. As consideration for the irrevocable resignation as herein defined, the tenure charges presently pending before the Office of Administrative Law and Commissioner of Education, under Agency Reference No. 115-5/99 and EDUTH 04550-99, shall be withdrawn without prejudice by the Board, to which Ms. Longo hereby consents.

6. According to information gathered by Ms. Longo and/or her representatives, Ms. Longo understands that she has accumulated 22 years and 10 months of pension credit in her PERS account #582327 with the New Jersey

Division of Pensions and Benefits as of March 31, 1999. According to Ms. Longo and her representatives, Ms. Longo has been purchasing pension credit for prior service with the Board, which additional time in included in the aforementioned pension time. (Payment for this purchase is deducted directly from her salary and forwarded along with her regular pension contribution payment.) The Board has no information as to Ms. Longo's pension credits, entitlements or standing and disclaims any responsibility for any such information. This Agreement and the resignation reflected therein shall not be subject to any modification by reason of any misunderstanding, mistake, miscalculation or other reasons which may cause a change in Ms. Longo's actual or perceived pension standing.

7. As further consideration for the irrevocable resignation as herein described and defined, the Board agrees to convert Ms. Longo's 4 month (120 day) suspension which began on or about May 6, 1999 to a 4 month unpaid medical leave of absence and agrees to make the appropriate contributions on behalf of both the Board and Ms. Longo to the Division of Pensions such that she shall receive pension credit for those 4 months.

8. As an inducement to the Board to enter into this Agreement, Ms. Longo has supplied the attached recitation of her medical history, diagnosis and prognosis dated November 24, 1999 and has signed the attached Certification representing to the Board that her medical condition has improved to the degree that permits her regular, productive attendance at work.

9. Ms. Longo shall execute and deliver a general release with the only

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exception to the general release being the terms and conditions of the Settlement Agreement.

10. In agreeing to the settlement of this matter on the terms set forth in the Settlement Agreement, Ms. Longo was advised of her rights to a full hearing on the merits of this case. Ms. Longo acknowledges that, in agreeing to settle this matter in the furtherance of the public interest, she is waiving her rights to such hearing.

11. This Settlement Agreement is contingent upon the approval of the Commissioner of Education.

12. This Agreement contains all the terms and conditions of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

McOMBER & McOMBER, P.C.
Attorneys for Petitioner,
Board of Education of the City of Long Branch

By: _____ 3/14/00
J. PETER SOKOL, ESQ. Dated:

Christine Longo 3-10-00
CHRISTINE LONGO Dated:

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Respondent, Christine Longo

By: Kathleen A. Naprstek 3-13-00
KATHLEEN A. NAPRSTEK, ESQ. Dated:

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH,
IN THE COUNTY OF MONMOUTH

By: Rose M. Wilds
President
Date: 3/15/00

By: _____
Secretary
Date: 3/15/00

3a. As a 12-month employee, Ms. Longo is entitled to four (4) weeks of paid vacation each school year (July 1st through June 30th). Upon Ms. Longo's return to work, her vacation time for the 1999-2000 school year (July 1, 1999 through June 30, 2000) shall be appropriately pro-rated.

OAL DKT. NO. EDU 4550-99
AGENCY DKT. NO. 115-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE LONGO,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
LONG BRANCH, MONMOUTH COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 11 2000

Date of Mailing: APR 11 2000

117-00

LETITIA MC DOUGALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08413-99S

AGENCY DKT. NO. 197-7/99

LETITIA McDOUGALL,

Petitioner,

v.

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: February 15, 2000 Decided: February 29, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Letitia McDougall, ("petitioner") with the Commissioner of Education on July 15, 1999, regarding a controversy over a Corrective Action Plan issued to the petitioner by respondent, which plan the petitioner alleges is in violation of the New Jersey school laws. The matter was transmitted to the Office of Administrative Law on October 4, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and General Release of All Claims indicating the terms of settlement.

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

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

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

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

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

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

February 29, 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

March 2, 2000
DATE

D. M. Antenaitis /jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 2000
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

SETTLEMENT AGREEMENT AND GENERAL RELEASE OF ALL CLAIMS

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Settlement Agreement") is made and entered into by and between PRINCETON REGIONAL SCHOOLS (the "BOARD"), with Board Offices at 25 Valley Road, Princeton, New Jersey 08540 and LETITIA MCDOUGALL ("MS. MCDOUGALL"), residing at 273 Hawthorne Avenue, Princeton, New Jersey 08540, with reference to the following facts:

WITNESSETH:

WHEREAS, MS. MCDOUGALL has caused to be filed a petition before the Commissioner of Education entitled Letitia McDougall v. Princeton Regional School District, Mercer County, OAL Docket No. EDUOR 08413-99S, Agency Ref. No.: 197-7/99 (hereinafter referred to as the "Action"), in which she seeks removal of Sections 2 and 5 from the Board's April 16, 1999 Corrective Action Plan; and

WHEREAS, MS. MCDOUGALL and the BOARD now desire to settle fully and finally all differences between them arising from the aforementioned Action.

NOW THEREFORE, in consideration of the recitals above and the mutual promises and obligations herein contained, it is agreed as follows:

1. The BOARD shall remove Sections 2 and 5 from the April 16, 1999 Corrective Action Plan.

2. MS. MCDOUGALL, for and in consideration of the BOARD's withdrawal of Sections 2 and 5 of the Corrective Action Plan and for other good and valuable consideration, hereby releases and forever discharges, and by this instrument does release and forever discharge, the BOARD and each of its respective present and former directors, officers,

employees, trustees, agents, attorneys, insurers, representatives, predecessors, successors and assigns, and each and all of them ("RELEASEES") from any claims to which MS. MCDOUGALL had, now has, or hereafter may have against the BOARD, in any way related to, emanating from or otherwise in respect to this ACTION, and attorneys fees arising therefrom, or allegations that could have been alleged in the Action. In return for the consideration set forth in this Agreement, MS. MCDOUGALL releases the BOARD from any and all claims under all state and federal rules and regulations and contract or tort law which MS. MCDOUGALL may have against the BOARD, whether known or unknown, unforeseen, unanticipated, unsuspected or latent, that she, her heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, claims arising out of this Action, except to the extent that any such claim concerns an allegation that the BOARD has failed to comply with any obligations created by this Settlement Agreement.

3. MS. MCDOUGALL agrees to dismiss with prejudice in its entirety the Action with OAL Docket No. EDUOR 08413-99S, Agency Ref. No.: 197-7/99, relating to the April 16, 1999 Corrective Action Plan, against all defendants named therein. MS. MCDOUGALL understands that she is responsible for her attorneys fees associated with this Action and settlement and expressly waives any right or claim she may have to attorneys fees. MS. MCDOUGALL further understands that the BOARD's withdrawal of Sections 2 and 5 of the Corrective Action Plan pursuant to this Settlement Agreement is expressly conditioned upon the Entry of an Order dismissing the Action with prejudice in its entirety.

4. MS. MCDOUGALL acknowledges that: (a) the consideration provided pursuant to this Settlement Agreement is in lieu of any consideration that she would otherwise be entitled to receive and the receipt of the consideration set forth in this agreement by MS. MCDOUGALL

is full and complete satisfaction of any and all claims MS. MCDOUGALL had, has, or may have against the BOARD arising from this Action; (b) she is hereby advised in writing to consult with an attorney prior to signing this Settlement Agreement; and (c) she has been provided a full and reasonable opportunity to study and consider this Settlement Agreement with legal counsel of her choice before signing it.

5. As a term of this Settlement Agreement, the BOARD will remove from Ms. MCDOUGALL'S personnel file all disciplinary memorandum related to Sections 2 and 5 of the Corrective Action Plan.

6. MS. MCDOUGALL understands that neither this Settlement Agreement nor the aforesaid promises are to be construed as an admission on the part of any of the BOARD of any wrongdoing or liability, nor to be admissible as evidence in any proceeding other than for enforcement of the provisions of this Settlement Agreement. The BOARD does not admit, and specifically denies, any liability, wrongdoing or violation of any law, statute, regulation, agreement or policy. The BOARD is entering into this Agreement solely for the purpose of (a) amicably resolving any and all matters in controversy, disputes, causes of action, claims, contentions and differences of any kind whatsoever between MS. MCDOUGALL and the BOARD and (b) avoiding the attorneys' fees and other expenses that will result from litigation.

7. MS. MCDOUGALL understands that this Settlement Agreement represents the entire agreement and understanding between the parties and supersedes any prior agreement, understanding or negotiations respecting such subject. No change to or modification of this Settlement Agreement shall be valid or binding unless it is in writing and signed by MS. MCDOUGALL and a duly authorized officer of the BOARD.

8. This Settlement Agreement shall be governed and construed under the laws of the State of New Jersey.

9. No waiver of any breach of any term or provision of this Settlement Agreement shall be construed to be, nor shall be, a waiver of any other breach of this Settlement Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

10. This Settlement Agreement shall inure to the benefit of and be binding upon the heirs, representatives, successors and assignees of each of the parties to it. Each of the RELEASEES who is not a signatory to this Settlement Agreement is hereby agreed to be a third party beneficiary of this Settlement Agreement and shall be entitled to all rights, benefits and protections of this Settlement Agreement and shall further be entitled to enforce this Settlement Agreement and each of its terms.

IN WITNESS WHEREOF, this Settlement Agreement is executed by the parties hereto as of the date indicated by the signature.

Dated: 12/18/99, 1999

Letitia McDougall
LETITIA MCDOUGALL

Dated 1/7/2000, ~~1999~~

FOR PRINCETON REGIONAL SCHOOLS

OAL DKT. NO. EDU 8413-99
AGENCY DKT. NO. 197-7/99

LETITIA MC DOUGALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 11 2000

Date of Mailing: APR 11 2000

119-00R

IN THE MATTER OF THE TENURE	:	
HEARING OF DANITA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ELIZABETH, UNION COUNTY.	:	
	:	

April 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12084-99
AGENCY DKT. NO. 168-6/99
(On Remand – EDU 7378-99)

SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY,

v.

DANITA WILSON,

Respondent.

Mary E. Hennessy, Esq., for petitioner
(Murray, Murray & Corrigan, attorneys)

Brian Kronick, Esq., for respondent
(Oxfeld Cohen, L.L.C., attorneys)

Record Closed: February 8, 2000 Decided: February 23, 2000

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

On or about June 24, 1999, the School District of the City of Elizabeth certified charges of incapacity, incompetency, excessive absenteeism and unbecoming conduct due to unauthorized absence and abandonment of position against respondent, Danita Wilson, a tenured instructional enhancement teacher. On July 1, 1999, respondent filed an answer denying the charges.

On July 9, 1999, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a

contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on July 14, 1999, and a telephone prehearing conference scheduled for July 20, 1999. During the prehearing conference held on that date, the issues were isolated, and a hearing scheduled for September 9 and 10, 1999 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. As a result of settlement conferences held between the parties, a settlement was reached and the hearing was adjourned.

The undersigned filed an Initial Decision on September 1, 1999 with the Commissioner of Education, recommending approval of the filed settlement agreement. On October 18, 1999, the Commissioner of Education issued his decision in this matter. The Commissioner rejected the agreement since he could not be satisfied that the proposed settlement met the standards for settlement of tenure matters as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Bd. of Educ. (April 6, 1983), 1990 *S.L.D.* 842, 846. Specifically, the Commissioner determined that there was no indication in the settlement agreement that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate. The Commissioner remanded the matter to the Office of Administrative Law for revision of the documents, consistent with the concerns set forth above. He noted that if the parties were unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter should proceed to a hearing on the merits.

On December 29, 1999, this case was remanded to the undersigned judge in accordance with the Commissioner's decision. Thereafter, the parties signed and filed a revised settlement agreement. Of import, the amended agreement indicates that the signatories acknowledge that respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of respondent's teaching certificate. In light of the amended settlement agreement, I **FIND**:

1. The settlement agreement complies with the requirements of *In re Cardonick, supra*.

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

3. The settlement agreement is in the public interest.

4. The settlement agreement is in conformity with the Commissioner's decision of October 18, 1999.

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

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

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

[1] It is noted that although the signatories acknowledged that the Commissioner of Education may still make a determination on the charges that were filed against respondent, this determination would only be made if the matter was heard by the undersigned judge and an Initial Decision filed with the Commissioner of the Department of Education for consideration. In light of the settlement agreement, this matter has not been heard by the undersigned judge.

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

February 23, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

3/1/00
DATE

Debbie Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 2 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(732) 747-2300
Attorneys for Petitioner, Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF DANITA WILSON, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.	**OFFICE OF ADMINISTRATIVE LAW** **AGENCY REF NO. 168-6/99** **OAL DOCKET NO. 7378-99** **SETTLEMENT AGREEMENT**

INTRODUCTION

Counsel for the Elizabeth Board of Education (hereinafter "Board") and counsel for its tenured employee Danita Wilson join in moving for an order finding that the following Settlement Agreement between the parties meets the requirement of N.J.A.C. 1:1-19.1, recommending that the attached Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board, be withdrawn and this matter be dismissed.

SETTLEMENT AGREEMENT IN THE ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board and Ms. Wilson.

I. STATEMENT OF INTENT

On June 23, 1999, the Board filed tenure charges against Ms. Wilson with the Commissioner of Education captioned In the Matter of the Tenure Hearing of Danita Wilson, Board of Education of the City of Elizabeth, Union County, OAL Docket No. EDUTH 7378-99, Agency Ref. No. 168-6/99; and

WHEREAS this Agreement is the end product of settlement negotiations conducted by the parties and is intended to fully and finally depose of the issues in controversy as based upon the mutual understanding set forth below;

II. DISMISSAL OF TENURE CHARGES

The Board shall withdraw the pending tenure case against Ms. Wilson. The Board shall take all necessary actions to notify the Clerk of the Office of the Administrative Law and the Administrative Law Judge Elinor R. Reiner that it is withdrawing the tenure charges.

III. RESIGNATION OF EMPLOYMENT

It is agreed that Ms. Wilson shall submit a letter of resignation to the Elizabeth Board of Education's counsel upon full execution of this Settlement Agreement. The letter will be held and not released to the Board until this agreement is approved by the Commissioner of Education. Such resignation shall be effective June 30, 1999. It is further agreed that Ms. Wilson will not apply for any position of employment with the Elizabeth Board of Education in the future.

IV. SETTLEMENT

The parties have agreed to settle this case to save the time and expense of an expedited hearing. The Board also has agreed to settle this matter to ensure its ability to utilize Board employees and central staff during the opening of the 1999-2000 school year.

V. AGREEMENT MAY NOT BE USED AS EVIDENCE IN ANY SUBSEQUENT PROCEEDING

The Board and Ms. Wilson agree that this Agreement shall not be used as evidence in any subsequent proceeding should the Commissioner not approve the terms and conditions agreed hereto by the parties.

VI. VOLUNTARINESS OF AGREEMENT

The signatories to this Agreement certify that they have read the terms of this Agreement, that they have had the opportunity to discuss the terms with their respective attorneys, are satisfied with the services of their respective attorneys in connection therewith, and that they understand the terms of this Agreement and its effects. The signatories to this Agreement acknowledge further that they are executing it of their own volition, with full understanding of its terms and effects, and with the intention of releasing all claims herein for consideration which they acknowledge is adequate and satisfactory to them. The signatories to this Agreement further acknowledge that they have not received any representations concerning its terms and effects other than those contained herein. T signatories to this Agreement acknowledge that they enter into it with a full understanding of their rights. The signatories acknowledge that the Commissioner of Education may still make a determination on the charges that were filed against Ms. Wilson. The signatories further acknowledge that Ms. Wilson was advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6, to refer tenure determinations for possible revocation of Ms. Wilson's teaching certificate.

VII. ENTIRE AGREEMENT

This Agreement represents the full and entire agreement between the Board and Ms. Wilson. It can only be modified by a written agreement between the parties. It is binding upon the Board and its officers, agents, servants and employees as well as their successors and assigns. It is binding upon Ms. Wilson as well as her heirs, executors and administrators.

VIII. BINDING AGREEMENT

Intending to be legally bound hereby, the Board and Ms. Wilson execute the foregoing Agreement.

FOR THE ELIZABETH BOARD OF EDUCATION

By: Mary E Hennessy
Mary E. Hennessy, Esq.
Attorney for the Petitioner

Date: 12/2/99

FOR DANITA WILSON:

By: B K E
Brian Kronick, Esq.
Attorney for Respondent

Date:

Danita L Wilson
Danita Wilson

Date: 11/22/99

OAL DKT. NOS. EDU 12084-99 AND EDU 7378-99 (ON REMAND)
AGENCY DKT. NO. 168-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANITA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ELIZABETH, UNION COUNTY.	:	
	:	

The record and Initial Decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner approves the settlement terms as they comport with the appropriate standards for setting aside tenure matters as expressed in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). He, therefore, adopts the settlement as the final decision in this matter, which is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 12 2000

Date of Mailing: APR 12 2000

M.S., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

April 14, 2000

OAL DKT. NO. EDU 677-97
AGENCY DKT. NO. 580-12/96

M.S., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date ofDecision: APR 14 2000

Date Mailed APR 14 2000

121-00

SERGE BRAIDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 14, 2000

OAL DKT. NO. EDU 5131-97
AGENCY DKT. NO. 414-9/96

SERGE BRAIDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: APR 14 2000

Date of Mailing: APR 14 2000

122-00 E

J.M., on behalf of minor child, D.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

April 14, 2000

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON STREET
NEWARK, NEW JERSEY 07102
Telephone 973-648-6069
Fax 977-648-6124

Michael L. Ravin
Administrative Law Judge

April 7, 2000

Honorable David C. Hespe
Commissioner
Department of Education
P.O. Box 500
Trenton, New Jersey 08625-0500

Re: Consent Order for Interlocutory Emergency Relief
J. M. o/b/o Minor Child D.D. v. BOE, City of Orange
OAL Dkt. No. EDU 3327-00
Agency Dkt. NO. 102-3/00

Dear Commissioner Hespe:

Enclosed please find a copy of a Consent Order entered regarding an application for emergency relief in the above-captioned matter. This order does not resolve all of the issues in dispute and the OAL will schedule a plenary hearing. Pursuant to *N.J.A.C.* 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown under *N.J.A.C.* 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Michael L. Ravin
Administrative Law Judge

MLR:jrp
encl. 1
cc: Ellen M. Boylan, Esq.
David V. Conte, Esq.
Thomas F. Lowe, Clerk

D.D., by his guardian, J.M., and
J.M.,

Petitioners,

v.

Elizabeth Board of Education,
Respondent.

OALDKT. No
EDU 3327-00

CONSENT ORDER
RESOLVING
EMERGENT RELIEF

This matter having been brought before the Commissioner of Education upon the motion of petitioners for the entry of emergent relief, Ellen Boylan, Education Law Center, for petitioners, David V. Conte, Jr, Conte & Malloggi, for respondent, and the parties having agreed to the entry of this Consent Order

It is on the 31st day of March, 2000

Ordered that by no later than April 7, 2000, the Board shall assess the instruction and academic curriculum D.D. has missed since February 14, 2000, and it shall develop and implement a plan, with input from J.M., for the immediate delivery of the missed instruction and

through supplemental tutoring, curriculum, so that D.D. has the opportunity to receive credit for eleventh grade during the 1999-2000 school year;

Ordered that by no later than April 14, 2000, D.D. shall be assessed by a professional with expertise and knowledge in the area of alternative education, who is mutually agreed upon by the parties, for the purpose of identifying D.D.'s individual educational needs and identifying an appropriate alternative education program which meets those needs;

Ordered that upon completion of the assessment discussed in the above paragraph, the Board shall immediately take all steps necessary to place D.D. in an appropriate alternative education program that meets his individual needs, including entering into a contract with the alternative school for the payment of services and arranging transportation, if necessary; and it is finally

Ordered that pending the

assessments discussed above, the Board shall immediately provide home instruction starting April 3, 2000 P.O.

Muriel C. Ravin
Judge Ravin ALJ

The undersigned attorneys for the parties do hereby consent to the form and entry of the within Consent Order.

Ellen Boylan
Ellen Boylan
attorney for Petitioners

Dated: 3/31/00

David V. Corriveau
DAVID V. CORRIVEAU
Attorney for the Eggleston Board of Education

OAL DKT. NO. EDU 3327-00
AGENCY DKT. NO. 102-3/00

J.M., on behalf of minor child, D.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The Consent Order, executed by the parties and approved by the Administrative Law Judge (ALJ), resolving the emergent aspect of the within matter has been received from the Office of Administrative Law. Upon his review, the Commissioner approves the Consent Order terms and adopts such order as the final decision in this emergent matter.

Accordingly, this case shall move forward, consistent with the recommendation of the ALJ, to a plenary hearing on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: APR 14 2000

Date of Mailing: APR 14 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

M.S., on behalf of minor sons, D.R.S. AND D.R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 14, 2000

OAL DKT. NO. EDU 8894-96
AGENCY DKT. NO. 401-9/96

M.S., on behalf of minor sons, D.R.S. AND D.R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date Of Decision: April 14, 2000
Date of Mailing: April 14, 2000

TRENTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4645-98
AGENCY DKT. NO. 89-4/98

TRENTON EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attoneys)

Thomas W. Sumners, Jr., Esq., for respondent, (Sumners, George & Dortch, attorneys)

Record Closed: February 29, 2000 Decided: March 1, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 8, 1998 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

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

MAR 0 1 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

March 3, 2000
DATE

D. N. Antenucci/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 6 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

Settlement Agreement

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

TRENTON EDUCATION ASSOCIATION ON BEHALF OF ITSELF AND ALL AFFECTED BARGAINING UNIT MEMBERS, Petitioners, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDUOR 04645-98S **STIPULATION OF SETTLEMENT/ SETTLEMENT AGREEMENT**

The parties, having reached a voluntary and amicable resolution of this matter, hereby agree that this matter shall be deemed settled and resolved based upon the following terms:

1. Within 45 days of approval of this agreement by the Commissioner of Education, respondent shall provide petitioner with a preferred eligibility list for all teaching staff members who are assigned to or were assigned to teaching staff positions, except those teaching staff members who have formally resigned or who are receiving State pension allowances.

2. The seniority list shall provide the following information in a reasonably clear, specific and defined form.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK A PROFESSIONAL CORPORATION ATTORNEYS AT LAW

A. All seniority categories as set forth in the New Jersey Administrative Code at N.J.A.C. 6:3-5.1 et seq.

B. All prior categories which each teaching staff member on the list was assigned to, and each teaching staff member's seniority in his/her present categories of assignment, and in all of his/her prior seniority categories.

3. Said categories shall include, but not be limited to the following:

A. All teaching staff members serving in the secondary category under instructional certificates or endorsements, and the specific seniority that each such teaching staff member has under each endorsement in that and in all other categories.

B. All teaching staff members serving in the District-wide category under instructional certificates or endorsements, and the specific seniority acquired under all endorsements that each such teaching staff member has served under in that category and in all other categories.

C. All teaching staff members serving in the elementary category, their seniority under specific endorsements if applicable, and under their elementary endorsements if applicable, and in all other categories.

D. The list shall include all positions which require an instructional certificate but no specific endorsement, in which the parties agree that all teaching staff members with tenure under instructional endorsements can assert seniority rights to.

4. The list shall include the same information, i.e., that

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

delineated in all of the above paragraphs for all teaching staff members who have served or are serving under Educational Services certificates and under Administrative certificates.

5. The list shall include all teaching staff members who have been riffed, but who are neither retired nor formally resigned from employment with respondent.

6. There shall be a separate list including all bargaining unit members covered by paragraphs 1 through 5 above, which shall include their tenure bumping and recall rights as such rights have been defined under N.J.S.A. 18A:28-12 and under the relevant case law.

7. The provision of the lists set herein above shall not be construed to waive or limit any tenure or seniority right that any teaching staff member employed by respondent may have.

8. This agreement shall not constitute an admission by either party.

Kevin O'Brien, President — Dated: 2-22-00

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____ Dated: 2/28/00
Richard A. Friedman, Esq.

Board of Education of the
City of Trenton

By: _____ Dated: 2/3/00
Superintendent

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

SUMNERS, GEORGE & DORTCH
Attorneys for Respondent

By: Thomas W. Sumners
Thomas W. Sumners, Esq.

Dated: 2/4/00

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 4645-98
AGENCY DKT. NO. 89-4/98

TRENTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 17 2000

Date of Mailing: APR 17 2000

IN THE MATTER OF THE TENURE :

HEARING OF RANDALL DUNHAM, :

SCHOOL DISTRICT OF POINT : COMMISSIONER OF EDUCATION

PLEASANT BOROUGH, OCEAN : DECISION

COUNTY. :

_____:

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent middle school teacher for allegedly leaving vulgar and obscene messages on an answering machine for two pupils in the school system, M.L. and D.L.

In light of the record and the testimony of witnesses, the ALJ found and concluded that the Board had proven the charge of unbecoming conduct. Respondent admitted making the telephone calls and admitted the content of each call, blaming his behavior on a drug interaction with a small amount of alcohol. The ALJ questioned respondent's veracity as to the quantity of alcohol he consumed on the date of the incident and found that his defenses lacked substance. Citing *In re Sammons* and *Redcay*, the ALJ noted that respondent engaged in inexcusable behavior for a teacher and the incident was sufficiently flagrant to warrant his dismissal from his teaching position. The ALJ ordered his removal from his position as of the date of the final decision in this matter.

The Commissioner concurred with the ALJ that respondent's behavior was sufficiently flagrant to warrant dismissal from his teaching position. Even after considering respondent's lengthy, apparently unblemished record with the Board, along with his proffered defenses, the Commissioner found these factors were greatly outweighed by the seriousness of respondent's admitted conduct. The Commissioner ordered respondent dismissed from his teaching position and transmitted the matter to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4937-99
AGENCY DKT. NO. 173-6/99

IN THE MATTER OF THE TENURE HEARING OF RANDALL DUNHAM, SCHOOL DISTRICT OF POINT PLEASANT BOROUGH,

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Daniel S. Popovitch, Esq., for petitioner (Popovitch & Popovitch, attorneys)

Stephen B. Hunter, Esq., for respondent (Klausner, Hunter & Rosenberg, attorneys)

Record Closed: January 26, 2000 Decided: February 28, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Point Pleasant Borough Board of Education certified charges of unbecoming conduct against Randall Dunham, a tenured teaching staff member.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held on August 3, 1999. Among other things, it was settled that hearing would commence at 9 a.m. on October 25, 26, 28 and November 3, 1999. Hearing began on October 26, and was continued to and completed on October 28, 1999. Counsel gave notice to the judge that they were to order transcripts. *N.J.S.A.*

52:14B-10.1(d). The reporting company did not provide transcripts within fifteen days as provided in the statutory provision just cited. This disrupted the history of strict adherence to the statutes that had occurred to that point. Although the delay was not occasioned by either party, I requested that they accelerate their submissions and cut two weeks from the time allotted for the judge's preparation of an initial decision.

The respondent does not challenge any procedural aspect of this case. The matter rests on substantive facts and the law.

THE CHARGES

Randall Dunham is charged with conduct unbecoming a teaching staff member. The charge is based on information and belief presented to the Board of Education by its superintendent of schools. In statements sworn and subscribed on May 7, 1999, the superintendent states that he was contacted by a Mr. M.L. [1] on Monday, April 12, 1999. M.L. told the superintendent that he had been the subject of messages left at his home on the previous day, Sunday, April 11, 1999. M.L. stated that the respondent left the messages on M.L.'s home answering machine. As a result of investigation by the Point Pleasant Police Department, the tape recording of these messages was turned over to the superintendent together with a transcript of their contents. Upon review, the superintendent believed that the messages were directed at two pupils in the school system, M.L. and D.L.

On April 16, 1999, the respondent and a union representative appeared before the superintendent. The respondent admitted making telephone calls to the L. residence, but stated he did not remember what he had said. The respondent denied he had been drinking. He claimed the telephone call was the result of a reaction to medication. He also stated he had been attending anger management counseling.

[1] Because of the involvement of minor children whose identification is neither necessary nor desirable, most names of persons in this initial decision will be represented by initials.

School records reflect that in 1997, the respondent was on leave from March 18 through the end of the school year because of psychiatric treatment related to emotional problems. He was authorized to return to school by a psychiatrist as of August 13.

The respondent was assigned to a middle school attended by D.L., one of the pupils to whom the messages were directed. The girl's father has stated that his daughter is now fearful of attending school and particularly fearful of the possibility of contact with the respondent.

M.L. also stated that his daughter believes the respondent has gone out of his way to put himself in a position where he can have eye contact with her and that she believes the respondent has stared at her. M.L. also claims that the respondent has been observed outside the L. home which has served to heighten D.L.'s fears.

The fact of the telephone messages is conceded by the respondent, although he claims to have no knowledge of the content. The messages were directed toward the two pupils. There were four messages over a four-hour period which would appear to indicate an extended angry outburst. The respondent has conceded he has problems with anger management and has sought counseling for the problem. The superintendent concluded that the conduct is clearly unbecoming and, if true in fact, that it warrants dismissal from position. The Board of Education agreed and certified the charges to the Commissioner of Education on June 24, 1999.

PAROL AND DOCUMENTARY EVIDENCE

M.L. appeared at hearing and testified, under subpoena. He has two daughters, N.L. and D.L. D.L. is a pupil in the middle school in which the respondent taught. In the 1997-98 school year, D.L. had the respondent as a teacher in a six-week course.

Before April 11, 1999, the respondent tried to contact M.L.'s house. The witness twice saw on his caller identification device the name Clinton Dunham with a telephone number. Clinton Dunham is the respondent's father.

Before April 11, D.L. told her father that the respondent peered into her room at school about ten days before the incidents that underlie the charges here. D.L. stated she had not seen the respondent there before and D.L. stated the respondent stared at her.

On Sunday, April 11, the witness returned to his home with his daughters. The girls almost immediately checked the telephone answering machine. The first three messages were on the machine. The witness immediately called police who came and recorded the messages. The witness then took his children to dinner and, upon returning home, discovered one further message.

The parties stipulated the contents of the messages. The witness stated that the effect on his daughters was devastating. D.L. was physically sick and afraid to go to school. The witness took his daughter to a physician and a psychiatrist. His daughter continued to wake at night.

The effect was not as severe on N.L. M.L. stated that the respondent was observed outside their house. N.L. was afraid to go home for lunch. The witness went to see the middle school principal. He called police and he testified he saw the respondent twice more, which he reported to a neighbor who is a policeman.

On April 12, 13 and 14, D.L. attended school. On April 14, the Wednesday, D.L. went to the principal's office at approximately 1 p.m. in tears. She stated the respondent was looking into her classroom at her. D.L. then missed one week of school.

The witness stated his home is two-three blocks from the middle school. He did not observe the respondent in the area before the April 11 telephone calls.

M.L. also testified he has been divorced for approximately ten years and the girls live with him. Originally, he and his former wife had joint custody.

On April 11, 1999, the witness had known Karen Dunham, the respondent's wife, for five or six weeks. They met at a gymnasium. The witness's daughters had had Karen Dunham as a teacher in a gifted and talented program some years before. When the couple first met at the

gymnasium, each did not know the marital status of the other. Karen Dunham told M.L. of her status, that a divorce was in process and that the respondent was under legal restraint.

M.L. also testified that Karen Dunham lives in another municipality. He does not know what part, if any, of her living expenses the respondent paid. The witness stated he did not sleep at Karen Dunham's home in March or April of 1999 and stated he never invited one of Dunham's children into bed with Karen Dunham and him.

On or about April 16, M.L. called a reporter and discussed the case with him. He played the telephone recording tapes for the reporter. An article appeared in a local newspaper which his children read. He discussed the article with his children. The reporter called to follow up on the story.

M.L. stated he did not know if a Point Pleasant Borough patrolman is also a board of education member. The witness gave his information to the patrolman because he stated he was "getting nowhere" with local police concerning complaints about telephone calls and the respondent's appearances outside his home. M.L. knew that the patrolman was involved in town affairs and he invoked the patrolman's good offices. He contacted the reporter at about the same time. The parties stipulated that Larry Williams was a member of the local board of education in 1998-99 and will continue to serve in the 1999-2000 school year. The witness denied speaking to any other board members.

Exhibits J-1, J-2 and J-3 were admitted in evidence. The first is the statement of evidence and charges by the superintendent of schools dated May 7, 1999. The second is the affidavit of Randall Dunham in opposition which is dated May 20, 1999. J-3 is the certification of determination of the board of education with an accompanying resolution dated June 24, 1999. M.L. testified he believes the statement of evidence and charges is inaccurate because he made clear to the middle school principal that the messages were directed to his daughters, not to him. See paragraph 2, exhibit J-1.

M.L. also challenges the accuracy of paragraph 5 in exhibit J-1. One sentence of the paragraph reads, "Although Mr. Dunham has not had this student in any of his classes, and Mr.

Dunham has denied specifically knowing the child, it is obvious that the student has to be in the same building with Mr. Dunham." M.L. insists that the respondent did have his children as pupils.

On Monday morning, April 12, M.L. met with the principal. He did not tell Principal Feldman that D.L. had been taught by Dunham. The witness states he believed he talked to Superintendent Ciliento on Wednesday, April 14, and gave him the same information. He asked to meet with Mr. Dunham to discuss the matter. School authorities did not arrange a meeting. M.L. had no contact with school persons between his meeting with Ciliento on April 14 and the Thursday before this hearing began (October 21, 1999) when he was contacted by the Board's attorney. The attorney did not go over particular questions that might arise in hearing. The witness stated his only concern was for his children.

M.L. also stated that two calls from R.D. were recorded on his business caller identification machine. No messages were left. In response to a question about when Karen Dunham told M.L. that she had informed Randall Dunham about their relationship, M.L. stated that, to his knowledge, Karen Dunham had never said anything to Randall Dunham because of Dunham's record of anger. The witness testified further about reports from his daughter that Dunham appeared in or looked into her music class at least three times in the period March 10-April 16, 1999. She reported nothing to her school principal, but told her father.

Before April 11, M.L. instructed D.L. to stay out of Dunham's way. After April 11, on April 14, D.L. reported that the respondent had peered into her classroom at her. On April 12, Principal Feldman had said that if D.L. perceived any problem with the respondent, she was to go directly to his office. In the week beginning Monday, April 12, D.L. was out of school part of Monday and all of Wednesday, Thursday and Friday. She missed at least Monday through Thursday, April 19-22.

M.L. determined just before hearing that D.L. was Dunham's pupil in the sixth grade (1997-98 school year). When the principal and superintendent asked D.L. if she had been in Dunham's class in the 1998-99 school year, she honestly answered no.

D.L. testified. She is a thirteen-year-old pupil in the eighth grade at Memorial Middle School. She knew the respondent was a teacher in the school. She was his pupil in a six-week exploratory course while in sixth grade. The course met twice per week for forty-five minutes each period. D.L. did not have Dunham as a teacher again.

The witness often saw Dunham in and near the school. In spring 1999, most of her classes were in the seventh grade wing. Her social studies class was located between the sixth and seventh grade wings. Dunham entered that classroom after the telephone messages had been received and he peered into several other rooms where D.L. was in attendance. D.L. told her father and her father advised her that Dunham was a teacher and might have a need to be there. In effect, he advised D.L. not to make a mountain of a molehill. D.L. maintained that being stared at made her uncomfortable.

D.L. heard the telephone messages left by Dunham. After a Sunday soccer game, she, her father and sister returned home. The girls went to the answering machine immediately. They heard the messages Dunham left. The witness was in the room ahead of her father. Her sister was not then in the room. The messages contained vulgar language and scared D.L.

D.L. went to school late on Monday, April 12. She did not want to attend at all. She knew that Dunham could come into her class at any time because he was a teacher.

D.L. met with her father and the school principal. The principal told her nothing would happen, advised her not to worry and gave her permission to come directly to his office if she perceived a problem. On Wednesday, April 14, Dunham peered at the witness in her music class. She did nothing about it at that time. Between two other classes, Dunham stared at her again and she went directly to Principal Feldman's office. It was approximately 1:25 p.m.

The principal told D.L. not to worry and assured her that she was safe in the office. The principal also stated that Dunham had not had a drink in a month. The witness asked for her father to be called. Her father could not be reached, but her grandparents were contacted. Her grandmother came to take her home. In the meantime, her father arrived and she and he went to the principal's office. A policeman appeared. The witness stated Dunham had frightened her.

On Thursday and Friday, she attended most of the school day. She missed all of the following week, however, suffering from stomach pains and frequent vomiting. She stated she did not want to go to school and she was still afraid of seeing Dunham or having any problems with him.

D.L. did not know of newspaper coverage until friends informed her on the following Monday when she returned to school. She then read the article. The article did not bother her as much as the telephone calls. The witness actually felt a bit more comfortable knowing that people in town knew the situation and would be looking out for her.

The witness was clear that Dunham had stared into her classroom and, she believes, at her, both before and after the April 11 telephone calls.

N.L. testified. She stated that when she returned to the family home after working in a local restaurant on Sunday, April 11, 1999, D.L. told her that Dunham had left messages. N.L. listened to the messages with her father's consent. N.L. had not had Dunham as a teacher, but knew who the respondent was. N.L. also knew that her father had been dating Karen Dunham for approximately one month. She knew Mrs. Dunham through school. She had had Mrs. Dunham as an enrichment teacher and, in 1998-99, as guidance counselor.

The messages made her extremely nervous and unsure of what would happen or could happen. N.L. did not see the respondent after the messages were received. She occasionally went home for lunch after the messages were received, but did not want to be at home alone.

N.L. is presently a tenth grade pupil at Point Pleasant Borough High School.

Superintendent of Schools Robert Ciliento testified. This matter came to his attention on April 12, 1999 when a man appeared at his offices and asked to speak with the superintendent. The man was M.L. He was visibly upset. The two men discussed the safety of his child in the middle school, that M.L. was seeing Mrs. Dunham and that the respondent taught in the middle school. The superintendent also became aware of the messages left on an answering machine by

the respondent. He did not at that time listen to the messages. He referred the matter to the middle school principal. On Thursday, April 15, a police officer-board member came in and showed a transcript of the messages to the superintendent. The superintendent believed the messages were aimed at the girls. The police officer and board member told the superintendent that he should see the transcript. The superintendent read the material and immediately called Principal Feldman. He instructed Feldman to instruct Dunham to report to the superintendent's office with his union representative at the opening of business the next day.

The superintendent met with Dunham, two representatives and his assistant superintendent. He told Dunham how disappointed he was in Dunham's behavior. He mentioned vile and vulgar actions. He stated that this matter should have been kept between adults.

The witness stated he asked the respondent if the respondent had been drinking at the time of the calls. Dunham denied this but said he was suffering a reaction to medication at about the same time. Dunham remembered making the telephone calls but said he could not remember the contents. The superintendent informed the respondent to leave school immediately and that he was suspended. None of the respondent's representatives asked to see the transcript. The respondent denied knowing who D.L. and N.L. were. A week before hearing, board counsel advised the respondent that he had had D.L. for a six-week exploratory course.

The superintendent stated he was repulsed by the thought that the girls had been exposed to such language. He had his secretary type the messages (J-1, Ex. A). The message designated three on the machine, but the second received from Dunham, begins, "Hi, [N.], [D.]." Near the end of the message, Dunham states, "I teach in Point Pleasant too. . . ."

Since the incident, the superintendent has become aware of the newspaper coverage and he disagrees with M.L. about going public with the matter. However, the superintendent also stated he received no pressure from M.L. and did not see M.L. again until the first day of hearing. The superintendent was also angered at an assertion in the article that nothing was being done. In order to protect Dunham, the witness said nothing to the media. It seemed to him that the children were being ignored by all sides.

Concerning allegations that Dunham had been seen outside the L. home and had peered at D.L. in school, the superintendent advised M.L. to contact the police if Dunham appeared outside his home and to contact Principal Feldman about any incident arising in school. When the superintendent learned the message contents, he believed his first duty was to protect D.L.

At the conclusion of the April 12 meeting, when M.L. left, the superintendent called Principal Feldman and warned against any involvement in the marital problem. He also told the principal to be available to D.L. On or about Wednesday of that week, the principal called M.L. and asked him to come to school. M.L. called the police and went to the school.

The superintendent reviewed the respondent's personnel file after meeting with the respondent. He became aware of prior problems. Dunham's leave had occurred before the witness came to the district. The superintendent refused a meeting between M.L. and Dunham, believing the matter to be a domestic problem. After reviewing the transcript of the telephone messages, he changed his mind. It appeared that Dunham had behaved in an unacceptable manner and it was now a tenure matter. However, the superintendent still believed there was nothing to be gained by a meeting between M.L. and the respondent.

The superintendent did not remember knowing of a possible tort claim action against the Board prior to May 7, 1999. While speaking with the respondent, he did not ask if Dunham had gone by the L. home. Nor did he recall Dunham saying that Dunham power walked in that area. The superintendent did not require Dunham to take a physical or psychiatric examination pursuant to *N.J.S.A.* 18A:16-2, because it was after the fact. His actions warranted tenure charges. The superintendent also stated he did not know about anger management counseling until Dunham told him that Dunham was attending sessions.

On the respondent's case, Robert C. Bransfield, M.D., testified. He has from time-to-time served the Point Pleasant Board by doing psychiatric evaluations for its child study team. Dr. Bransfield knows Dunham as a patient. He saw him first in March 1997. At that time, Dunham complained of stress. Dr. Bransfield has seen the respondent approximately twelve times. In March 1997, his diagnosis of the respondent was adjustment disorder with mixed

emotions. This appeared to be triggered by separation from his wife and children. The doctor suggested that Dunham take a leave from duties through May and June 1997.

Dr. Bransfield cleared Dunham to resume work in September 1997. His matrimonial situation seemed to have improved and his ability to deal with the everyday things in life also seemed to improve.

During the 1997-98 school year, the witness saw Dunham twice. After June 1998, he continued to treat Dunham. From the end of June 1998 through April 10, 1999, the doctor saw Dunham in person on August 17 and spoke to him by telephone sometime in February. Dunham appeared to be having some problems and the witness adjusted Dunham's medications. He believed the respondent was stabilized as of February 19, 1999.

The witness has read the tenure charges and the respondent's answer and evidence. He saw the respondent on April 15, 1999 and concluded that Dunham was reactive and was attending Alcoholics Anonymous. He continued the respondent's medications and encouraged Dunham to return on April 27. On April 27, Dunham described what had happened on April 11. He told the doctor that he was working on a boat, drank one-half can of beer, his wife brought his children to his house, his wife accused him of being drunk and left with the children. Thereafter, a neighbor telephoned and told Dunham that someone was staying at his wife's house.

The physician discussed medications with Dunham. He also discussed the telephone calls Dunham had made. Dunham stated that the beer he ingested on April 11 was the first alcohol he had consumed since the prior December. According to the witness, the respondent exhibited more systems, more stress, did drink and did show uncharacteristic anger.

At a session on May 13, 1999, Dunham spoke about his job, stated that his wife's boyfriend had gone to the Board and that tenure charges had been filed against him. Dunham said his wife had told him she was sleeping with someone else. He found this upsetting, but it also helped him to "separate." Dunham also stated he believed one or both of his sons had climbed into bed with his wife and M.L.

Dr. Bransfield identified a letter he sent to Dunham's counsel under date of June 7, 1999 (R-58). The doctor's opinion is that Dunham was under several stresses on April 11. The doctor states that Dunham reported his three and one-half-year-old twin children had mentioned climbing into bed with mommy and M.L.. After hearing this, Dunham was away until April 10. Upon his return, he reported being told by his wife that she had a right to have a relationship and that she had known her current boyfriend for six years. The next day, a neighbor told Dunham that M.L.'s car was in his wife's driveway overnight while the two small children were in the house. Shortly thereafter, Dunham's wife walked into his current residence, screamed at him and then left the premises. At that time, the respondent had been on different prescribed medications and stated he had had one beer. He called and left the messages as described.

There may have been an unknown and possibly contributory drug-alcohol interaction. The respondent was taking blood pressure, antidepressant and antibiotic medications at the time. His physician had previously advised against any alcoholic consumption. The antibiotic had been prescribed for sinusitis. Some persons react to this medication and it is possible that Dunham did. It is possible that during the course of a bacterial infection, dead bacteria release an endotoxin which, in turn, affects the patient's neurology.

Dr. Bransfield believes the respondent's prognosis is good. A divorce does not last forever. Dunham seems to be accepting the fact that his marriage is over. This removes the "reactive" stressors to some extent. The patient also exhibits heightened awareness of his alcohol problem and the need to continue with AA and abstinence. The physician believes that Dunham is genuinely remorseful.

Dr. Bransfield also testified that Dunham stated that he had once fallen down stairs, lay helpless for hours while his wife was present, but she offered no assistance. Dunham conceded he had been drinking at the time of the incident and "blanked out." Dr. Bransfield believed at least the alcohol abuse. A history of blackouts indicates an alcoholic condition. All drinking is highly contraindicated for the balance of Dunham's life.

His review of the case shows that the respondent often met the criteria for major depressive illness. The physician cannot predict recurrence with certainty. Things presently look

good for Dunham. The doctor is equally sure that Dunham had days when he was dysphoric, although not necessarily pathological. This seemed to come from his life situation and his reaction was not out of proportion, yet he was unable to cope at the time.

Histories, as reported by patients, are not always taken at face value. The doctor testified about a drug he had prescribed. If Dunham took two 150 milligram tablets, a few hours apart, there would be no problem. Three hundred milligrams per day is the recommended dosage. The events of April 11 could have been the result of alcohol ingestion as easily as a drug interaction. The doctor read the transcript of the telephone messages and cannot surely attribute these to one cause. He has no reason to doubt Dunham's statements in general. A doctor develops a sense of credibility. However, he doubted the statement that Dunham had only one-half can of beer of April 11. He was not able to evaluate whether Dunham had not consumed alcohol since December 1998. The physician testified further about Dunham's specific progress from August 1997 through April 1999, including medications and dosages. Although questioned extensively, the doctor's testimony remained essentially consistent.

Randall C. Dunham testified. He has been a teacher in the Point Pleasant system for twenty-five years without significant problems. He has taught mathematics, social studies, language and reading, usually to sixth grade pupils. Exhibits R-2 through R-53 are complete and accurate records of his evaluations. Exhibit R-1 is a true copy of his teaching certificate. He has been involved in extracurricular activities. He has been involved in his local education association.

The witness married in 1989. In December 1995, his wife gave birth to twin boys. In March 1997, his wife, on sabbatical leave, was pursuing a master's degree. She left with the children and moved into her parents' home. He was depressed and sought help. He saw a psychiatrist and had some counseling with his wife. He then saw the psychiatrist, Dr. Bransfield. He began to take prescribed medications. He agreed to and applied for a medical leave of absence from mid-March through June 30, 1997. In August 1997, Dr. Bransfield approved him to return to teaching in September. The Board accepted the physician's recommendation. Dunham did teach in the 1997-98 school year. He was observed and evaluated (R-51, R-52).

Prior to April, he had no problems. He was seeing the psychiatrist and the psychologist regularly. He and his wife were officially separated and legal papers had been filed in December 1998.

On April 10, 1999, he returned from a two-day drive from Florida. He arrived home late on Saturday evening, April 10. He contacted his wife and arranged to see his sons the next day. Dunham states his wife then told him about the relationship with M.L. Dunham stated that his wife said she had known M.L. for perhaps six years, but only recently had the relationship become serious. He also says she stated that who she saw was none of his business. Prior to this, Dunham knew his wife was seeing someone, but did not know who the person was. In late March one of his sons had mentioned something about bunk beds and said something about climbing into bed with mom and M.L.

On Sunday, April 11, the respondent wanted to work on his father's boat. He left home at about 6 a.m. and worked until rain began at about 11:15 a.m. He "had a beer with a neighbor" although he had been told not to drink while taking medication.

Dunham stated that he was taking several medications including an antibiotic. He took one 150-milligram antidepressant tablet. When he returned to his parent's home, he was tired. To the best of his recollection, he lay on a bed and went to sleep. At about 1:30 p.m. his wife arrived with the children. He states he was "groggy." His wife was upset. She stated she believed he had been drinking, took the children and left.

At that time, he and his wife had an arrangement under which he saw the children on Sunday afternoons. When his wife left, Dunham was upset and took another antidepressant tablet.

He received an anonymous phone call from someone in Spring Lake Heights. This person questioned the presence of M.L. in his wife's home overnight. Dunham believed he was unable to think clearly. He made a series of telephone calls trying to express his anger to M.L. He does not remember what he said.

Dunham states he knew nothing about M.L.'s children at the time. On the night before, April 10, his wife had stated she had counseled one of M.L.'s girls. Dunham had been D.L.'s teacher for six to eight weeks in her sixth grade year. He recalls the child did well.

After April 11, he was interviewed first by his principal. He assured the principal he did not know D.L. On the sixteenth, he was interviewed by the superintendent and assistant superintendent. He had two union representatives with him. The superintendent asked if he had made the calls and Dunham admitted that he had. Dunham stated he could not recall the contents. Dunham states he did not read the transcript. He also states there were no references made to a meeting between M.L. and him. He would have been willing to meet with M.L.

The tenure charges refer to D.L.'s statements that R.D. had been staring at her and following her. He denies this. He did go into a room in which the girl was a pupil, but it was on school business. He would also normally be in the hallway late in the day. He denies walking by the L. residence deliberately. In January, February, March and the beginning of April, he went walking each lunch period. On Monday, April 12, while doing his walking, he noticed M.L.'s truck and avoided that street thereafter.

Dunham states he has never had spillover behavior in the classroom and that his problems have nothing to do with pupils. He saw Dr. Bransfield first in 1997 and saw him more intensively after the April 11, 1999 incidents. In 1997, 1998 and 1999, he was seeing a psychologist to deal with his anger problems and attending Carrier Foundation six hours per week and two AA meetings per week.

The witness read the transcript of the telephone messages he had left and concedes that they are inappropriate. He wishes he had not made the calls, especially because the girls heard what he said.

The witness testified about the anonymous telephone call he received that weekend. He believes a neighbor or at least someone in the area made the telephone call. He received the call immediately after his wife left with the children. He was intoxicated when the call came in. He

has recollection of consuming one can of beer. He told the superintendent that he was not drinking because he did not consider the consumption of one can of beer to constitute drinking.

The respondent recalls no drinking problem on April 11, 1999. He heard the tape of his messages played. His speech was, indeed, slurred. However, Dunham is not sure why. He states he could have blacked out.

The respondent recognized D.L. at hearing. The Memorial Middle School has thirty-five to forty classrooms. He did not notice D.L. when he entered a room in which she was a pupil.

Dunham believes he is a good teacher and truly involved with children. He knew D.L. simply as D., and did not connect her with M.L. until later. He marked at least two of her papers and went over them with her.

The respondent denies he was trying to use the girls to get at M.L. He denied that the anonymous telephone call came from a best friend who had given him other information about "goings on" at the Dunham marital home. He also denied calling M.L.'s business prior to April 10.

Dunham further stated that he agrees the messages were inappropriate. If he were sober, he would not have said those things. He did not control his inebriation and takes full responsibility.

Before April 11, he walked by the L. home everyday during his power walk exercises. On April 12, he knew he had made some inappropriate telephone calls and avoided going by the home because of embarrassment. Dunham stated he was aware he had done something inappropriate even though he could not remember the contents of the messages. He presumed, because he had blacked out, that he had done something inappropriate. He stated there was one earlier incidence of blacking out in December 1998. He believed there had been an inappropriate incident with his wife while he was undergoing a blackout.

Karen L. Dunham was called by the Board on rebuttal. She had a telephone conversation with the respondent on April 10 concerning a visit on Sunday, April 11. Both had been on vacations the week before. She said nothing to the respondent about M.L. Dunham complained about her behavior without reference to anyone in particular. Prior to April 10, there had been no mention of M.L. by her to Dunham or by Dunham to her.

On April 11, she took the children to Dunham's for visitation. He had just moved to that address. Karen Dunham arrived at about 2:30 p.m. She rang the bell but got no response. The door was open, keys in the lock. She knocked and received no answer. She called in and Dunham asked who it was. She twice stated, "It's me, Karen." Dunham appeared, holding onto the wall and partly undressed. She stated to him that he had been drinking and left. She did not smell his breath.

The first time the respondent mentioned M.L. to the witness was Sunday, April 11. When she returned to her home, there were already three messages on her machine from Dunham referring to M.L. He was quite angry. He accused her of fooling around. As of that day, she and M.L. had dated a few times, M.L. had not stayed at her house at any time and she denied that the children ever were in bed with her and M.L.

The witness had no doubt that Dunham was intoxicated on April 11. He was not capable of caring for the children. She had to identify herself twice before he made himself visible.

DETERMINATION AND ORDER

The facts are not in dispute. The messages were left on M.L.'s recording machine. The only dispute is concerned with what to do about the facts. The respondent argues that he has a twenty-five year record of outstanding performance within the school district. A chain of events including service of divorce papers by his wife led up to the April 11 telephone calls.

Dunham testified that before making the calls, several things had happened. He had ingested alcohol. He had taken at least one and probably two 150-milligram tablets of an antidepressant drug. He had received an upsetting telephone call from a neighbor. His wife had

come, with their children, to visit him but she had immediately left with the children when she perceived Dunham to be intoxicated.

Over a period of several hours, Dunham called the M.L. residence and left four messages, at least one of which is clearly directed at D.L. and N.L. Dunham asserted that he could recall making the telephone calls and had an uncomfortable feeling that he had made inappropriate statements, but he could not recall the substance of any of the telephone messages.

Dunham also argues that although approximately twelve words he used during the course of the telephone messages were clearly profanities, the only fair reading of the messages clearly establishes that his only objective was to speak to M.L. Neither D.L. nor N.L. was in the home when the telephone messages were received. Although M.L. said he filed complaints with the local police department, no criminal charges were in fact filed against him. The police department did not pursue an investigation regarding M.L.'s claims of alleged harassment. In addition, M.L. contacted a local newspaper and made available to a reporter a transcription of the telephone calls. Articles appeared in the newspaper that publicized the nature of the phone calls.

Dunham's psychiatrist testified that he advised Dunham not to ingest alcohol while on any medication. He further stated there could be psychiatric effects connected with certain antibiotics and that some people may have a specific reaction. Finally, the psychiatrist testified that he believed that what precipitated the telephone calls was related to ongoing matrimonial stress.

Dunham insists that any contact with D.L. in school was incidental and coincidental. He would normally be in areas that the girl would be or would be passing through. He denied peering at her at any time. He stated that, if he entered a classroom in which she was a pupil, it was on school business. He finally stated that he had walked past the L. residence for several months while exercising during his lunch period. He ceased using that route for his walks after April 11.

Dunham urges that he did not engage in conduct unbecoming a teacher. The telephone calls he made on April 11, 1999 were immediately and directly related to ongoing matrimonial

problems. The telephone calls were placed when Dunham was in a highly inebriated and medicated state. He stresses that there was no anger directed at N.L. or D.L.

Dunham further argues that M.L. must share some blame for dissemination of the inappropriate messages. Had M.L. acted responsibly, he would have immediately stopped the answering machine after he heard the first obscenity directed at him. M.L. could have easily screened the rest of the telephone messages outside the presence of his daughter. And it was M.L. who caused the matter to appear in a local newspaper.

Dunham also appears to argue that it is wrong to maintain the messages were directed to D.L. and N.L. It must immediately be observed that each of the messages refers to "your father." In addition, the second message begins, "Hi, [N.] and [D.]."

Dunham also suggests that the Board and its agents somehow erred in not arranging a meeting between him and M.L. This must be rejected out of hand. The Board and its agents quite properly restricted their actions to those portions of the matter that dealt with Dunham, the pupils and the school. As the superintendent credibly testified, he regarded relationships between and among M.L., Randall Dunham and Karen Dunham to be beyond the school's purview.

Dunham further argues that a review of prior Commissioner of Education cases relating to more serious conduct supports his contention that even assuming that the charges at issue were sustained, they should not result in his dismissal. He cites *In the Matter of the Tenure Hearing of Madelin Ribacka*, 1978 *S.L.D.* 929; *In the Matter of the Tenure Hearing of Fred Brown*, 1970 *S.L.D.* 239; *In the Matter of the Tenure Hearing of Frederick Ostergrem*, 1966 *S.L.D.* 185 and *In the Matter of the Tenure Hearing of William H. Kittell*, 1972 *S.L.D.* 535. He goes on to cite twenty-four additional tenure matters ending with *In the Matter of the Tenure Hearing of William Koller*, 97 *N.J.A.R.* 2d (Edu. 157) (Nov. 15, 1986). For the reasons expressed below, I **FIND** and determine most of these matters to be distinguishable from today's case.

The Board argues that the charges certified by it to the Commissioner of Education are true in fact and that they warrant the respondent's dismissal. The defense offered by Dunham does not mitigate or justify his actions. He denies knowledge of the contents of the telephone

calls, at least at the time he made them and claims he was in an intoxicated state created by an overdose of a prescription medication and the consumption of the half can of beer. Yet, in his response to the superintendent's charges and in his testimony, the respondent argued that the prescribed dosage of the medication on April 11 was a single 150-milligram tablet. His treating psychiatrist testified that on April 11 the prescribed dosage was one 150-milligram table taken twice per day and that dosage had been established in the prior August. The psychiatrist stated that after having treated Dunham in 1997, he saw him again in August 1998 and observed the respondent's mood to be worse. Dr. Bransfield increased the dosage from 150 milligrams per day to 300 milligrams per day. The psychiatrist also testified that two 150-milligram tablets separated by six to eight hours is not excessive dosage.

In his response to charges, Dunham blamed his intoxicated state on a drug interaction resulting from the alleged overdose of antidepressant with the consumption of one beer or half a beer sometime prior to the phone calls. The psychiatrist could not testify with certainty about any type of drug interaction with a whole or a half can of beer. Thus, Dunham's contention that his actions were caused by a drug interaction with a small amount of alcohol is not supported by any competent evidence.

The psychiatrist carefully avoided mention of a formal diagnosis of alcoholism in any of his reports. At hearing, however, he stated to a reasonable degree of medical certainty that Dunham is an alcoholic. The psychiatrist then qualified that by stating that Dunham was a recovering alcoholic, at least at the time of this hearing. Bransfield had treated Dunham for at least two years. Dunham had a history of at least one alcohol-related blackout in March 1998. The psychiatrist determined that alcohol was a problem in Dunham's life and that he should not drink at all. Yet his June 7, 1999 report (R-5) makes only tangential mention of Dunham's alcohol problems.

It is true that Bransfield cleared Dunham to return to work in August 1997 and that the Board never questioned or challenged his ability to return to work. However, the Board was never fully aware of Dunham's alcoholism by way of Bransfield's reports.

The Board further argues that Dunham claims there were three particular stressors that caused him to make the telephone calls. The psychiatrist testified that Dunham's remarks were not typical of a specific psychiatric illness, thereby ruling out any temporary mental disorder as a cause. The psychiatrist relates the telephone calls only to the acute stressors. Thus, if those stressors as alleged by Dunham did not occur, then Dunham's conduct is left without any excuse whatsoever.

The only information about the stressors comes from Dunham himself. The first incident referred to is an alleged statement by one of his children that he had spent time in bed with mom and M.L. Karen Dunham specifically denied any such incident could have ever occurred. Dunham also alleges an anonymous phone call from an unidentified male referring to M.L. staying at the respondent's Spring Lake Heights home overnight. This, too, lacks any corroboration whatsoever. The third stressor identified by Dunham was a telephone conversation between him and his wife. Dunham claims in this conversation, on Saturday, April 10, his wife told him of her relationship with M.L. Again, Mrs. Dunham specifically denied ever telling Mr. Dunham anything about M.L. either in a telephone conversation on April 10 or prior to that time.

Dunham recognized, even while making the calls, that his conduct was wrong. He conceded that he stopped walking past the L. house although he claimed that every day at lunch prior to that he had walked the same route. This indicates that Dunham knew where the L. household was prior to April 11. It also indicates that he did not dare walk past the house on April 12 because he knew that the calls he made were completely inappropriate, he was aware of their content and he knew whether they were made in an alcohol-induced state or not.

Dunham was also accused of conduct that amounted to stalking D.L. in school. He denied this. Yet there is no reason to disbelieve D.L.'s testimony and her perception that Dunham was going out of his way to create a situation she found frightening. This type of conduct destroys the basic trust that should exist between pupil and teacher.

The Board says Dunham's conduct warrants dismissal. Although he admits that the message machine identified all three names, M.L., D.L. and N.L., he directed the vulgar and obscene language only to the two children. Dunham admitted that at the time he made the

telephone calls on April 11 and addressed the message to N.L., he knew she was a student at the high school. His defense has been to deny, excuse, obfuscate and fabricate. The facts warrant a finding that the only triggering incident on April 11 was Dunham's voluntary consumption of a quantity of alcohol sufficient to make him intoxicated and a determination fired by that alcohol consumption to get at M.L. through his children. Dunham knew at the time of the telephone calls that both children were enrolled in the Point Pleasant school system. It is an abuse of his position and it undermines any confidence the Board can have in his ability to continue to function as a teacher. The heart of the matter is that the respondent saw fit to use the pupils as a means of venting his rage at M.L. That type of conduct and abuse of a position of trust with pupils was never addressed by Bransfield except to say that it was not caused by any mental disease or illness. His denial of important facts surrounding the incident, such as his oral denial to the superintendent that he had even consumed any alcohol on April 11, strengthens the Board's position that Dunham's version of the facts is a sham.

The Board anticipates that Dunham would argue that these are strictly personal problems that have no effect on his teaching capacity. That is not all true; these same types of problems compelled him to take an extensive medical leave before the end of the 1996-97 school year and have led to the present incident. Dunham will further argue that there is no potential for his conduct to recur. Nevertheless, eight days after Bransfield's prognosis of June 7, 1999, Dunham had a relapse. The Board is not compelled to wait until a teaching staff member's conduct spills over again more directly into the classroom.

Even if the ALJ and the Commissioner do not agree that the conduct warrants termination of Dunham's employment, at the very least this conduct demands serious and substantial discipline by way of a long-term suspension, in years, without pay, and a return to teaching only upon condition of an independent physical and psychiatric examination with results satisfactory to the Board of Education.

After a complete review of the record and careful attention to the parties' briefs, I am satisfied that most of the cases the respondent cites are inapplicable to the present case. *Ribacka*, above, had to do with a pupil and teacher and their interactions throughout the pupil's sixth grade year. The Commissioner observed that pupil testimony in that matter was inconclusive and that

the credible evidence presented was insufficient to support the charge against the teacher. In *Brown*, the Commissioner cautioned as he has in many cases that the testimony of children must be examined and weighed with great care. Further, the matter dealt with an alleged unwanted touching which was never established. *Ostergren* was a physical abuse matter. The Commissioner usefully observed in that case that in two earlier matters involving the infliction of physical indignities upon pupils he had both upheld dismissal and denied dismissal. At 1966 *S.L.D.* 188, the Commissioner states:

> The Commissioner finds significant differences between these two cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.

Applying this useful instruction to today's case, I **FIND** that none of the two dozen cases the respondent suggests support his position is particularly helpful. The two cases that come closest to resembling today's are *In the Matter of the Tenure Hearing of Paul H. Wells*, 1982 *S.L.D.* 158, *aff'd* State Bd. of Ed., 1982 *S.L.D.* 173, and *In the Matter of the Tenure Hearing of William Koller*, 97 *N.J.A.R.* 2d (Edu. 157). In *Wells*, a school psychologist had been intoxicated during school hours and was immediately suspended. The psychologist admitted that he was an alcoholic. The Commissioner did not order his dismissal, however, because he found the respondent had joined AA and was, in the testimony of his counselor, in the recovery stage of the disease. The Commissioner also noted that dismissal would be inappropriate because the psychologist had received excellent evaluations even when his problem was at its worst. Unlike Dunham's case, the psychologist was not accused of any inappropriate behavior in connection with a pupil. The *Koller* matter is similar in that Koller had been intoxicated during school hours. Here again, however, there was no allegation that he had engaged in any untoward activity or conduct involving pupils. In fact, Koller was relieved of duty immediately before he was scheduled to teach a history class beginning at 1:03 p.m. A careful reading of *Koller* indicates that all interactions that day touching on the intoxication were between Koller and

colleagues. The judge in K*oller* concluded that forfeiture of tenure under the circumstances would violate protections afforded by the Law Against Discrimination, *N.J.A.C.* 10:5-1 through -49. There is no such argument here.

Dunham can point to good evaluations, but the resemblance to the preceding two cases ends there.

Dunham has admitted making the telephone calls and has admitted the content of each call. There is no mitigation apparent. These calls were made over a four-hour period. No one forced Dunham to ingest what he says he did. Importantly, I am not convinced of his veracity as to the quantity of alcohol he consumed on April 11, 1999. The standard of evidence in an administrative proceeding is a preponderance of the credible evidence. *Matter of Polk*, 90 *N.J.* 550 (1982). Where the standard is preponderance of the evidence, the evidence must be such as to "generate belief that the tenured hypothesis is in all human likelihood the fact." *Loew v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div. 1959).

One factor that must be considered in a determination as to which parties' version of an incident has the "reasonable probability of truth" is that "the [trier of fact], whose province it is to pass upon the credibility of an interested witness," may disbelieve his testimony. *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952) (citations omitted), *certif. den.* 10 *N.J.* 316 (1952). Importantly, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

I **FIND** and **CONCLUDE** that the Point Pleasant Borough Board of Education has proven the charge of conduct unbecoming a teacher as to the telephone calls certified against Randall Dunham. The respondent's defenses lacked substance. He offers a curious concatenation of events to explain his behavior. A trier of fact is at liberty within the bounds of reason to reject in whole or in part the testimony of a witness which does not convince the trier of fact of its merit even if that testimony is uncontradicted. *N.B.O. Industries Treadway Companies, Inc. v. Brunswick Corp.*, 523 *F.*2d 262, 277 (3d Cir. 1975).

Charges five and six (J-1) go to D.L.'s fear of attending school with the concomitant possibility of contact with Dunham, even to the extent of passing him in the hallway. Notwithstanding Dunham's denial that he never made inappropriate eye contact with D.L. and that his presence in the hallway is incidental to his own schedule, I credit D.L.'s testimony. She is thirteen years old, articulate and intelligent. Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954) citing *In re Perrone's Estate*, 5 *N.J.* 514, 521 (1950). I am satisfied that D.L. told the truth during her testimony although it was, at times, uncomfortable for her.

As to the balance of charge six that Dunham was outside the L. home, without more I am not convinced that this was more than a coincidence. There is testimony in the record that on April 12, the day following the telephone calls, Dunham was aware of where the L. home was and carefully avoided it thereafter.

The several cases discussed above do not contain the elements present here. In this matter, a teacher, a person in a position of authority over a pupil, clearly addressed improper messages including profanity to a thirteen-year-old pupil and her older sister. It is not possible to explain away the direction of vulgar and obscene messages to two children. It is clear to this judge that Dunham knew he was addressing a high school pupil and a pupil in his own school. No matter what Dunham believed the provocations to be, this is inexcusable behavior. The respondent used two children as a means of getting at his perceived tormentor, M.L.

The Commissioner of Education long ago observed:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 197 *S.L.D.* 302, 321.

And in *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369, 371, our former Supreme Court stated:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.

The removal proceedings here have been in all respects proper and in accordance with statute. The Board cannot be said to have overreached in these circumstances. Good cause for removal having been shown, I **ORDER** the removal of Randall Dunham from position effective on the date of final decision in this matter.

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

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

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

Bruce R. Campbell

FEB 28 2000

DATE

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/1/00

DATE

Debbie Astanatis/pa

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 2000

DATE

Barbara A Harnak

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner

M.L.

D.L.

N.L.

Robert Ciliento

For respondent

Robert C. Bransfield, M.D.

Randall C. Dunham

EXHIBITS

Petitioner's

None

Respondent's

R-1 Department of Education teaching certificate issued June 1974

R-2 Teacher Evaluation Report of Randall Dunham, October 31, 1974

R-3 Teacher Evaluation Report of Randall Dunham, January 16, 1975

R-4 Teacher Evaluation Report of Randall Dunham, February 10, 1975

R-5 Teacher Evaluation Report of Randall Dunham, February 25, 1975

R-6 Teacher Evaluation Report of Randall Dunham, October 9, 1975

R-7 Teacher Evaluation Report of Randall Dunham. December 1, 1975

R-8 Teacher Evaluation Report of Randall Dunham, January 20, 1976

R-9 Teacher Evaluation Report of Randall Dunham, March 8, 1976

R-10 Teacher Evaluation Report of Randall Dunham, November 11, 1976

R-11 Teacher Evaluation Report of Randall Dunham, January 18, 1977

R-12 Teacher Evaluation Report of Randall Dunham, February 24, 1979

R-13 Teacher Evaluation Report of Randall Dunham, March 7, 1977

R-14 A copy of a tenure recommendation prepared by Principal George Scardena, March 30, 1997

R-15 Teacher Evaluation Report of Randall Dunham, November 16, 1977

R-16 Teacher Evaluation Report of Randall Dunham, March 1, 1978

R-17 Teacher Evaluation Report of Randall Dunham, November 16, 1979

R-18 Teacher Evaluation Report of Randall Dunham, February 4, 1980

R-19 Annual Performance Report of Randall Dunham referring to a conference date of May 13, 1980

R-20 Teacher Evaluation Report of Randall Dunham, December 19, 1980

R-21 Annual Performance Report of Randall Dunham with a conference date of May 12, 1981

R-22 Observation Evaluation Report of Randall Dunham, December 21, 1981

R-23 Annual Performance Report of Randall Dunham with a conference date of May 19, 1981

R-24 Observation Evaluation Report of Randall Dunham, December 14, 1982

R-25 Annual Performance Report of Randall Dunham with a conference date of May 18, 1983

R-26 Teacher Observation/Evaluation Report of Randall Dunham, December 6, 1983

R-27 Annual Summary Conference Report of Randall Dunham with a conference date of May 15, 1984

R-28 Teacher Observation/Evaluation Report of Randall Dunham, November 6, 1984

R-29 Annual Summary Conference Report of Randall Dunham with a conference date of May 20, 1985

R-30 Teacher Observation/Evaluation Report of Randall Dunham, January 27, 1986

R-31 Annual Summary Conference Report of Randall Dunham with a conference date of May 9, 1986

R-32 Teacher Observation/Evaluation Report of Randall Dunham, January 22, 1987

R-33 Annual Summary Conference Report of Randall Dunham with a conference date of May 6, 1987

R-34 Teacher Observation/Evaluation Report of Randall Dunham, December 9, 1987

R-35 Annual Performance Report of Randall Dunham, June 3, 1988

R-35A Teacher Observation/Evaluation Report of Randall Dunham, December 15, 1988

R-36 January 7, 1989 letter from Laurie Musgrave to the Board of Education regarding Randall Dunham

R-37 Annual Summary Conference Report of Randall Dunham, May 23, 1989

R-38 Teacher Observation/Evaluation Report of Randall Dunham, December 15, 1988

R-39 Annual Summary Conference Report of Randall Dunham, May 24, 1990

R-40 Teacher Observation/Evaluation Report of Randall Dunham, February 13, 1991

R-41 Annual Summary Conference Report of Randall Dunham with a conference date of May 9, 1991

R-42 Teacher Observation/Evaluation Report of Randall Dunham, April 10, 1992

R-43 Annual Summary Conference Report of Randall Dunham, April 10, 1992

R-44 Teacher Observation/Evaluation Report of Randall Dunham, December 5, 1993

R-45 Annual Summary Conference Report of Randall Dunham with a conference date of May 17, 1993

R-46 Teacher Observation/Evaluation Report of Randall Dunham, March 17, 1994

R-47 Annual Summary Conference Report of Randall Dunham with a conference date of June 3, 1994

R-48 Teacher Evaluation Report of Randall Dunham, June 1994

R-49 Annual Performance Conference Report of Randall Dunham signed by Randall Dunham on June 14 and by Roy Feldman, Principal of the Memorial Middle School on June 15, 1995

R-50 Annual Written Performance Report of Randall Dunham, December 4, 1997

R-51 Teacher Observation/Evaluation Report of Randall Dunham, December 4, 1997

R-52 Annual Written Performance Report of Randall Dunham, May 14, 1998

R-53 Teacher Observation/Evaluation Report of Randall Dunham, November 4, 1998

R-54 A letter to Whom it May Concern from Dr. Ken Bauer regarding Randall Dunham dated May 17, 1999

R-55 The Curriculum Vitae of Dr. Robert C. Bransfield

R-56 A note from Dr. Robert Bransfield to Whom it May Concern, April 21, 1999

R-57 A note from Dr. Robert Bransfield regarding Randall Dunham, May 15, 1999

R-58 A letter to Stephen B. Hunter regarding Randall Dunham from Dr. Robert Bransfield, June 7, 1999

Joint

J-1 Statement of Evidence and Charges by Robert Ciliento, Superintendent of Schools, May 7, 1999

J-2 Affidavit of Randall Dunham in opposition to the charges, May 20, 1999

J-3 Certificate of Determination and Board Resolution executed by Steven Corso, Board Secretary, and certificate of service, June 24, 1999

OAL DKT. NO. EDU 4937-99
AGENCY DKT. NO. 173-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDALL DUNHAM,	:	
SCHOOL DISTRICT OF POINT	:	COMMISSIONER OF EDUCATION
PLEASANT BOROUGH, OCEAN	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were submitted in accordance with the directives of *N.J.A.C.* 1:1-18.4. The Board, for good cause shown, requested and was granted an extension of time within which to submit reply exceptions, and such submission was filed in conformance with the adjusted timelines. The parties' exception filings were fully considered by the Commissioner in making his determination herein.

Respondent's exceptions[1] object to the Administrative Law Judge's (ALJ) finding him guilty of unbecoming conduct, charging that in so concluding the ALJ failed to consider and analyze any of respondent's advanced defenses and, moreover, neglected to even find these defenses "mitigating circumstances" in fashioning an appropriate penalty herein. (Respondent's Exceptions and Brief Submitted in Support of Exceptions, at 30) Initially, in this regard, respondent charges that the ALJ failed to consider and properly weigh hearing testimony establishing that respondent was a "recovering alcoholic" and that, due to his ingestion of four

[1]It is noted that the vast majority of respondent's 72-page exception submission is essentially a verbatim reiteration of his Post-hearing Brief advanced before the ALJ and fully addressed in the Initial Decision.

prescription drugs and alcohol, he was in a "highly intoxicated state" during the period on April 11, 1999 when he made the telephone calls at issue herein. (*Id.* at 31) As a consequence of this condition, respondent maintains, he was incapable of formulating any "intent" to involve D. and N. in his marital difficulties. (*Id.* at 33) It is "[in]explicable," respondent contends, that the ALJ would ignore "intent" in evaluating his conduct on this day, particularly in light of his "alcoholism disability" and the New Jersey Supreme Court's holding that "alcoholism is a handicap protected, in part, by the New Jersey State Law Against Discrimination***." (*Id.* at 34) Clearly, he argues, the telephone calls he made were solely attributable to his alcoholism disability and the matrimonial-related stress factors that he faced during that time period. (*Id.* at 35) Respondent urges that "had the Administrative Law Judge properly evaluated the proffered facts in this matter a determination should have been made that [respondent] did not possess the capacity during the operative time period on April 11th to engage in any 'conduct unbecoming a teacher.'" (*Id.*)

Even assuming that a finding of unbecoming conduct could be sustained, respondent contends, the ALJ again erred by failing to accord proper weight and consideration to his 25-year excellent teaching record in the District and the fact that the conduct at issue here was not "work related," in evaluating a proper penalty. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 35-37) Respondent reproduces from his Post-hearing Brief a myriad of prior decisions of the Commissioner[2] which, he urges, stand for the proposition "that it is unprecedented that a teaching staff member, with the exemplary record that [respondent] had within the Point Pleasant Borough School District, would face removal from

[2]One additional case was included in respondent's exception submission, *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner August 4, 1999.

his position regarding conduct that was not work related and that, moreover, was not criminal in nature." (*Id.* at 38) Similarly, respondent asserts, the ALJ erred in failing to accord proper significance to his testimony with respect to the monumental matrimonial stress factors he was under on April 11 which precipitated the phone calls; his testimony expressing deep remorse for his actions; and testimony of his expert witness, Dr. Robert Bransfield, stating that respondent's prognosis was very positive and there was no reason he could not return to his teaching duties. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 38-45)

In conclusion, respondent urges that the tenure charges be dismissed or, should the Commissioner find "*any* 'conduct unbecoming a teacher,'" (emphasis added) the penalty imposed be limited, in recognition of respondent's excellent record and the likelihood that such behavior will not be repeated, to a one-year increment withholding. (Respondent's Exceptions and Brief Submitted in Support of Exceptions at 72)

In reply, the Board advances that although respondent "persistently argues" that he is remorseful for his actions, he continues to deny that such actions were directed at students, a contention fully belied by the transcript of the conversations at issue. (Board's Reply Exceptions at 6) Further, the Board advances that, curiously, respondent's exceptions fully fail to challenge the factual findings or conclusions with respect to his other conduct at issue herein, the "stalking" of D.L. "[Respondent] argues that he was remorseful for his actions, [the Board posits,] but apparently that remorse did not occur on the Wednesday after the phone calls when he was peering into two different classrooms at D.L., frightening her." (*Id.*)

The Board next observes that not only did respondent, himself, never previously agree or claim that his actions here were attributable to "alcoholism," such a "defense" was never argued before the ALJ below, and no medical basis was presented for such a conclusion.

(Board's Reply Exceptions at 9) Undoubtedly, the Board reasons, "[t]here would appear to be no question that [respondent] became intoxicated on the afternoon of the telephone calls, but it is unclear what substance or substances caused that state, inasmuch as [respondent] is the only one who knows what he consumed that afternoon." (*Id.*) Even assuming, *arguendo*, that alcoholism could be termed a legitimate defense here, the Board proffers, such condition does not address or explain respondent's subsequent stalking behavior which occurred days later. (*Id.* at 10)

Upon careful and independent review of the record in this matter, which included transcripts of the two days of hearing conducted at the OAL[3], the Commissioner determines to affirm the Initial Decision of the ALJ, since he finds that the record before him amply establishes that respondent's behavior with respect to the incidents detailed in the Board's tenure charges constitutes conduct unbecoming a teaching staff member. He further concurs with the ALJ that, under the circumstances existing here, respondent's dismissal from his tenured teaching position is warranted.

In reaching his determination that the within charges have been established, the Commissioner observes that respondent's admitted conduct in this regard is serious and highly unprofessional. As observed by the ALJ:

> In this matter, a teacher, a person in a position of authority over a pupil, clearly addressed improper messages including profanity to a thirteen-year-old pupil and her older sister. It is not possible to explain away the direction of vulgar and obscene messages to two children. It is clear to this judge that Dunham knew he was addressing a high school pupil and a pupil in his own school. No matter what Dunham believed the provocations to be, this is inexcusable behavior. The respondent used two children as a means of getting at his perceived tormentor, M.L. (Initial Decision at 25)

[3]Hearing was held on October 26 and October 28, 1999.

Such behavior[4] is directly contrary and inimical to the expectations placed on teaching staff members and, undeniably, conduct unbecoming a teacher. It is well-established that the obligation and responsibilities of a public school teacher impose a heavy duty of self-restraint and controlled behavior "rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321. The Commissioner categorically dismisses respondent's exception contention that, because his faculties were impeded, he was, therefore, incapable of forming the "intent" to engage in unbecoming conduct, rendering it impossible for him to have committed such an offense. The within respondent admittedly engaged in conduct which is clearly unbecoming. Whether he did so purposely or intentionally is of no moment here. Although such *mens rea* may be considered by the Commissioner in fashioning an appropriate penalty, it does not operate to immunize respondent from guilt, or absolve him from the consequences of his actions. Likewise, the Commissioner rejects as untenable respondent's apparent claim of entitlement to the protections afforded a handicapped person by New Jersey's Law Against Discrimination (LAD) by virtue of his "alcoholism disability," which, it is noted was *raised for the first time in his exceptions*. Although it is well-established that alcoholism is a handicap under LAD, *N.J.S.A.* 10:5-1 *et seq.*, *e.g.*, *Matter of Cahill*, 245 *N.J. Super.* 397 (App. Div. 1991), and even accepting, *arguendo,* that such a defense was properly before the Commissioner, *i.e.*, *previously advanced and argued in the proceedings below*, the result in this matter would remain unaltered, as employers are not required to tolerate

[4]It is additionally noted that "[t]here were four messages over a four-hour period which would appear to indicate an extended angry outburst.***" (Initial Decision at 3)

criminal or egregious conduct of employees, even if the conduct in question was caused by a disability. *See Barbera v. DiMartino*, 305 *N.J. Super.* 617, 640 (App. Div. 1997).[5]

Similarly, no credence can be afforded respondent's exception challenge to credibility determinations made by the ALJ and the weight he ascribed to proffered testimony. In this regard, the Commissioner is satisfied, based on the record as a whole, that the ALJ gave full consideration to all evidentiary proofs and testimony which comprise the record and weighed it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis whatsoever in the record before him for overturning such findings or credibility assessments of the ALJ who had the benefit of observing the witnesses firsthand. In so concluding, the Commissioner was especially mindful that:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.*** (*In re Perrone*, 5 *N.J.* 514, 522 (1950))

Like the ALJ, the Commissioner's review persuades him that "[t]he respondent's defenses lacked substance. He offers a curious concatenation of events to explain his behavior," (Initial Decision at 24) which, the Commissioner observes, lacks persuasive evidential corroboration in the within record. Although it is axiomatic that in tenure matters a Board has the burden of proving its proffered charges by a preponderance of the credible evidence, it is, likewise, undeniable that a respondent in going forward with defenses, must present credible evidence of those defenses.

---

[5]In this case, the Court held that plaintiff's assault of a supervisor caused by a psychotic episode, was nonetheless a legitimate nondiscriminatory reason for terminating and not rehiring him finding "We are in line with the federal authority that laws protecting the handicapped from employment discrimination are not intended to protect against crime or egregious conduct which, if committed by any other employee, would have warranted the adverse employment decision." (at 640

In considering the appropriate penalty in this matter, the Commissioner is again compelled to reiterate his long-standing belief that educators, by virtue of the unique position they occupy, must be held to an enhanced standard of behavior and must continually realize that they serve as role models to students and the community. The Commissioner, as did the ALJ, finds the prior decisions of the Commissioner cited by respondent in support of mitigation of penalty in consideration of what he claims is the "less serious" nature of his offense, his exemplary work record and his claim that his conduct here was not "work related," are not particularly beneficial to him in the context of this case. The Commissioner finds appropriate the ALJ's culling of guidance from *Ostergren, supra,* in this regard, namely:

> The Commissioner finds significant differences between these *** cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion *each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.* (emphasis added) (Initial Decision at 23, citing *Ostergren*, 1966 *S.L.D.* 188)

Said differently, because in tenure matters each case is extremely fact sensitive, meaningful comparisons between cases can be difficult to make. The Commissioner's full review persuades him that the ALJ correctly concluded that none of the cases advanced by respondent is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for respondent's position.

The Commissioner, additionally, does not share respondent's belief that his offending actions here were not "work related." The within record establishes that the messages left by respondent were directed to two students in the District, one of which, D.L., was a former student of his and attended the very school where he was a teaching staff member. The record

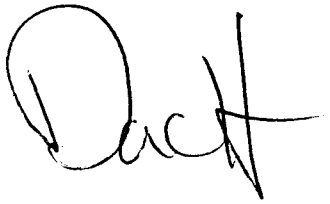
further contains credible testimony that D.L. became physically ill, experienced sleeping difficulties, and was fearful of the possibility of contact with respondent. At the very least, respondent's conduct had the effect of causing unwarranted disruption to and interruption of N.'s educational program. *See In the Matter of the Tenure Hearing of Robert A. Dombloski, School District of the Town of Belvidere, Warren County*, decided by the Commissioner June 23, 1999. The adverse effect upon the proper administration of the Point Pleasant Borough School system is, likewise, apparent. The incident resulted in negative newspaper coverage for the school (Initial Decision, at 9), and may have precipitated a possible tort claim action against the Board. (Initial Decision, at 10) Moreover, even accepting, *arguendo,* respondent's claim that his conduct was not work related, it does not necessarily follow that such situation calls for a mitigated penalty. The mere fact that misconduct occurred at a time and place entirely apart from school and even may involve people entirely unrelated to it does not immunize the offender from disciplinary sanction commensurate with his offense. Indeed, the Commissioner has not refrained from imposing the penalty of dismissal upon a tenured employee for unbecoming conduct "even if such conduct did not occur in the course of a teacher's employment," where it is otherwise warranted. *Board of Education of the Township of Parsippany-Troy Hills v. Molinaro*, 96 *N.J.A.R.* 2d (EDU) 268, 276, citing *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville*, 1973 *S.L.D.* 157. *Also see In re Dombloski, supra.*

Although duly considering respondent's lengthy, apparently unblemished record with the Board, along with each of his other proffered defenses, the Commissioner concludes that these factors, which ordinarily could serve to mitigate against respondent's dismissal, are greatly outweighed by the seriousness of his admitted conduct in this matter. Therefore, in light of the charges established herein reflecting respondent's clear violation of his obligation to

conduct himself in a manner befitting a tenured teaching staff member, the Commissioner concludes that, under the particular circumstances of this matter, respondent's behavior is "sufficiently flagrant" to warrant his dismissal from his tenured position. *See Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944).

Accordingly, for the reasons expressed therein, as expanded upon above, the Commissioner affirms the Initial Decision of the OAL, and hereby orders that Randall Dunham be dismissed from his teaching position with the School District of Point Pleasant Borough as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: APR 17 2000

Date of Mailing: APR 17 2000

[6] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

124-00

EDU #4937-99
C # 124-00
SB # 30-00

IN THE MATTER OF THE TENURE HEARING:

OF RANDALL DUNHAM, SCHOOL DISTRICT : STATE BOARD OF EDUCATION

OF POINT PLEASANT BOROUGH, : DECISION

OCEAN COUNTY. :

Decided by the Commissioner of Education, April 17, 2000

For the Petitioner-Respondent, Popovitch & Popovitch (Daniel S. Popovitch, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter & Rosenberg (Stephen B. Hunter, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 6, 2000

Date of mailing SEP 08 2000

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

April 17, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11828-98
AGENCY DKT. NO. 531-11/98

MARVIN HARRIS,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Eugene G. Liss, Esq., for petitioner

Joseph Verga, Associate Counsel, for respondent

Record Closed: February 28, 2000 Decided: February 28, 2000

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

This matter was transmitted to the Office of Administrative Law on December 28, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

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

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

Feb. 28, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/1/00
DATE

Debbie Gartenautis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 2 2000
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
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EUGENE G. LISS
Attorney-at-Law
94 MAIN STREET
1st Floor
LITTLE FALLS, NEW JERSEY 07424
Attorney for Petitioner, Marvin Harris

MARVIN HARRIS	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Dkt. No.: EDU 11828-98 Agency Ref. No.: 531-11/98
v.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER and RELEASE
Respondent.	:	

The State-Operated School District of the City of Newark ("Newark" or "District") and Marvin Harris ("Harris"), agree to the following terms in full resolution of this matter:

WHEREAS, Harris disputes the basis for the District's withholding of his 1998-1999 increment; and

WHEREAS, it appears that Harris made efforts to improve his performance during the 1998-1999 school year and he received a satisfactory annual evaluation for the 1998-1999 school year; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. The 1998-1999 increment withholding shall remain in effect until the end of the 1999-2000 school year, at which time Newark will review Harris's observations and evaluations. If Harris's annual summative evaluation reflects a satisfactory rating, he shall be placed back on the appropriate step, degree level, and dollar amount of the salary guide, effective September 1, 2000. The withheld monies will not be returned to Mr. Harris.

2. Harris shall, upon execution of this agreement, withdraw with prejudice, the appeal filed in relation to his 1998-1999 increment withholding specifically OAL Docket No. EDU 11828-98.

3. Harris acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that he shall receive no additional payments. In exchange for the above consideration, Harris, on behalf of himself, his heirs, successors and assigns, hereby full releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind in character, that he has had or may now have against any of them, relative to the litigation herein identified.

4. This agreement is subject to the approval of the State District Superintendent and the Commissioner of Education.

5. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

State-Operated School District of the City of Newark

Marvin Harris

MARVIN HARRIS

Dated: February 23, 2000

By: M. Bolden

MARION BOLDEN, Superintendent

Dated: February 25, 2000

OAL DKT. NO. EDU 11828-98
AGENCY DKT. NO. 531-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 17 2000

Date of Mailing: APR 17 2000

IN THE MATTER OF THE TENURE :

HEARING OF CELESE SEGALL, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

ELIZABETH, UNION COUNTY. :

:

SYNOPSIS

Board certified tenure charges of (Charge 1) chronic and excessive absenteeism, incapacity, incompetency, unbecoming conduct and (Charge 2) abuse of sick leave against respondent teacher.

The ALJ granted the Board's motion for summary decision with respect to Charge 1 since there were no genuine issues of material fact in dispute between the parties and the moving party was entitled to prevail as a matter of law. (*Brill*) The ALJ concluded that the Board gave due consideration to the particular circumstances of respondent's absences, not merely their inordinate number. The ALJ found that the principal was in frequent contact with respondent regarding her 720 days of absence in seven years and the negative impact of those absences on the continuity of instruction. Thus, the Board met the three-prong standard for termination of a tenured employee for excessive absenteeism established by *In re White*. The ALJ dismissed Charge 2 as duplicative of Charge 1 and lacking documentary evidence. The ALJ ordered respondent dismissed from her tenured employment.

The Commissioner concurred with the ALJ's decision to sustain Charge 1 against respondent relative to chronic and excessive absenteeism and to dismiss Charge 2 (abuse of sick leave) for the reasons well-stated in the Initial Decision. Citing *In re White*, among other cases, the Commissioner emphasized that it is well-settled law that excessive absenteeism warrants dismissal of a tenured teacher even when the absences have been excused or caused by legitimate illness. The Commissioner ordered respondent dismissed from her employment and directed a copy of this decision be transmitted to The State Board of Examiners for action as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL SUMMARY DECISION

OAL DKT. NO: EDU 1077-00

AGENCY DKT. NO: 390-12/99

ELIZABETH BOARD OF EDUCATION,

Petitioner,

v.

CELESE SEGALL,

Respondent.

Mary E. Hennessy, Esq., for petitioner

Gail O. Kanef, Esq., for respondent
(Balk Oxfeld Mandell & Cohen, attorneys)

Record Closed: February 18, 2000 Decided: February 25, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

PROCEDURAL BACKGROUND

In this matter, the Elizabeth Board of Education filed two tenure charges against the respondent. Charge #1 was for alleged chronic and excessive absenteeism, incapacity, incompetency and unbecoming conduct. Charge #2 was for alleged abuse of sick leave. After transmittal to the Office of Administrative Law (OAL) on January 7, 2000 for resolution as a contested case, petitioner filed a motion for summary decision on February 8, 2000. The respondent's letter-brief in opposition to the motion was received by the undersigned on February 18, 2000, at which time the record was closed.

FINDINGS OF FACT

Relative to the charges filed, the respondent did not dispute the following, which **I FIND** to be the pertinent **FACTS** of this case:

1. Respondent, Celese Segall, is a tenured teacher employed by the Elizabeth Board of Education (hereinafter the Board) since December 4, 1989. (Tenure Charges Exhibit A, Affidavit of Rimanta Bitenas, para. 4).[1]

2. Ms. Segall's most recent assignment with the Board is to teach mathematics enhancement to grades 7 through 9 at Alexander Hamilton Middle School. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 4).

3. Pursuant to Article VIII of the Agreement between the Board and the Elizabeth Education Association, teachers are allocated 12 sick days per school year, 2 personal days per school year and 1 family day per school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 3).

4. Ms. Segall did not report to work in the 1999-2000 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 13; Tenure Charges Exhibit B, Affidavit of Linda Lee Kelly para. 3; Tenure Charges Exhibit C, Affidavit of Joseph D. Harris para 3).

5. Ms. Segall was absent from her teaching position for 147 days during the 1998-1999 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 12; Tenure Charges Exhibit B, Affidavit of Linda Lee Kelly para 3; Tenure Charges Exhibit C, Affidavit of Joseph D. Harris para 2; Tenure Charges Exhibit E, 1998/1999 Personnel report for Celese Segall).

6. Ms. Segall was absent from her teaching position for 110 days during the 1997-1998 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 11; Tenure Charges Exhibit J, 1997/1998 Personnel report for Celese Segall).

7. Ms. Segall was absent from her teaching position for 34 days during the 1996-1997 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 10; Tenure Charges Exhibit K, 1996/1997 Personnel report for Celese Segall).

8. Ms. Segall was absent from her teaching position for 174 days during the 1995-1996 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 9; Tenure Charges Exhibit L, 1995/1996 Personnel report for Celese Segall).

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[1] all exhibit references are the exhibits attached to the tenure charges filed against Celese Segall.

9. Ms. Segall was absent from her teaching position for 126 days during the 1994-1995 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 8; Tenure Charges Exhibit M, 1994/1995 Personnel report for Celese Segall).

10 Ms. Segall was absent from her teaching position for 71 days during the 1993-1994 school year. (Tenure Charges Exhibit N, Affidavit of Rimantas Bitenas para. 7; Tenure Charges Exhibit N, 1993/1994 Personnel report for Celese Segall).

11. Ms. Segall was absent from her teaching position for 24 days during the 1992-1993 school year. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 8; Tenure Charges Exhibit O, 1992/1993 Personnel report for Celese Segall).

12. From September 1992 to October 28, 1999, Ms. Segall was absent 720 days from her tenured teaching position. (Tenure Charges Exhibit A, Affidavit of Rimantas Bitenas para. 5).

ANALYSIS AND DISCUSSION

(A)

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b).

The standard for granting summary judgement (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Elec. Indus. Co. Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S, 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, *i.e.*; 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, *supra*, at 533 (quoting Liberty Lobby, Inc., *supra*, 477 *U.S.* at 251-252). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Id at 540 (quoting Liberty Lobby, Inc., *supra*, 477 U.S. at 251-252).

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose." *Id* at 541.

(B)

In addressing whether the Brill standard has been met in this case, further guidance is found in Rule 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

Relative to the foregoing, it is well settled law that a teacher's chronic and excessive absenteeism constitutes both "unbecoming conduct" and "incapacity" such as amount to "just cause" which warrants the termination of a teacher under N.J.S.A. 18A:6-10. In the Matter of the Tenure Hearing of Jerome Kacprowicz, 93 *N.J.A.R.* 2d (EDU 1147, 151 *citing* Trenton Board of Education v. Williamson, OAL DKT. EDU 7335-85 (Apr. 14, 1986), aff'd by Commissioner (May 28, 1986). Excessive absenteeism warrants the dismissal of a tenured teacher even when the absences have been excused or caused by legitimate illness. State-Operated School District of Jersey City v. Pellecchio, 92 *N.J.A.R.* 2d (EDU) 267, 269.

Nevertheless, in order for a Board of Education to terminate a tenured employee for excessive absenteeism, the Board must demonstrate that:

> There was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact and (3) that there be some warning given

> to the employee that his or her supervisors were dissatisfied with the pattern of absences. (See In the Matter of the Tenure Hearing of Lena White, 92 *N.J.A.R.* 2d (EDU) 157, 161.

In these regards, the undersigned has gleaned from the documentary evidence and its omissions these additional **FACTS:**

1. respondent supplied the Board with virtually no explanations for her prolonged absences over a lengthy, seven year period of time;
2. during 1998 and 1999, the Board supplied its examining physician with certain data to evaluate whether respondent could return to work (see Exhibits G and H);
3. the doctor saw "no reason why she is unable to work based upon her work-related injury as reported" (see Exhibit G);
4. the doctor also stated that there was "no reason why Ms. Segall should continue to stay out of work. If she alleges that injuries sustained at work caused her to miss further work, then she should be evaluated by a work[ers'] compensation physician (see Exhibit H);
5. the Board unsuccessfully attempted to have Ms. Segall submit to a medical exam in March 1999 (see Exhibit F); and
6. in September 1999, when respondent found out about the proposed exam, she did not take the initiative to make whatever arrangements were necessary to have it done (see respondent's certification).

Thus, I initially **CONCLUDE** that the Board gave due consideration to the particular circumstances of the respondent's absences and not merely their inordinate number. Given the respondent's failure to voluntarily and periodically disclose the reasons for her absences over a seven year period of time, the Board's consideration of her particular circumstances was about as diligent as it could have been.

Moreover, the negative impact that the absences had on the continuity of instruction during the seven year period of time is uncontrovertedly established by the affidavit of the principal at the respondent's school (see Exhibit B):

> It is my opinion that Ms. Segall's absences have destroyed the continuity and delivery of instruction that only a continuous teacher can provide to her students.

> Ms. Segall was originally supposed to teach five Mathematics Enhancement classes this school year [1999]; however, I only assigned her to teach three classes due to the fact that I was unsure whether she planned on returning to school. Because Ms. Segall has not returned, I have been forced to find replacement teachers to instruct and monitor these classes.
>
> Due in part to Ms. Segall's absence, our school is now understaffed with teachers, and the students are the ones who have suffered most. Classes tend to be extremely large, especially in mathematics and the sciences. Some of these classes have over 35 students. I believe that classrooms as large as these, and at this tender age, detract from the individualized attention that students need to effectively learn.

Accordingly, I further **CONCLUDE** that the petitioner has satisfied the second prong of the Lena White case, *supra*.

With respect to the last prong of the Lena White case, *supra*, I **CONCLUDE** that it too has been met, because the principal at the respondent's school was in frequent contact with respondent regarding her absences (See undisputed Exhibit P). Certainly those contacts did not take place because the principal was delighted by the respondent's prolonged, unexplained absences over a seven year period of time. To the contrary, the undersigned has been inferentially persuaded that the principal expressed her dissatisfaction and frustration during those contacts and that her responses in effect constituted a warning to respondent that she should take corrective action or face the inevitable consequences. In this context of course, it is difficult for the undersigned to fathom how someone absent for 720 days in seven years would even need to be warned that their absenteeism is a problem.

(C)

Concerning all of the foregoing, respondent essentially contends that: (1) she never attended a Board arranged medical appointment in 1999 because she never received notification to do so; (2) after finding out in September 1999 that the Board had sought to have her examined the previous March, she assumed that the Board thereafter abandoned its request because she never heard from the Board again; and (3) she should soon be able to provide medical information to justify her absences.

However, this case is not materially about an unsuccessful attempt (for whatever reason) by the Board of Education to have respondent examined by its physician; nor is it materially about a current attempt to medically justify previously unexplained absences. The substantive materiality of this case consists of the chronic and excessive nature of respondent's

absenteeism as well as its equivalence to incapacity and unbecoming conduct. Consequently, neither the conduct of an examination by the Board's physician nor the supplying of current medical information (to justify respondent's absences) would create any legitimate inferences in favor of the non-moving party. See, Rule 4:46-2. Succinctly put, no permissible inferences can be drawn from the competent evidential materials presented which would inure to respondent's benefit or allow a rational fact-finder to conclude that Ms. Segall was not chronically and excessively absent from her job during the seven years in question.

Having considered the competent evidential materials presented in the light most favorable to the non-moving party, I **CONCLUDE** that no genuine issue of material fact exists to preclude the grant of summary decision in this case (see Brill, *supra* at 540) and that the moving party is entitled to prevail as a matter of law. (See N.J.A.C. 1:1-12.5(b).

(D)

Petitioner's motion for summary decision requested the undersigned to sustain its action concerning alleged chronic and excessive absenteeism. Since the motion included no such request *vis-à-vis* Charge #2, *i.e.*, alleged abuse of sick leave, and since no documentary evidence was proffered in this regard, the **DISMISSAL** of said charge is warranted and appropriate at this juncture. For these reasons and because Charge #2 is duplicative of Charge #1, I hereby **ORDER** that Tenure Charge #2 **BE** (and is hereby) **DISMISSED**.

DISPOSITION

On the strength of the foregoing, I hereby **GRANT** petitioner's motion for summary decision with respect to Tenure Charge #1 since there are no genuine issues of material fact in dispute between the parties. Accordingly, I **ORDER** that respondent Celese Segall **BE (and is hereby)DISMISSED** as a tenured teacher by the Elizabeth Board of Education on account of her chronic and excessive absenteeism.

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

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

2/25/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

3/1/00
DATE

Debbie Santantis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 2 2000
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 1077-00
AGENCY DOCKET NO. 390-12/99

IN THE MATTER OF THE TENURE	:	
HEARING OF CELESE SEGALL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially reiterate those arguments set forth in her brief in opposition to summary judgment which were considered by the Administrative Law Judge (ALJ). In addition, respondent avers, *inter alia*, that the ALJ should have held that a material fact issue existed with respect to whether or not respondent was requested to attend an independent medical examination, arguing that the ALJ erroneously held that she had an obligation to ensure that she attended an appointment when the Board made the error of sending the letter to the wrong address. Respondent also avers that the ALJ completely ignored the fact that she was never warned regarding her continued absences and the effect her absences would have on her future employment with the District. *In re Tenure Hearing of White, supra.*

Respondent's exceptions further argue that the ALJ erred in relying on the alleged opinion of a physician who never examined her and in holding that she never gave the Board any information concerning the reasons for her absences. As to this latter point, respondent states:

> Ms. Segall received a medical leave of absence from the Board at least through August 1999. In addition, although the record does not contain direct evidence of the notes [respondent] submitted, she clearly must have given the Board medical information because the Board's doctor allegedly viewed some medical information prior to giving his opinion. The Board never stated that [respondent] failed to give the Board information on her medical condition. There is simply no basis in the record on which the ALJ could have made such a finding. (Respondent's Exceptions at 6)

Respondent also maintains that the ALJ erroneously relied on the Board's conclusory assertions about the impact of her absences on students and contends that no actual evidence was submitted to the record regarding this issue. She likewise contends that the ALJ completely ignored the fact that the Board had granted her a medical leave, a fact which she believes cuts against the assertion she was warned about her absenteeism.

In summary, respondent avers that there was absolutely no evidence submitted that her special circumstances were in any way considered by the Board, maintaining that her certification in response to the tenure charges sets forth that her medical condition was misdiagnosed and has now been correctly diagnosed. Respondent urges that she is on the road to recovery and will soon be able to resume her duties fully; thus, her special circumstances dictate that she should not be terminated and should at least be granted a hearing on the tenure charges.

Upon careful and independent review of the record in this matter, including the parties' exceptions, the Commissioner concurs with and adopts as his own the recommended decision of the Administrative Law Judge to sustain the first tenure charge against respondent relative to chronic and excessive absenteeism and to dismiss the second charge of abuse of sick leave for the reasons well-stated in the Initial Decision.

In so holding, the Commissioner concludes that the ALJ properly applied the standard for granting summary decision as set forth by the New Jersey Supreme Court in *Brill,*

supra, and, therefore, adopts the ALJ's conclusion that no genuine issues of material fact exist in this matter which would require a plenary hearing. As correctly stated by the ALJ:

> The *Brill* standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and 'will serve no useful purpose.'" (Initial Decision at 4, quoting *Brill, supra,* at 541)

Moreover, the Commissioner is in full agreement with the ALJ's conclusion that:

> [T]his case is not *materially* about an unsuccessful attempt (for whatever reason) by the Board of education to have respondent examined by its physician; nor is it *materially* about a current attempt to medically justify previously unexplained absences. The substantive issue of this case consists of the chronic and excessive nature of respondent's absenteeism as well as its equivalence to incapacity and unbecoming conduct. Consequently, neither the conduct of an examination by the Board's physician nor the supplying of current medical information (to justify respondent's absences) would create any legitimate inferences in favor of the non-moving party. See, *Rule* 4:46-2. Succinctly put, no permissible inferences can be drawn from the competent evidential materials presented which would inure to respondent's benefit or allow a rational fact-finder to conclude that Ms. Segall was not chronically and excessively absent from her job during the seven years in question. (emphasis in text) (Initial Decision at 6-7)

The Commissioner further determines that the record supports the findings of fact set forth by the ALJ on page 5 of the Initial Decision and that the ALJ's legal analysis properly applied pertinent law relative to a teacher's chronic and excessive absenteeism. *In re White, supra*; *State-Operated School District of Jersey City* v. *Pellecchio, supra; In re Kacprowicz, supra.* As correctly noted by the ALJ, it is well-settled law that excessive absenteeism warrants dismissal of a tenured teacher even when the absences have been excused or caused by legitimate illness.

Accordingly, for the reasons expressed in the Initial Decision, respondent is hereby dismissed from her tenured employment with the Board. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: APR 17 2000

Date of Mailing: APR 17 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

131-00

IN THE MATTER OF THE TENURE	:	
HEARING OF VYVIAN FELDER, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

April 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11520-99

AGENCY DKT. NO. 302-10/99

VYVIAN FELDER,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Charles I. Auffant, Esq., for petitioner

Joseph Verga, Esq., for respondent

Record Closed: March 14, 2000 Decided: March 15, 2000

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

STATEMENT OF THE CASE

This case involved tenure charges of conduct unbecoming a teacher certified by the State-Operated School District City of Newark (District) against Vyvian Felder under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to –18.1.

The matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 26, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Prior to and at the hearing, settlement discussions were held and a settlement was reached, which has been reduced to writing and signed by both parties. (See J-1).

Vyvian Felder is a tenured math teacher employed by the District for 14 years. By resolution dated September 22, 1999, the District found the existence of probable cause to certify tenure charges, which, if true, were sufficient to warrant dismissal or reduction in salary. Basically, the District accused Ms. Felder of leaving her classroom without authorization, being in possession of a controlled dangerous substance, namely heroin, while on the school premises, and being arrested for same, and testing positive for cocaine following a random drug test.

The record reflected that after the charges Ms. Felder sought treatment and entered into a residential rehabilitation center. The criminal charges were disposed of by treating Ms. Felder as a first offender.

Under the proposed terms of the settlement, Ms. Felder would be restored to the District's payroll until the end of 1999-2000 school year. Along with the settlement, Ms. Felder signed a letter resigning effective the last day of school, June 26, 2000. Ms. Felder also agreed that she will never seek employment with the District.

The District stipulated that if a hearing was necessary the District would have to call several witnesses from out of state, which could cause a great deal time and expense. Moreover, although the District felt it would ultimately prevail in the matter, there were hotly contested facts and unsettled issues of law concerning the necessity to provide reasonable accommodation under the Law Against Discrimination.

Before entering into this agreement, Ms. Felder understood her rights and had adequate opportunity to speak with counsel. Ms. Felder is aware that pursuant to

N.J.A.C. 6:11-3.6, the Commissioner of Education may refer this matter to the State Board of Examiners for any licensing action which it may deem appropriate.

I **CONCLUDE** that the terms of the settlement are in the public interest and the settlement disposes of all issue in controversy.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

March 15, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

3-17-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358

In the Matter of the Tenure Hearing of	:	
VYVIAN FELDER	:	**BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW**
v.	:	**AGENCY REF. NO. 302-10/99**
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	**STIPULATION OF SETTLEMENT**

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), and Vyvian Felder, a tenured teacher, residing at 528 Midwood Street, Brooklyn, New York 11225, hereby stipulate and agree as follows:

1. Ms. Felder hereby agrees to irrevocably resign her tenured teaching position, effective June 26, 2000, and to relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon the final approval of the signed Stipulation and Letter of Resignation, the District shall and hereby does withdraw the Tenure Charges of Conduct Unbecoming certified on September 22, 1999.

2. Ms. Felder will receive her salary and benefits as an employee through June 26, 2000.

3. As of June 26, 2000, all of Ms. Felder's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. Ms. Felder expressly waives and gives up any rights to tenure in the District and agrees not to seek employment with the District in the future.

4. The District will not pursue tenure charges against Ms. Felder as long as this Stipulation remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Ms. Felder, including such charges that have previously been filed by the District against Ms. Felder.

5. In accordance with the District's Department of Records/Verification policy, unless otherwise compelled by law and/or Authorization of Release by Ms. Felder to provide information regarding Ms. Felder, an authorized representative of the Department of Records/Verification will only confirm the status of employment (*e.g.* active or inactive) and/or confirm dates of hire/termination and/or last position held with the District to inquirers such as prospective employers.

6. Ms. Felder specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6 and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding her teaching certification.

7. The parties respectively acknowledge that counsel has advised them and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

8. This Stipulation constitutes the full agreement between the parties.

9. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

10. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything that has happened up to now. It specifically includes, without limitation, all claims that Ms. Felder may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, with the exception of any claims pursuant to Workers Compensation.

11. This Stipulation is subject to approval by the State District Superintendent and the Commissioner of Education.

Dated: 3-10-00

Vyvian Felder

Dated: 3-10-00

Charles I. Auffant, Esq.
Attorney for Ms. Felder

Dated: 3/10/2000

Marion Bolden
State District Superintendent

Dated: 3/10/2000

Joseph Verga, Esq.
Associate Counsel
Newark Public Schools

March 10, 2000

Ms. Marion Bolden
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby resign my tenured teaching position with the State Operated School District of the City of Newark effective June 26, 2000.

Very truly yours,

Vyvian Felder

CERTIFICATION

I, VYVIAN FELDER, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

VYVIAN FELDER

DATE

The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139
Fax: 973-733-8771

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Marion A. Bolden
State District Superintendent

Hope R. Blackburn, Esq.
Interim General Counsel

Arsen Zartarian, Esq.
Joseph Verga, Esq.
Associate Counsel

David C. Hespe
Commissioner of Education

March 13, 2000

Honorable Margaret Hayden
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102-3011

Re: Vyvian Felder v. State Operated School District of Newark
OAL Docket No: 302-10/99

Dear Judge Hayden:

Enclosed please find a fully executed original of the Stipulation of Settlement regarding the above matter for submission to the Commissioner of Education. Thank you for your attention to this matter.

Very truly yours,

Joseph Verga
Associate Counsel

CC: Charles Auffant, Attorney for Ms. Felder

OAL DKT. NO. EDU 11528-99
AGENCY DKT. NO. 302-10/99

IN THE MATTER OF THE TENURE	:	
HEARING OF VYVIAN FELDER, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 20 2000

Date of Mailing: APR 20 2000

132-00

IN THE MATTER OF THE TENURE HEARING OF JOSEPH BROWN, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, GARDEN STATE CORRECTION FACILITY, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

April 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08931-99S

AGENCY DKT. NO. 309-10/99

NEW JERSEY DEPARTMENT OF CORRECTIONS, GARDEN STATE CORRECTION FACILITY, MERCER COUNTY,

Petitioner,

v.

JOSEPH BROWN,

Respondent.

Laura M. Todaro, Deputy Attorney General, for petitioner (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Colin M. Page, Esq., for respondent (Weissman and Mintz, attorneys)

Record Closed: March 8, 2000 Decided: March 16, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of tenure charges with the Commissioner of Education on October 7, 1999, by The New Jersey Department of Corrections ("petitioner") against Joseph Brown ("respondent") alleging conduct violating appropriate guidelines and procedures to be employed relative to the orderly operation of details under his supervision, more specifically in regard to security procedures designed to ensure the safety of staff and inmates assigned to the

details. The matter was transmitted to the Office of Administrative Law on November 5, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing in this case was partially held on January 26, 2000, and settlement is an appropriate resolution of the matter in light of the proofs and circumstances revealed at the hearing. The resolution properly considers the nature of Mr. Brown's conduct and the attending considerations.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement. The settlement properly balances the interests of all the parties.

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

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

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

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

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

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

March 16, 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

3-17-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

JOHN J. FARMER, JR.
Attorney General of New Jersey
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for Department of Corrections

By: Laura M. Todaro
Deputy Attorney General
(609) 292-6252

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DEPARTMENT OF CORRECTIONS,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	OAL DOCKET NO. EDUTH 08931-99S
v.	:	AGENCY REF. NO. 309-10/99
	:	
JOSEPH BROWN,	:	SETTLEMENT AGREEMENT
	:	
Respondent.	:	

This matter having been scheduled for a hearing before the Honorable Jeff Masin, A.L.J. on January 26, 2000, and the parties having come to an amicable resolution of the matter, the parties agree to settle this matter in accordance with the following terms:

1. The petitioner will withdraw its tenure charges.

2. The respondent will be reassigned to Central Office and report to Christine Laquidara, Director, Office of Educational Services, Department of Corrections.

3. All time between October 15, 1999 and January 31, 2000 will be recorded as an approved leave of absence without pay.

4. Respondent shall not receive any back pay, counsel fees, costs, or any other monetary relief as a result of this settlement.

5. Respondent shall retire from the Department of Corrections ("Department") upon reaching eligibility for his veterans pension, and shall not apply or reapply for a position within the Department.

6. Respondent shall receive the attached written reprimand for the incident giving rise to the tenure charges which will be placed in his personnel file. Respondent agrees to waive his right to appeal this reprimand.

7. Respondent's personnel file shall be amended to reflect the provisions of this settlement.

8. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

9. Respondent waives all claims, suits, or actions, whether known, unknown, vested or contingent, civil, criminal, or administrative, in law or in equity against the Department, Garden State Youth Correctional Facility, or their employees, agents, or assigns, including but not limited to those which could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the

Civil Rights Act of 1964, the Civil Rights Act of 1991, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, N.J.S.A. 11A:1-1 et seq., the Civil Service Regulations, N.J.A.C. 4A:1-1 et seq., and any conduct express or implied.

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

11. This agreement will only become effective when it is approved by the Commissioner of the Department of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

Authorization has been given by the Department to agree to this settlement, the parties have read this settlement agreement and freely and voluntarily agree to its provisions.

Kristine A. Lavelle
For the Appointing Authority
Dated: February 25, 2000

Respondent
Dated:

JOHN J. FARMER, Jr.
ATTORNEY GENERAL OF NEW JERSEY

By: Laura M. Todaro
Laura M. Todaro
Deputy Attorney General
Dated:

Rosemarie Cipparulo
Respondent's Representative
Dated: 3/3/00

CERTIFICATION

I, Joseph Brown, being the respondent in the above-captioned matter hereby certify that I have been represented in this matter by Colin M. Page, Esquire, that my representative has reviewed the foregoing settlement agreement with me and that I fully understand the meaning and terms of this agreement.

It is also my understanding that if the settlement agreement is approved by the Commissioner of the Department of Education, my claim as set forth in the above-captioned matter will terminate against the State of New Jersey Department of Corrections as long as the terms and conditions of this settlement agreement are met by the State of New Jersey.

Respondent

Dated:

To: Joseph Brown, Teacher I

From: Daniel Finlay, Assistant Supervisor of Education

Date: February 25, 2000

Re: Written Reprimand

On July 27, 1999 a knife and an altered hammer handle were discovered in your van. You told Investigator Leto that the knife had been discovered by an inmate on the grounds of Trenton High School and that you used it to open paint cans. You stated that you shortened the hammer handle after it was broken and used it to close paint cans. As you are aware, these items should not have been accessible to inmates as they create a security risk.

Your use of these implements and storage of them in your vehicle violated the following DOC and Garden State policies and procedures regarding the control of tools and reporting of contraband: NJAC 10A:3.0-6.1, NJAC 10A3-6.5, Human Resources Bulletin 84-17:B-2, B8, B-9, D-11, D-17, E-1 and Administrative Policy and Procedures #311-176.1, #GS 15.10.1, #GS 15.10.2. You are now on notice that these policies and procedures will be strictly enforced.

OAL DKT. NO EDU 8931-99
AGENCY DKT. NO. 309-10/99

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH BROWN, NEW	:	
JERSEY STATE DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
CORRECTIONS, GARDEN STATE	:	DECISION
CORRECTION FACILITY, MERCER	:	
COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure charge matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 20 2000

Date of Mailing: APR 20 2000

133-00

ANNE BOYD-HINTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 25, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9807-98
AGENCY DKT. NO. 391-8/98

ANNE BOYD-HINTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Wayne J. Oppito, Esq. for petitioner

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: March 7, 2000 Decided: March 8, 2000

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on October 29, 1998 for a hearing pursuant to *N.J.S.A.* 52:14B-1 3 et seq.

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

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

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

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

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

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

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

March 8, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 14, 2000
DATE

D. N. Centanni Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 2000
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
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CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

ANNE BOYD-HINTON, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 391-8/98 OAL Dkt. No. EDUOA 9807-98 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding petitioner's claims of violation of her tenure/seniority rights and of entitlement to appointment to a supervisory position in the respondent school district. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

1. The parties agree that this Stipulation of Settlement represents the compromise of disputed claims and is not an admission of liability or wrongdoing by either party.

2. The petitioner withdraws her petition in the within matter.

3. The petitioner agrees to relinquish all claims of entitlement to any position in the respondent Jersey City School District arising out of the abolishment of her position in July 1998.

4. The respondent Jersey City School District agrees to pay the petitioner Anne

Boyd-Hinton the amount of ten thousand dollars ($10,000.00) in full settlement of all claims in her petition.

5. The petitioner hereby releases and forever discharges the respondent Jersey City School District, its officers, employees and agents, from all pending and future claims and causes of action against the District, except for the suit now pending in the Superior Court of New Jersey which is captioned Hinton v. Alexander and bears the Docket No. HUD-L-4376-98.

6. The petitioner Anne Boyd-Hinton acknowledges that she has had the right and opportunity to discuss all aspects of this Stipulation with her attorney prior to signing it, that she has read and fully understands all of the terms of this Stipulation, and that she had entered into this Stipulation knowingly and voluntarily, without coercion or duress.

7. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

ANNE BOYD-HINTON
Petitioner

DATED: 2/24/00

WAYNE J. OPPITO, Esq.
Attorney for Petitioner

DATED: 2/28/00

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 3/3/00

OAL DKT. NO. EDU 9807-98
AGENCY DKT. NO. 391-8/98

ANNE BOYD-HINTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 25 2000

Date of Mailing: APR 25 2000

134-00

H.T., on behalf of minor child, A.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

April 25,2000

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11824-99
AGENCY DKT. NO. 308-10-99

H. T., ON BEHALF OF MINOR CHILD A.T.,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY

Susan E. DiMaria, Esq., for petitioner

Thomas M. McCormack, Esq., for respondent
(McCormack & Matthews, P.C.)

Record Closed: March 2, 2000 Decided: March 9, 2000

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, H. T., on behalf of minor child A.T., appeals the determination of the Township of Union Public Schools that A.T. was not being domiciled in the Township of Union and was not eligible for enrollment in the Union High School.

This matter was transmitted to the Office of Administrative Law (OAL) on November 18, 1999 for hearing as a contested case, pursuant to *N.J.S.A* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

This matter was set down for a hearing on March 6, 2000. Prior to the scheduled hearing date, the parties informed the administrative law judge that the matter had been settled. The parties have prepared the attached Stipulation of Settlement setting forth the terms of the settlement which the administrative law judge (ALJ) received on March 7, 2000.

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

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

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

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

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

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

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

March 9, 2000
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

March 14, 2000
DATE

D. N. Centanaitis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

McCORMACK & MATTHEWS, P.C.
A Professional Corporation
38 Roseland Avenue
Roseland, New Jersey 07068
(973) 228-7818
FAX (973) 228-0171
Attorneys for Respondent

H.T. on behalf of Minor Child, A.T.,	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Petitioner	:	Docket No. 308-10/99
vs.	:	
	:	STIPULATION OF SETTLEMENT
Board of Education of the Township of Union,	:	
Respondent.	:	

WHEREAS, on or about October 8, 1999, Helen Teofilovic,on behalf of Alexis Teofilovic, filed a petition before the Commissioner of Education appealing the determination of the Township of Union Public Schools that said Alexis Teofilovic, not being domiciled in the Township of Union, was not elibible for enrollment in the Union High School, and

WHEREAS, on or about October 26, 1999, an Answer was filed on behalf of the Township of Union Public Schools, and

WHEREAS, petitioner has been represented by Susan E. DiMaria, Esq., throughout this appeal and the respondent has

been represented by Thomas M. McCormack, Esq., throughout this appeal, and

WHEREAS, the parties, through their respective counsel, have reached an amicable agreement resolving all issues arising from said appeal, it is on this day of , 2000,

STIPULATED AND AGREED to by and between the parties as follows:

1. Based upon the documentary evidence produced by the appellant, the respondent hereby acknowledges the residency of the appellant and the subject minor child as being 471 Chestnut Street, Union, New Jersey and, as such, the respondent acknowledges that commencing with the September 1999 semester said child was in fact eligible to be enrolled in Union High School.

2. In light of the fact that it is hereby acknowledged and agreed that the subject child was domiciled in the Township of Union during the fall 1999 semester, the respondent expressly waives any claim for reimbursement of the tuition costs for the education of said child for the period commencing with the fall 1999 semester through and including the date of the execution of this agreement.

3. It is expressly understood and agreed by and between the parties that in the event the child shall cease to be

domiciled in the Township of Union, the respondent is free to pursue any and all legal remedies available to it with respect thereto.

4. Appellant releases respondent from any and all liability arising from respondent's investigation of appellant's residency and any other issue raised in the within litigation.

Dated: 2-29-2000

Attorney for Petitioner

by _____
SUSAN E. DiMARIA

McCORMACK & MATTHEWS, P.C.
Attorneys for Respondent

by _____
THOMAS M. McCORMACK

OAL DKT. NO. EDU 11824-99
AGENCY DKT. NO. 308-10/99

H.T., on behalf of minor child, A.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 25 2000

Date of Mailing: APR 25 2000

DANIEL CUPO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

April 27, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9808-98
AGENCY DKT. NO. 397-8/98

DANIEL CUPO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Ken Iwama, Assistant General Counsel, for respondent
(Charlotte Kitler, General Counsel, attorney)

Record Closed: March 8, 2000 Decided: March 9, 2000

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

These consolidated matters were transmitted to the Office of Administrative Law on October 29, 1998, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

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

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

March 9, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 14, 2000
DATE

D. M. Costanzo Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

al

KEN IWAMA
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231 Fax (201) 915-6230
Attorney for Respondent

DANIEL CUPO,	:	
Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	:	
STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	AGENCY REF. NO. 397-8/98 OAL DKT. NO. EDUOA 09808-98N
Respondent.	:	STIPULATION OF SETTLEMENT

In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement (hereinafter "Settlement") the Petitioner, Daniel Cupo, and Respondent, State-Operated School District of Jersey City (hereinafter "District"), hereby agree that the above-captioned matter and any and all other claims, rights and obligations between the undersigned parties shall be resolved as follows:

1. The parties agree that this Settlement represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by either party. This Settlement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation.

2. Daniel E. Cupo withdraws, with prejudice, his appeal of the District's withholding of his salary increment for the 1998-1999 school year for less than satisfactory performance during

2/22/00

3a

the preceding 1997-1998 school year, bearing Agency Reference Number 397-8/98 and OAL Docket Number EDUOA 09808-98N.

3. Daniel E. Cupo hereby releases and forever discharges the District, its successors and assigns, and its past, present or future officers, directors, agents or employees, from all pending and future claims and causes of action based upon the withholding of his salary increment for the 1998-1999 school year.

4. In the Memorandum of Agreement dated December 21, 1998, between the Jersey City Administrators and Supervisors Association and the State-Operated School District of Jersey City, Daniel E. Cupo would have been entitled to appeal to the State District Superintendent three (3) years after the withholding of his salary increment for the prospective restoration of same. Article 3B of the Memorandum of Agreement is attached as exhibit 1.

5. Pursuant to this Settlement, Daniel E. Cupo shall have the right to appeal to the State District Superintendent for the restoration of his salary increment two (2) years after the withholding of his salary increment pursuant to the terms and conditions of Article 3B of the Memorandum of Agreement attached as exhibit 1.

6. Mr. Cupo cannot be advanced a step on the salary guide as he is currently on the maximum step of the Elementary Principal salary guide. Should Mr. Cupo's increment be restored, the District will pay Mr. Cupo two thousand six hundred and thirty-eight dollars ($2,638), which represents the amount of money Mr. Cupo would have received had his salary increment not been withheld for the 1998-1999 school year.

7. The parties to this Settlement acknowledge that they have been represented by independent legal counsel of their own choice throughout all of the negotiations that preceded the

2/22/00

3b

execution of the Settlement and that they are satisfied with their representation. The parties and/or their representatives acknowledge that they have carefully read and understand all of the provisions herein and that they have voluntarily executed same without coercion and duress. The parties and/or their representatives further acknowledge that they are not taking any medication nor are they suffering from any physical or mental disabilities which would affect their understanding of the terms of this Settlement or their decision to enter into this Settlement.

8. This Settlement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties.

9. This Settlement shall be effective only upon the final approval of the State District Superintendent and upon the final approval of the Commissioner of Education should same be required.

Ken Iwama
Assistant General Counsel for
Respondent State-Operated School
District of Jersey City
Date: 3/8/00

Philip Feintuch
Attorney for Petitioner
Daniel E. Cupo
Date: 3/7/00

Daniel R. Cupo
Daniel E. Cupo
Petitioner
Date: 3/15/2000

2/22/00

3c

MEMORANDUM OF AGREEMENT BETWEEN THE JERSEY CITY ADMINISTRATORS AND SUPERVISORS ASSOCIATION AND THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY

The Jersey City Administrators and Supervisors Association (hereinafter "Association") and the State-Operated School District of Jersey City (hereinafter "District") agree to the following terms for a collective negotiations agreement, for the term of the contract to be established, subject to ratification by the Association and the State District Superintendent and Commissioner of Education. The Association and the District agree to recommend the terms for ratification.

ARTICLE 1 (modify as follows)

A. The District hereby recognizes the Association as the exclusive and sole bargaining representative for all personnel in the bargaining unit as follows:

Directors
[delete Assistant Directors]
Supervisors
[delete Assistant Supervisors]
Principals
Vice/Assistant Principals

ARTICLE 3 (modify as follows)

ASSOCIATION RIGHTS AND RESPONSIBILITIES

A. All responsibilities, duties, prerogatives, and privileges therefore exercised and enjoyed by Administrators and not specifically restricted from them or assigned to other parties are understood to be continued as tradition has dictated.

B. If the increment of an administrator is withheld, the administrator shall have the right to request a review after three (3) years of performance for the prospective restoration of the increment. The appeal shall be made to the State District Superintendent or designee. The State District Superintendent or designee shall review the three (3) years performance of the administrator. If the administrator's performance has been fully improved to a level of acceptable or better in all areas, the increment may be restored prospectively in the sole discretion of the State District Superintendent or designee. The State District Superintendent or designee shall retain the discretion to restore the increment sooner, A denial shall not be subject to the grievance procedure.

2/22/00

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OAL DKT. NO. EDU 9808-98
AGENCY DKT. NO. 397-8/98

DANIEL CUPO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 27 2000

Date of Mailing: APR 27 2000

A.J.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

May 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8807-99

AGENCY DKT. NO. 327-10/99

A.J.G. ON BEHALF OF MINOR CHILD,

M.G.,

Petitioner,

v.

BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

A.J.G., petitioner, *pro se*

Louis Greco, Esq. for respondent

Record Closed: March 10, 2000 Decided: March 14, 2000

BEFORE **EDGAR R. HOLMES** ALJ:

This matter was transmitted to the Office of Administrative Law on October 29, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

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

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

3/14/00
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3-16-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

		Commissioner of Education
Gelwicks	:	
	:	EDU 8807-99
vs.	:	
	:	
Greater Egg Harbor Regional	:	STIPULATION of DISMISSAL
	:	
	:	

In that Petitioner agrees to provide her own transportation for M.G. for the remainder of the school year 1999-2000 the parties agree to dismiss this case.

ANNA JONES

Louis J. Greco, Esq.
Attorney For Respondent

DATE: March 10, 2000

OAL DKT. NO. EDU 8807-99
AGENCY DKT. NO. 327-10/99

A.J.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 01 2000

Date of Mailing: MAY 02 2000

B.G., on behalf of minor child, J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY *ET AL.*,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 28, 2000

00 APR 18 PM 3:29
CONTROVERSIES AND DISPUTES

WILLIAM M. FETKY, ESQ.
22 Kirkpatrick Street
P.O. Box 915
New Brunswick, New Jersey 08903
Telephone: 732-545-7755
Attorney for Petitioner Belinda Giles

BELINDA GILES, Guardian ad Litem of JAMES GILES,	:OFFICE OF ADMINISTRATIVE :AGENCY REF. NO. 84-3/00
Petitioner,	:OAL DKT. NO. EDU 2046-00
-v-	:ORDER GRANTING INTERIM RELIEF
TIMONTHY M. O'HALLORAN, NEIL P. HORNE, and SOMERVILLE SOMERVILLE BOARD OF EDUCATION	
Respondents.	

This matter being opened to the Office of Administrative Law before Hon. Robert Miller, A.L.J., on Thursday, April 6, 2000, by William M. Fetky, Esq., attorney for Petitioner, Allan Marain, Esq., appearing, and Respondents being represented by McDonald, Rogers & Rizzolo, Esqs. Michael J. Rogers, Esq., appearing, on the application of Petitioner for interim relief, and the Court having reviewed the parties' moving papers and listened to argument of counsel, and for the reasons stated on the record,

It is, on this 13 day of April, 2000

ORDERED AS FOLLOWS:

1. The Somerville Board of Education will reinstate James Giles to regular classes at the Somerville High School effective Monday, April 10, 2000;

2. Should the Somerville Board of Education again suspend James Giles, it will provide James Giles:

a. Written notice of any charge on which the suspension is based;

b. A written statement of the factual allegations on which any charges are based;

c. The names and addresses (or means of contact) of any person with knowledge of relevant facts;

d. A copy of any relevant documents;

e. Notice of a Board of Education hearing, during which James Giles may confront any witnesses and evidence against him and call witnesses and offer evidence in his defense;

f. A Board of Education hearing, during which he may confront any witness and evidence against him and he may call any witness and offer evidence in his defense and, immediately after which, the Board of Education will issue a decision on he charge and punishment and notify James Giles of that decision;

3. ~~On _____, 2000~~, the attorneys and the Court will engage in a telephone conference to set any ~~additional~~ hearings days that may be necessary;

4. This Order may be reviewed by the Commissioner of the Department of Education, either upon interlocutory review, pursuant to N.J.A.C.1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6; and

5. Petitioner will serve a signed a copy of this Order upon Respondents pursuant to applicable Regulations.

Hon. Robert Miller, A.L.J.

OAL DKT. NO. EDU 2046-00
AGENCY DKT. NO. 84-3/00

B.G., on behalf of minor child, J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY *ET AL.*,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on April 6, 2000, along with the order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner affirms the order granting emergent relief as he concurs with the ALJ's hearing determination that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within order of the ALJ is hereby affirmed. This matter is being returned to the OAL for further proceedings, if any, necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: APR 28 2000

Date of Mailing: APR 28 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, AND MICHAEL EDWARDS, PRESIDENT OF THE BERLIN TOWNSHIP BOARD OF EDUCATION, CAMDEN COUNTY, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
RALPH CONDO IN HIS CAPACITY AS A MEMBER OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND A MEMBER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, RESPONDENT.	:	DECISION

May 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00426-99S

AGENCY DKT. NO. 554-12/98

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, CAMDEN COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY AND MICHAEL EDWARDS, PRESIDENT OF THE BERLIN TOWNSHIP BOARD OF EDUCATION,

Petitioners,

v.

RALPH CONDO IN HIS CAPACITY AS A MEMBER OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY

AND A MEMBER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioners (Porzio, Bromberg and Newman, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Sumners, George and Dortch, attorneys)

Record Closed: March 6, 2000 Decided: March 15, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Verified Petition by Berlin Township Board of Education, Clementon Board of Education, Lindenwold Board of Education, Pine Hill Board of Education, Winslow Township Board of Education and Michael Edwards, President of the Berlin Township Board of Education, ("petitioners") with the Commissioner of Education on December 18, 1999, seeking to remove Ralph Condo, ("respondent") from the Lower Camden County Regional High School District Board of Education. The matter was transmitted to the Office of Administrative Law on February 3, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

March 15, 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

3-16-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & ROSEN,
A Professional Corporation
103 Eisenhower Parkway
Roseland, New Jersey 07068-1072
(973) 228-9600
Attorneys for Petitioners

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BERLIN TOWNSHIP BOARD OF EDUCATION, CLEMENTON BOARD OF EDUCATION EDUCATION, LINDENWOLD BOARD OF EDUCATION, PINE HILL BOARD OF EDUCATION, WINSLOW TOWNSHIP BOARD OF EDUCATION and MICHAEL EDWARDS, PRESIDENT OF THE BERLIN TOWNSHIP BOARD OF EDUCATION Petitioners, v. RALPH CONDO, in his capacity as a member of the Lower Camden County Regional High School District No. 1 Board of Education and a member of the Waterford Board of Education, Respondent.	:BEFORE THE COMMISSIONER OF :EDUCATION, :STATE OF NEW JERSEY : :AGENCY DOCKET NO.: 554-12/98 :OAL DOCKET NO. EDU OA 426-99S

STIPULATION OF SETTLEMENT

This action having been filed on behalf of petitioners Berlin Township Board of Education, Clementon Board of Education, Lindenwold Board of Education, Pine Hill Board of Education, Winslow Township Board of Education and Michael Edwards, President of the Berlin Township Board of Education, by and through its attorneys Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C.; and an answer denying the essence of the allegations having been filed by respondent Ralph Condo through his attorney, Thomas W. Sumners, Jr. of Sumners

George & Dortch, P.C.; and the circumstances which led to the filing of the petition having changed (not at the least of which is the Waterford Township Board of Education's decision not to continue as a party to the litigation which led to the alleged conflicts); and the parties having engaged in settlement discussions; and the parties being mutually desirous of a cost-effective resolution,

IT IS NOW THEREFORE, RESOLVED by and between the parties as follows:

1. The instant action be and hereby is dismissed with prejudice.

2. Mr. Condo shall recuse himself from any executive session discussion and abstain from any vote regarding the matters at issue in In the Matter of the Dissolution of Lower Camden County Regional High School District #1, OAL Docket No. EDU-4210-99S/Agency Reference No. 377-8/98 and State Board Docket No. 16-99. However, Mr. Condo shall not be precluded from participation in any public discussion regarding same.

3. In and of itself, this Agreement does not bar Mr. Condo from participating in any action or discussion, in public or private session, as to any other matters which may come before him in his capacity as a member of the Lower Camden County Regional High School District Board and as a member of the Waterford Township Board of Education. After final execution, copies of same shall be served on the Board Secretary and Board Solicitor for both districts so that the terms of this agreement will be known to them.

4. The parties recognize and agree that the making of this Stipulation of Settlement is not intended to and does not constitute or imply an admission of liability of any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or equitable theory, whether contractual, common law, statutory or otherwise. The parties agree that this Stipulati

of Settlement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same.

5. The parties acknowledge that this Agreement shall be final only upon the written approval of the Commissioner of Education.

RAVIN, SARASOHN, COOK
BAUMGARTEN, FISCH & ROSEN, P.C.
Attorneys for Petitioners

By: Vito A. Gagliardi
Vito A. Gagliardi, Jr. Esq.

Ralph J Condo
Ralph Condo

SUMNERS, GEORGE & DORTCH, P.C.
Attorneys for Respondent

By: Thomas W. Sumners
Thomas W. Sumners, Jr., Esq.

DATED:

VAG/5142/2/PLDG/Doc # 9159 v1

OAL DKT. NO. EDU 00426-99
AGENCY DKT. NO. 554-12/98

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, BOARD OF EDUCATION OF THE BOROUGH OF CLEMENTON, BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, AND MICHAEL EDWARDS, PRESIDENT OF THE BERLIN TOWNSHIP BOARD OF EDUCATION, CAMDEN COUNTY, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
RALPH CONDO IN HIS CAPACITY AS A MEMBER OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND A MEMBER OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY, RESPONDENT.	:	DECISION

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

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

IT IS SO ORDERED.

MAY 01 2000

COMMISSIONER OF EDUCATION

Date of Decision: MAY 01 2000

Date of Mailing: MAY 01 2000

IN THE MATTER OF THE TENURE HEARING OF NEAL A. ERCOLANO, BOARD OF EDUCATION OF BRANCHBURG TOWNSHIP, SOMERSET COUNTY.

And

NEAL A. ERCOLANO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNHIP OF BRANCHBURG, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

In consolidated matters, the Board certified tenure charges of unbecoming conduct against teaching staff member for allegedly assaulting a student and Mr. Ercolano contested the withholding of his increment for the 1997-98 school year. ALJ concluded that Mr. Ercolano forfeited his teaching position due to his conviction. Moreover, the ALJ upheld the increment withholding. Commissioner reversed the initial decision in that, pursuant to N.J.S.A. 2C:51-2, as amended by *P.L.* 1995, *c.* 250, the Commissioner does noes not have jurisdiction to enter orders of forfeitures of public employment, as such orders may now only be issued by the sentencing court. Commissioner remanded this matter to OAL to move forward on both the Board's tenure charges and the increment withholding challenge.

On remand, the ALJ concluded that Mr. Ercolano's conviction constituted conduct unbecoming a teacher and that he should be removed from his position. ALJ also concluded that Mr. Ercolano presented no convincing arguments to show that the Board's action as to the withholding of the increment for the 1997-98 school year was untimely or that the Board's action was arbitrary, capricious or unreasonable. ALJ ordered that Mr. Ercolano be removed from his position, that the decision to withhold his salary increment for the 1997-98 school year be affirmed and that he be paid salary payments retroactive to February 27, 1998, the date on which the stay of his salary payments ended.

Commissioner adopted findings and determination in Initial Decision as his own. Commissioner dismissed Mr. Ercolano from his tenured position as teacher and referred the matter to the State Board of Examiners for action against his certificate as it deemed appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6138-98
(REMAND OF EDU 8422-97 and
EDU 8509-97)
AGENCY DKT. NO. 321-9/97 and
334-9/97

IN THE MATTER OF THE TENURE HEARING OF NEAL A. ERCOLANO, BOARD OF EDUCATION OF BRANCHBURG TOWNSHIP, SOMERSET COUNTY,

And

NEAL A. ERCOLANO,

Petitioner,

v.

BOARD OF EDUCATION OF BRANCHBURG TOWNSHIP, SOMERSET COUNTY,

Respondent.

David Rubin, Esq., for the Board of Education of Branchburg Township, Somerset County

David B. Rand and **John E. Croot, Jr.**, Esq., for Neal A. Ercolano (Rand, Algeier, Tosti & Woodruff, P.C., attorneys)

Record Closed: August 24, 1999 Decided: March 13, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charge of unbecoming conduct filed against Neal A. Ercolano and the withholding of Mr. Ercolano's salary increment for the 1997-98 school year. Both actions were taken after Mr. Ercolano was convicted of assaulting a student, a disorderly persons offense pursuant to *N.J.S.A.* 2C:12-1(a). The case was initially transmitted to the Office of Administrative Law (OAL) as two separate cases in October 1997, EDU 8422-99 and EDU 8509-97. The cases were consolidated.

David Rubin, Esq., on behalf of the Board of Education of Branchburg Township (Board) filed a motion for summary decision. Brian Miller Adams, Esq., who represented Mr. Ercolano at that time, opposed the motion. After reviewing the briefs of the parties, I issued an initial decision on April 7, 1998, and I concluded that Mr. Ercolano had forfeited his teaching position, pursuant to *N.J.S.A.* 2C:51-2, due to his criminal conviction, and that the Board's action as to the withholding of the increment was timely and was not arbitrary, capricious or unreasonable.

The Commissioner of the Department of Education (Commissioner) reversed my initial decision on June 25, 1998, and held that since the 1995 amendment to *N.J.S.A.* 2C:51-2, the Commissioner does not have the jurisdiction to enter orders of forfeiture of public employment and that such orders may now only be issued by the sentencing court. The Commissioner remanded the matter to the OAL. The Commissioner stated that the Board could again move for summary decision as to the tenure charge in the OAL matter or seek an order of forfeiture in an appropriate forum.

The matter was remanded to the OAL on July 10, 1998. I had telephone conferences about the case with Mr. Rubin, on behalf of the Board, and Russell J. Schumacher, Esq., who at that time represented Mr. Ercolano, on July 23, 1998 and September 16, 1998. David B. Rand, Esq., and John E. Croot, Jr., Esq., now represent Mr. Ercolano.

The Board again filed a motion for summary decision. Mr. Ercolano filed a response and a cross-motion for the reinstatement of his salary payments. After the receipt of the briefs from

the parties, the record in this matter closed on August 24, 1999. At my request, the time for the issuance of my initial decision was extended until March 21, 2000.

FINDINGS OF FACT

I **FIND** that the facts in this matter are not in dispute.

Mr. Ercolano was a tenured teacher employed by the Board for more than twenty years. Prior to January 17, 1996, Mr. Ercolano was never accused of an improper touching of a student.

An incident occurred between Mr. Ercolano and J.F., a sixth grade student at the Branchburg Central School on January 17, 1996. During a meeting on January 18, 1996 with J. Harry Westerholm, a Vice-Principal, J.F. and his mother, Mr. Ercolano apologized but did not admit any wrongdoing. The only action taken by the principal, George T. Revasy, was to write a letter, dated January 25, 1996, to Mr. Ercolano recommending that Mr. Ercolano be more sensitive to the needs of the students and recognize that student's feelings are very easily offended (A-4). The matter was not referred to the Division of Youth and Family Services.

On or about October 10, 1996, J.F.'s mother filed a complaint against Mr. Ercolano charging him with a violation of *N.J.S.A.* 2C:12-1a, simple assault (R-1). Specifically, the complaint stated that on January 17, 1996, Mr. Ercolano assaulted J.F. by lifting him off the floor and slamming him against a wall in the Branchburg Central School. Mr. Ercolano pled not guilty and a trial took place before Municipal Court Judge William T. Kelleher, Jr., on April 23, 1997.

During the municipal court trial, J.F. testified that Mr. Ercolano was not one of his teachers. J.F. stated that he left the study hall on January 18, 1996 to go to the bathroom without first getting permission. When he was returning to the study hall, J.F. testified:

> Answer: I was - - I saw a friend, Jennifer Meyer, and I said, boo. And Mr. Ercolano said, if you do that again, this is what – this is what will happen to you. And he – and he pulled me over; like he called me over and I did, and I went over. And he tried to pick me

up the first time, the second time, he –he picked me up and pushed me against the wall.

Question: Describe how he picked you up. What did he do?

Answer: Right underneath my arms, with his hands.

Question: And what did he do once he picked up?

Answer: He pushed me against the wall.

Question: How did it feel when he pushed you against the wall?

Answer: It hurt.

Question: And what were you thinking at that time?

Answer: I was afraid that he was going to hurt me.

[R-2 at page 7, lines 7 through 20]

According to J.F., he did not mention the incident to anyone at school but told his mother when he arrived at home (R-2 at page 8). J.F. stated that his back hurt him after the incident but he was not taken to see a doctor (R-2 at pages 7, 15-6).

M.F., J.F.'s mother, testified that J.F. was upset when he came home and told her about the incident (R-2 at pages 18, 24). On the next day, M.F. and her son met with Mr. Westerholm regarding the matter. Later, Mr. Ercolano joined them. According to M.F., Mr. Ercolano stated that he was kidding around, admitted that he made a mistake and had "screwed up," and apologized for his action (R-2 at pages 19-20). Based on his comments, M.F. assumed that Mr. Ercolano was admitting that he acted improperly (R-2 at pages 23-24).

During his testimony, Mr. Ercolano stated that J.F. was running towards him and that he reacted by grabbing J.F. by the arm and that J.F.'s momentum carried him into the wall (R-2 at pages 49-50, 57). Mr. Ercolano described it as a defensive reaction (R-2 at page 56). According to Mr. Ercolano, he has a bad back and denied that he could lift J.F., who weighed about 97 pounds (R-2 at page 50). Also, Mr. Ercolano denied doing anything wrong and denied that he was kidding around with J.F. (R-2 at page 65).

Also at the trial, Mr. Ercolano stated that he did not try to explain what had occurred when he met with J.F., J.F.'s mother, and Mr. Westerholm since J.F. and his mother were upset. He apologized for grabbing J.F. (R-2 at pages 52-3). Thereafter, in a conversation with Mr. Westerholm, he jokingly offered to cook a meal for J.F.'s family (R-2 at pages 65-6).

Mr. Westerholm stated that he wrote a memo after his meeting with Mr. Ercolano, J.F. and J.F.'s mother, and used that memo to refresh his memory. Mr. Westerholm stated that he spoke briefly to J.F. and his mother and then he spoke to Mr. Ercolano in the hallway and described J.F.'s accusation (R-2 at page 30). When he re-entered the room with Mr. Ercolano, Mr. Westerholm stated that he had J.F. restate his version of the incident. Mr. Westerholm testified that Mr. Ercolano stated that he was sorry, that it should not have happened, that he was just kidding and he apologized for his action (R-2 at pages 31-2). Mr. Westerholm stated that Mr. Ercolano later told him that he knew that he should not have touched a student and was sorry about the incident, and offered to cook a meal for the J.F.'s family (R-2 at pages 32-33). Mr. Westerholm stated that Mr. Ercolano never denied J.F.'s statement as to what had occurred (R-2 at page 33).

After hearing the testimony of the witnesses, Judge Kelleher rendered a decision on the record. He referred to the simple assault statute, *N.J.S.A.* 2C:12-1(a) which provides:

> Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
> (2) Negligently causes bodily injury to another with a deadly weapon; or
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

Judge Kelleher held:

> I am satisfied, Mr. Ercolano, that the contact of touching between you and [J.F.] does constitute a simple assault. I'm not satisfied by the testimony that I've heard from you that indicates

> that, defensively or reactively, you reached out to deflect this running child and subsequently at the meeting, when confronted with something altogether different, actively grabbing the child, you apologized and don't deny it.
>
> And maybe it should have gone away. And maybe, in a less complicated, less litigious world, it would have gone away. But I'm satisfied that, on the date in question, you grabbed the child and you pushed the child against the wall, and the child was placed in fear of bodily harm. Making those findings and being satisfied as to that, I find that there was a simple assault.
>
> [R-2 at page 77, lines 24-5 and page 78, lines 1 through 13]

Judge Kelleher found Mr. Ercolano guilty of simple assault, which is a disorderly persons offense, and fined him $100.00 and imposed court costs and fees. Mr. Ercolano filed an appeal but later withdrew it.

Prior to the January 17, 1996 incident, Mr. Ercolano had asked for a voluntary leave of absence without pay, starting on January 27, 1996. This leave request was approved and the Board later approved Mr. Ercolano's request for an extension of the leave of absence for the entire 1996-97 school year (A-5).

At its June 16, 1997 meeting, the Board voted to withhold Mr. Ercolano's salary increment for the 1997-98 school year based on the assault conviction. Also based on the conviction, at its September 2, 1997 meeting, the Board certified the tenure charge against Mr. Ercolano.

Prior to the filing of the tenure charge, the Board asked the municipal court to declare Mr. Ercolano's position forfeited pursuant to *N.J.S.A.* .2C:51-2. Judge Kelleher did not consider the request until September 24, 1997. When informed that the tenure charge had been filed, Judge Kelleher declined to exercise jurisdiction over the issue and opined that the matter should be addressed by the Commissioner.

As stated, the Board certified the tenure charge on September 2, 1997, and suspended Mr. Ercolano without pay. After the lapse of the statutory 120 days, pursuant to *N.J.S.A.* 18A:66-14,

Mr. Ercolano's salary payments resumed and continued until the payments were temporarily stayed pursuant to an agreement of the parties on January 17, 1998, to give Mr. Ercolano the opportunity to resolve the forfeiture issue on the municipal court level.

The Board has not reinstated Mr. Ercolano's salary payments. After the remand of the matter to the OAL, the Board filed another motion with the Branchburg Municipal Court seeking forfeiture and also filed a motion for summary decision in this matter.

It was agreed that the motion for summary decision and Mr. Ercolano's cross-motion as to his salary payments would be held in abeyance pending a decision of the Branchburg Municipal Court as to forfeiture.

On March 2, 1999, Municipal Court Judge William T. Kelleher, Jr., issued an order declaring Mr. Ercolano's employment forfeited as of April 23, 1997, the date of his conviction. Judge Kelleher held that the forfeiture was "mandatory as a collateral consequence of the conviction" and stated that while he found "this consequence perhaps unduly harsh" it was "mandated by the law" (R-3, letter to the parties from Judge Kelleher, dated March 2, 1999).

By letter dated March 4, 1999, Mr. Rubin argued that the matter before me was moot based on Judge Kelleher's order. By letter dated March 9, 1999, Mr. Rand disagreed, and stated that there were still several open issues and that Mr. Ercolano was considering an appeal as to Judge Kelleher's order.

Mr. Ercolano filed an appeal in the Law Division of the Superior Court and on July 2, 1999 the parties appeared before Superior Court Judge Leonard Arnold (A-10). Judge Arnold vacated the forfeiture order but did not foreclose another application. Judge Arnold held:

(1) The Board had no standing to ask the municipal court to consider forfeiture sometime after the finding of guilty pursuant to *N.J.S.A.* 2C:51-2.

(2) Judge Kelleher incorrectly found that forfeiture was a mandatory collateral consequence of the assault conviction and that Judge Kelleher had the

discretionary right to decide whether forfeiture was appropriate pursuant to *N.J.S.A* 2C:51-2.

(3) Judge Kelleher should have offered Mr. Ercolano a hearing as to the issue of whether the conviction touched on his employment consistent with *Moore v. Youth Correctional Institute*, 119 *N.J.* 256 (1990).

Judge Arnold appeared to have some concern about the fact that the possibility of forfeiture was not brought up during the hearing on the assault charge and the ability of the criminal court to make a judgment as to whether a criminal action touched on the person's public employment since the employer was not a party in the criminal case (A-10).

The Board filed an appeal with the Appellate Division in August 1999, and there has been no decision on the appeal.

CONCLUSIONS OF LAW

On behalf of the Board, Mr. Rubin argued that the matter is appropriate for summary decision since there are no factual disputes. *N.J.A.C.* 1:1-12.5(b), *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), *Brill v. Guardian Life Ins. Of America*, 142 *N.J.* 520 (1995).

Mr. Rubin disagreed with Mr. Croot's argument that Mr. Ercolano is entitled to a hearing in this case. He noted that the Commissioner in his remand recognized that a motion for summary decision could be filed as to a tenure matter. Mr. Rubin stated that the Commissioner in his final decision in *In the Matter of the Tenure Hearing of Alan P. Tighe*, OAL DKT. NO. EDU 6704-98 (May 3, 1999) held that a plenary hearing is required only when there is a genuine issue of fact which can only be determined in an evidentiary hearing. Also, Mr. Rubin noted that Administrative Law Judge Masin in *Frank Carney v. Board of Education of the City of Union City*, OAL DKT. No. EDU 9122-97, Agency Dkt. No. 287-8/97 (decided July 14, 1999), modified by the Commissioner (August 30, 1999) <http://www.state.nj.us/njded/legal/index.html>, denied the board's motion to remove an employee based on the forfeiture

statute but noted that "the municipal court findings would likely serve to estop any dispute over the facts of the harassment and serve to support an application for summary decision."

As to the tenure charge, Mr. Rubin argued that Mr. Ercolano was found guilty of assault beyond a reasonable doubt in the Branchburg Municipal Court after a trial and that the conviction is depostive of the issue of whether an assault took place and cited the decision in the *Matter of Goldberg*, 105 *N.J.* 278, 280 (1978). Mr. Rubin noted that the court has held that a respondent in a tenure matter is estopped from relitigating the facts underlying a municipal court conviction, *Matter of Tanelli*, 194 *N.J. Super.* 492, 498 (App. Div.), certif. denied, 99 N.J. 181 (1984).

Mr. Rubin argued that Mr. Ercolano's conduct during the January 17, 1996 incident clearly constitutes unbecoming conduct since the assault conviction means that the municipal court judge concluded that Mr. Ercolano attempted to cause or purposely, knowingly or recklessly caused bodily injury to J.F., citing the provisions of *N.J.S.A.* 2C:12-1(a). Mr. Rubin recognized that in some cases a fact finding hearing regarding the nexus between the offense and the employment is appropriate but argued that in this mater a hearing is unnecessary since Mr. Ercolano's assault of a student on school grounds during a school day clearly constitutes conduct unbecoming a teacher.

Mr. Rubin argued that Mr. Ercolano had a full and fair opportunity to present all relevant information, including any evidence of mitigation at the municipal court hearing. Also, Mr. Ercolano had the opportunity to appeal his conviction and decided not to pursue the matter. Even though Mr. Ercolano's record shows no prior similar discipline, Mr. Rubin argued that the courts have held that one incident if sufficiently serious warrants removal. Mr. Rubin argued that the assault conviction warrants Mr. Ercolano's removal pursuant to the tenure statute.

In addition, Mr. Rubin argued that since Mr. Ercolano was on a leave of absence without pay, there was no need to initiate the disciplinary actions until after the April 23, 1997 conviction.

Mr. Coots argued that a hearing is required as to the tenure charge and the withholding of increment, and that the case cited by the Board, *Matter of Goldberg*, is distinguishable on the

facts. Mr. Croot noted that in the *Tanelli* case, the State Board of Education remanded the matter for a hearing as to whether the basis for the conviction constituted unbecoming conduct. Mr. Croots argued that the guilty finding in the municipal court is not *res judicata,* and even if the assault conviction is *res judicata*, Mr. Croots argued that Mr. Ercolano is entitled to a hearing on the nature and severity of the offense, mitigating circumstances, prior conduct and character in order to decide the severity of the discipline to be imposed, and cited the decisions in *In re Addonizio*, 95 *N.J.* 121, 123 (1984), *In re Rosen,* 88 N.J. 1, 3, (1981), *In Re Tenure Hearing of Peter J. Romanoli, School. District of Willingboro,* 1975 SLD 352, *Bd. of Ed. of Wallington v. Thomas L. Harty*, 1960-61 SLD 199, *In re Tenure Hearing of Harry I. Buch, School District of Township of Delanco*, 1977 SLD 95.

Mr. Croots argued that when Mr. Ercolano grabbed J.F. it was a reflex action intended to stop a running student and to protect himself and anyone else in the hallway. Mr. Croots argued that Mr. Ercolano's apology was not an admission of guilt but was offered as a means to defuse the situation.

Mr. Croot noted that even though Judge Kelleher found Mr. Ercolano guilty of assault he expressed a reluctance and stated that "in a less complicated, less litigious world, it would have gone away" (Transcript, p. 77 lines 7-9). Also in his forfeiture order, Judge Kelleher suggested that forfeiture was "perhaps unduly harsh" (R-3).

I agree with Mr. Rubin's arguments. I **CONCLUDE** that Mr. Ercolano's conviction constitutes conduct unbecoming a teacher and that he should be removed from his position. Mr. Ercolano was convicted of assaulting J.F., the municipal court judge found that Mr. Ercolano attempted to cause or purposely, knowingly or recklessly caused bodily injury to J.F. During the municipal hearing, Mr. Ercolano was given ample opportunity to present his version of what happened as well as any mitigating circumstances.

As to the penalty to be imposed, the courts have clearly recognized that one single isolated incident may be severe enough to warrant removal. *Irvington Twp. School District v. Smith*, 93 *N.J.A.R.* 2d (EDU) 526, Redcay *v. State Bd. of Education*, 131 *N.J.L.* 326 (E&A 1944). This is such an incident.

As to the withholding of Mr. Ercolano's salary increment for the 1997-98 school year, Mr. Rubin argued that the Board had more than sufficient justification for its action based on Mr. Ercolano's assault conviction.

In his petition regarding the increment withholding matter, Mr. Ercolano alleged that the notice of the Board's decision to withhold his increment was not timely, pursuant to *N.J.S.A.* 18A:29-14, and that the Board's decision was arbitrary, capricious and unreasonable.

Having reviewed the arguments of the parties, I **CONCLUDE** that Mr. Ercolano has presented no convincing arguments to show that the Board's action as to the withholding of the increment was untimely or that the Board's action was arbitrary, capricious or unreasonable.

In his cross-motion, Mr. Croot argued that Mr. Ercolano is entitled to back pay retroactive to February 27, 1998, the date the record closed as to my first initial decision in this matter.

Mr. Coot argued that Mr. Ercolano agreed to a temporary stay of his salary payments while there was an attempt to resolve the matter of forfeiture on the municipal court level and that this attempt ended as of February 27, 1998, when the parties and I agreed to close the record. Mr. Croot noted that in my initial decision dated April 7, 1998, I stated that there would be a stay of Mr. Ercolano's salary payments until a "decision is made to proceed with this matter" (A-3, p.2). Mr. Coot argued that Mr. Ercolano is entitled to salary payments pursuant to *N.J.S.A.* 18A:6-14, and he should be granted retroactive payments back to February 27, 1998.

In his certification, dated August 4, 1999, Mr. Rubin confirmed that during a telephone conference on December 18, 1997, it was agreed that Mr. Ercolano's salary payments would be stayed while his attorney attempted to get a waiver of forfeiture (A-3). Mr. Rubin memorized the agreement in a letter dated December 19, 1997 (letter attached to Mr. Rubin's certification). In this letter, he noted that it had been agreed that:

> In the meanwhile, the Board's obligation to continue Mr. Ercolano's salary will be stayed effective January 17, 1998 and

> until the forfeiture issue is disposed of by either your honor or the municipal court judge.
> [A-3]

Mr. Rubin stated that Mr. Adams, who represented Mr. Ercolano at that time, never questioned his statement of the agreement.

Mr. Rubin argued that Mr. Ercolano is only entitled to the resumption of his salary payments as of March 2, 1999, the date on which Municipal Court Judge Kelleher decided the issue of forfeiture. Mr. Rubin argued that *N.J.S.A.* 2C:51-2(c) provides that if the forfeiture decision is reversed, reinstatement of compensation is only retroactive till the date of forfeiture, which in this case was decided on March 2, 1999. Mr. Rubin argued that this matter was further delayed because of the illness of Mr. Schumacher. Mr. Rubin argued that the Board is entitled to an offset for any income from substitute employment while Mr. Ercolano was suspended pursuant to *N.J.S.A.* 18A:6-14 and asked for discovery as to Mr. Ercolano's earned income during the period of suspension.

In response, Mr. Croot argued that Mr. Rubin's letter of December 19, 1997 misstated the agreement as to the duration of the stay and argued that it is not significant that no one questioned the contents of Mr. Rubin's letter. In his certification, Mr. Ercolano stated that his understanding was that his salary payments would resume in February 1998 (A-8). In his certification, Mr. Adams stated that the stay of Mr. Ercolano's salary payments was not a waiver and that Mr. Ercolano is entitled to salary payments retroactive to September 2, 1997 (A-9).

Mr. Croot admitted that Mr. Schumacher asked for several extensions, due to illness but denied that Mr. Schumacher acknowledged that these extensions would stay any salary payments due to Mr. Ercolano.

Further, Mr. Croot argued that the Board is not entitled to any set off pursuant to *N.J.S.A.* 18A:6-14. Mr. Croot stated that Mr. Ercolano has owned and operated the Brook Run Farm, a fruit, vegetable, nursing and landscaping business since 1977 and continued to operate it after his suspension. Mr. Croot stated that Mr. Ercolano did not assume any substitution employment during his suspension (A-8).

I agree with Mr. Croot's argument as to the duration of the temporary stay of Mr. Ercolano's salary payments. It was my directive that the stay would end when Mr. Adam's efforts to resolve the forfeiture matter on the municipal court level ended and I proceeded with a consideration of the case. This took place when the record initially closed on February 27, 1998.

I did not include the salary issue in my first initial decision since I ruled that Mr. Ercolano had forfeited his position upon conviction pursuant to *N.J.S.A.* 2C:51-2(b)(1). Forfeiture is not an issue in this matter and as stated the case relating to the question of forfeiture is now pending in the Appellate Division.

Under the tenure statute, *N.J.S.A.* 18A:6-14, Mr. Ercolano is entitled to a resumption of his salary payments after 120 days excluding all delays requested by Mr. Ercolano. The stay of Mr. Ercolano's salary payments ended on February 27, 1998, and he is entitled to salary payments retroactive to that date. There was never any decision to stay the salary payments due to Mr. Schumacher's illness. Further, there is no proof to dispute Mr. Ercolano's certification that he did not engage in any substitute employment during the period of his suspension.

Therefore, I **ORDER** that the tenure charge be upheld and that Mr. Ercolano be removed from his position. I **ORDER** that the determination to withhold Mr. Ercolano's salary increment for the 1997-98 school year be **AFFIRMED**. Also, I **ORDER** that Mr. Ercolano be paid salary payments retroactive to February 27, 1998.

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

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

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

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

March 13, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

3-15-00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

A-1 Certification of John E. Croot, Jr., Esq., attached to appellant's brief of November 24, 1998

A-2 Statement of facts prepared by Brian Miller Davis, Esq., attached to appellant's brief of November 24, 1998

A-3 Commissioner's decision of June 25, 1998, and Initial Decision of Administrative Law Judge Beatrice S. Tylutki, dated April 7, 1998, in the Matter of Tenure Hearing of Neal A. Ercolano and Neal Ercolano v. Board of Education of Branchburg Township, EDU 8422-97 and EDU 8509-97, attached to the appellant's brief of November 24, 1998

A-4 Letter to Mr. Ercolano from George T. Resavy, dated January 25, 1996, attached to the appellant's brief of November 24, 1998

A-5 Letter to Mr. Ercolano from Doctor Robert J. Sopko, dated August 21, 1996, attached to the appellant's brief of November 24, 1998

A-6 Letter from James L. McConnell, Assistant Prosecutor, dated January 20, 1998, attached to the appellant's brief of November 24, 1998

A-7 Letter from Debra L. Stone, Assistant Attorney General, dated February 20, 1998, attached to the appellant's brief of November 24, 1998

A-8 Certification of Neal A. Ercolano, dated August 18, 1999, attached to the appellant's brief, dated August 18, 1999

A-9 Certification of Brian M. Adams, dated August 18, 1999, attached to the appellant's brief, dated August 18, 1999

A-10 Transcript of the municipal court appeal and decision of Superior Court Judge Leonard N. Arnold in the case of State of New Jersey v. Neal Ercolano, sent by John E. Croot, Jr., Esq., on August 18, 1999

For the Respondent:

R-1 Complaint filed against Neal A. Ercolano, attached to the Board's brief, dated September 29, 1997

R-2 Transcript of the April 23, 1997 trial *In The Matter of State of New Jersey v. Neal Ercolano*, attached to the Board's brief, dated September 29, 1997

R-3 Affidavit of David R. Rubin, Esq., dated August 4, 1999, with attachments, attached to the Board's brief, dated August 4, 1999

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NOS. EDU 8422-97, EDU 8509-97 AND EDU 6138-98 (ON REMAND)
AGENCY DKT. NOS. 321-9/97 AND 334-9/9 (CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF NEAL A. ERCOLANO, BOARD OF EDUCATION OF BRANCHBURG TOWNSHIP, SOMERSET COUNTY.	:	
And	:	COMMISSIONER OF EDUCATION
NEAL A. ERCOLANO, PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE TOWNHIP OF BRANCHBURG, SOMERSET COUNTY, RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Both the Board and Neal A. Ercolano ("Ercolano") submitted exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the Administrative Law Judge's (ALJ) award of Ercolano's back pay retroactive to February 27, 1998, without off-set, and urges the Commissioner to vacate that portion of the Initial Decision. In the alternative, the Board requests that the Commissioner stay the award of any back pay due Ercolano until the forfeiture issue is decided by the Appellate Division, since a decision rendered by that Court in the Board's favor will negate Ercolano's entitlement to any back pay. (Board's Exceptions at 2)

In his exceptions, Ercolano maintains that there are facts in dispute, since he and J.F. "gave conflicting accounts of the incident in their testimony before the Municipal Court," (Ercolano's Exceptions at 2) thereby rendering this matter inappropriate for summary decision. Additionally, he excepts to the ALJ's finding that he was given ample opportunity to present his version of the incident, along with mitigating circumstances, in his municipal court trial. Instead, Ercolano asserts that in the municipal court trial, the sole issue before the Court was whether he had committed the simple assault; whereas, in this forum, the issue is whether he engaged in conduct unbecoming a teacher. (*Id.* at 3) In this connection, Ercolano reiterates that a plenary hearing is necessary to determine the appropriate penalty.

Upon careful and independent review of the record in this matter, the Commissioner affirms the findings and conclusions of the ALJ. Initially, the Commissioner notes that, under these particular circumstances, there is no meaningful purpose to be served by permitting Ercolano to relitigate the issue of his conduct on January 17, 1996, since this issue was fully and fairly litigated, and decided, in the prior criminal proceeding.[1] As such, the Commissioner draws his conclusion that Ercolano's conduct was, without question, unbecoming a teaching staff member,[2] based upon his conviction on April 23, 1997 for the simple assault of a sixth grade student while in school.[3]

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[1] Notably, Ercolano withdrew his appeal of that conviction. (Initial Decision at 6)

[2] The Board specifically charged that "[r]espondent was guilty of unbecoming conduct by assaulting a student, for which he was subsequently convicted in Branchburg Municipal Court," (Board's Statement of Tenure Charge at 1)

[3] "It is well established that where no disputed issues of material fact exist, and administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997.

The Commissioner also recognizes that his exclusive jurisdiction to hear and decide tenure matters requires a concomitant penalty determination. *See In re Fulcomer*, 93 *N.J. Super.* 404 at 412. Factors to be considered in assessing penalty include the nature and gravity of the offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and the harm or injurious effect, if any, the teacher's conduct may have had on the maintenance of discipline and proper administration of the school system. (*Id.* at 422) In this connection, like the ALJ, the Commissioner finds that Ercolano was accorded ample opportunity at his municipal court hearing to offer his version of the facts, as well as mitigating circumstances. (Initial Decision at 10) Yet, significantly, Judge Kelleher found that Ercolano "***grabbed the child and *** pushed the child against the wall, and the child was placed in fear of bodily harm," (Initial Decision at p. 6), thereby rejecting Ercolano's contention that he was merely reacting to deflect a running child. (*Id.*) Moreover, as the Judge observed, when Ercolano was confronted the next day with an account of events which was altogether different from the version he later presented, Ercolano nonetheless apologized and did not deny J.F.'s account of the incident. (*Id.*) Thus, Judge Kelleher found that Ercolano "*attempted to cause or purposely, knowingly or recklessly caused bodily injury to J.F.*" (emphasis added) (Initial Decision at 10)

Further, for the purposes of his penalty determination, the Commissioner accepts Ercolano's undisputed assertion that he has been employed by the Board for more than 20 years, "he was never the subject of any serious disciplinary action and, prior to January 17, 1996, was never the subject of an allegation that he improperly touched a student." (Brief on Behalf of Neal A. Ercolano in Support of Cross Motion and In Opposition to Motion for Summary Decision at 1) However, notwithstanding his apparently sound teaching record, like the ALJ,

the Commissioner finds that that this incident is sufficiently flagrant to warrant Ercolano's removal from his teaching position[4]:

> It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 *S.L.D.* 185, as cited in *In the Matter of the Tenure Hearing of Thomas Tiefenbacher, School District of the City of East Orange*, 1982 *S.L.D.* 142, 150, *aff'd with modification* 1982 *S.L.D.* 157. (Teacher found to have pulled a student from his chair, pushed him so that he hit a cabinet, grabbed him by the neck and thrown him to the back of the room where he hit a table. Teacher also threatened student in the corridor. The ALJ concluded teacher's conduct was "so gross so as to impose the most severe penalty allowed ***." *Tiefenbacher,* at 150. The Commissioner accepted the ALJ's findings of fact, but modified the penalty, asserting that "summary dismissal of respondent for a single offense is unwarranted in light of his prior unblemished record of teaching experience in the Board's employ ***." *Id.* at 156. The State Board of Education vacated the Commissioner's penalty determination, dismissing respondent in accordance with the ALJ's decision. *Id.* at 157.)

With respect to the issue of Ercolano's back pay, in light of the July 2, 1999 decision of the Superior Court (Initial Decision at 7), the Commissioner, like the ALJ, must conclude that, at the time of this decision, respondent remains entitled to his salary and related emoluments retroactive to February 27, 1998, without off-set for substituted employment.[5] (*Id.* at 11-13)

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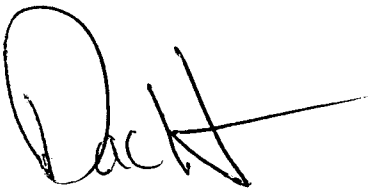
[4] Although Ercolano asserts that *In re Portia Williams*, 1981 *S.L.D.* 931, is "a factually similar tenure case," (Brief on Behalf of Neal A. Ercolano in Support of Cross Motion and In Opposition to Motion for Summary Decision at 7), the Commissioner does not agree. There, respondent was found to have "hit various students in her class lightly on the hand with a ruler for disciplinary purposes ***." *In re Williams* at 940. The ALJ, however, specifically found that Ms. Williams "did not intend to inflict any physical pain on her pupils," and further determined that "[t]here was no evidence of lack of self-control on the part of respondent." *Id.* at 941. In the instant matter, however, Judge Kelleher's findings *are not* consistent with those of the ALJ and the Commissioner in the *Williams* case.

[5] On April 10, 2000, the Board filed a Motion to Enlarge the Record to include information which, it attested, provided a basis on which to permit discovery in order to determine whether respondent's income derived from his landscaping business constituted "substitute employment." The motion was denied.

Finally, the Commissioner concurs with the ALJ that Ercolano has not met his burden of establishing that the Board's action to withhold his salary increment for the 1997-98 school year was arbitrary and capricious.

Accordingly, the Initial Decision of the ALJ is affirmed for the reasons expressed therein, and Ercolano is dismissed from his tenured position as a teacher in the Board's District. This matter is hereby referred to the State Board of Examiners for action against Ercolano's certificate as it deems appropriate.

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: MAY 01 2000

Date of Mailing: MAY 01 2000

[6] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

B.B., on behalf of minor child, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

May 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR

EMERGENT RELIEF

OAL DKT. NO. EDU 2323-00

AGENCY REF. NO. 103-3/00

B.B. ON BEHALF OF MINOR CHILD, J.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,

Respondent.

L. B., Grandmother of **J.L.,** substituting for **B.B.,** **father of J.L.,** petitioner, *pro se,* pursuant to *N.J.A.C.* 1:1-5.4(a)7

William S. Cappuccio, Esq., for respondent

Record Closed: April 20, 2000 Decided: April 25, 2000

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 27, 2000, petitioner, J.L, through her father, B.B., filed a Petition of Appeal before the Commissioner of Education (Commissioner) alleging, among other things, that J.L. a pupil in the public schools under the direction and control of the Board of Education of the Township of Weymouth (Board), had been improperly suspended from its schools and placed on home instruction. Petitioner seeks, among other things, her immediate reinstatement to the Board's schools and that the alleged offense be stricken and expunged from any school records.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was originally set down for an emergent relief hearing on April 11, 2000, pursuant to *N.J.A.C.* 1:1-12.6 and *N.J.A.C.* 6:24-1.5. However, B.B., the father, of petitioner requested an adjournment in order to seek legal counsel. The adjournment was granted and the matter was rescheduled for April 20, 2000. The hearing was held on April 20, 2000, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. Petitioner did not retain legal counsel but, rather, appeared *pro se.*

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, I **FIND** the following **FACTS.**

First, I **FIND** that the Board's case against petitioner, J.L, was based entirely upon and hearsay and double hearsay.

J.L. is a 12-year-old female, attending the Board's seventh grade in its elementary school.

The credible testimony offered by a fourteen year old male pupil, M.S., is as follows: On March 14, 2000, pupils were gathered at or near petitioner's locker in the schoolhouse. M.S.

testified that a male pupil, N.L., was teasing petitioner where N. said that petitioner "stinks" and "did not belong there." M.S. told N.L. to stop teasing petitioner because M.S. did not want anything to happen as happened at the Columbine High School. N.L. did not respond, however, he did stop teasing petitioner. Petitioner said to N. "just leave me alone and stop bothering me."

In addition to petitioner, M.S. and N.L. being present at the locker, another female pupil identified as J.K., was also present.

Petitioner, J.L., testified credibility that upon leaving language class she approached her locker when pupil N.L. came up to petitioner and began to make fun of petitioner and called petitioner "grimy." Petitioner asserted that as she turned, her bookbag touched N.L.'s bookbag and N.L. is purported to have said that he would have to go home and clean his bookbag with bleach.

Petitioner asserted that those who were present at the locker included herself, M.S., N.L. J.K. and another male pupil identified as J.F. Petitioner testified that another female pupil, K.D'A., had been at the locker, however, she had left the scene. Petitioner stated that M.S. told N.L. not to make fun of petitioner because petitioner would end up like one of the Columbine pupils. Petitioner asserted that N.L. just laughed, however, he did not say anything. Petitioner asserted that she would not bring a gun to school. Female pupil J.K. heard the statement and left the locker area.

Petitioner contends that M.S. said to N.L. "she'll shoot your brains out." Whereupon N.L. is alleged to have responded to M.S. that, "she'll shoot yours out first." Male pupil J.F. just laughed, as did M.S. and N.L. Petitioner proceeded to her next class and went home at the end of the school day.

The Board's case against petitioner is grounded upon the testimony of Cynthia Donahue, the teacher-in-charge, on March 15, 2000, in the absence of Chief School Administrator, Marshall E. Behr, Jr. Ms. Donahue testified that on the morning of March 15, 2000, she arrived at the schoolhouse and a staff member advised Ms. Donahue to go to the school nurse office. Ms. Donahue did so, where the school nurse reported that a pupil had reported to the nurse that a

conversation was overheard where petitioner was alleged to have said that petitioner was going to bring a gun to school and shoot another pupil. The nurse is alleged to have said that the pupil who made the report did not identify the pupil to whom petitioner was alleged to have directed the remark. All that Donahue heard was that petitioner was alleged to have made the statement.

Subsequently, Ms. Donahue called pupils to the school office including, M.S. and J.K., who were present at the locker on March 14, 2000. Ms. Donahue also called two female pupils, K.D'A. and C.C., pupils who were not at the locker when the alleged statement by petitioner was made. Ms. Donahue testified that she was aware that there were problems between petitioner and C.C. Ms. Donahue testified that her questioning of C.C. helped Donahue place the incident into perspective. Ms. Donahue did not explain what was meant by this testimony.

Ms. Donahue testified, among other things, that after she left the nurse's office she went to her office and immediately contacted the State Police and explained that she was the teacher-in-charge and that she was unaware of the proper procedure to follow. Ms. Donahue testified that she was advised that her actions were appropriate and soon thereafter a female State Trooper arrived, followed by a male trooper. Ms. Donahue advised the troopers that a pupil had overheard another pupil threatened a pupil in the school's hallway. Ms. Donahue considered it a serious matter and wanted the police involved.

The female trooper left and the male trooper remained with Ms. Donahue while she interrogated certain pupils concerning the alleged incident. Ms. Donahue asked the trooper's advice as to how to approach the matter. Ms. Donahue testified that the trooper stated to Donahue that it was not his role to offer advice. When petitioner was interrogated by Ms. Donahue, the trooper stated that he was not able to examine petitioner's bookbag. However, Ms. Donahue examined petitioner's bookbag and testified that she did not find a gun present.

Ms. Donahue testified that petitioner denied making any statement concerning a gun. Donahue asserted that petitioner told Donahue that M.S. made a statement, however, M.S. did not say he would bring a gun to school.

Ms. Donahue concedes that she based her action to recommend to her superior the suspension of petitioner upon the statements made to her by pupil J.K., who also made the statement to the school nurse.

Marshall E. Behr, Jr., testified on behalf of the Board and admitted that he was not present in the schoolhouse when the alleged incident occurred. He asserted, among other things, that he interviewed pupil K. D'A., who indicated to Behr that she heard the statement by petitioner, that petitioner would bring a gun to school and shoot female pupil C.C. Mr. Behr asserted that female pupil J.K. overheard the same conversation.

Mr. Behr testified that he reported the matter to the Board, however, he did not report the facts of the matter. He asserted that he only reported to the Board that petitioner had been suspended from school, not the details of the suspension.

Mr. Behr testified that C.C.'s mother is a member of the Board and, therefore, C.C.'s mother was excluded from any discussion concerning petitioner and his recommendation to suspend petitioner. Behr asserted that petitioner had been suspended for one day during the 1998-99 school year based upon petitioner's threats to another pupil. Petitioner served a one day in-school suspension for the offense. In another incident, Behr testified that petitioner had threatened a teacher. However, petitioner later apologized and no disciplinary action was taken. Behr reported these incidents to the Board when he made his recommendation to suspend petitioner.

Mr. Behr, admitted on the herein hearing record that he had no first hand evidence that petitioner, stated in fact, made the statement which was alleged she had made on March 14, 2000. Mr. Behr also admitted that he did not interview or question pupil M.S.

Mr. Behr asserted that he applied the Board's Policy No. 5114, when he determined to recommend to the Board the ten-day suspension of petitioner. In addition, to the ten day suspension, the parents were required to seek counseling for petitioner and a screening by the Board's Psychologist for an evaluation of petitioner's potential for violence and recurring threats.

In addition, the Board required that petitioner undergo a more comprehensive evaluation by a clinical psychologist.

Subsequent to a meeting with the Board, where petitioner was afforded the opportunity to challenge the Board's action, the Board voted to accept Mr. Behr's recommendation and suspended petitioner with conditions.

The parents of petitioner have resisted all of the Board's proposals and assert, among other things, that petitioner did not commit the offense alleged and seeks petitioner's immediate re-instatement to the Board's school.

The Board did not offer any direct evidence at the herein hearing of the alleged incident where petitioner is purported to have said she would bring a gun to the school and shoot another pupil.

CONCLUSIONS

Having found that the Board based its determination to suspend petitioner from its school on strictly hearsay evidence, I **CONCLUDE** that petitioner has met its burden of proof, by a preponderance of the credible evidence, that the suspension should be overturned and petitioner should be immediately re-admitted without any penalty. There was no direct evidence presented to the Board or this tribunal to substantiate the Board's action against petitioner.

This tribunal recognizes that hearsay evidence is admissible in administrative proceedings. *N.J.A.C.* 1:1-15.5(a) provides, in part that:

> . . . Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

The rule continues to state:

> (b) Notwithstanding the admissibility of hearsay evidence some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

No such legally competent evidence to support the Board's hearsay evidence was proffered to this tribunal in support of its action to suspend petitioner. Therefore, the Board's hearsay evidence is rejected. *In the Matter of Tanelli;* 194 *N.J. Super.* 492 (*App. Div.* 1984), cert. den. 99 *N.J.* 181 (1984); *Division of Medical Assistance v. Kares,* 8 *N.J.A.R.* 517 (1983).

I **CONCLUDE,** therefore, that the action by the Board should be reversed and petitioner immediately re-instated.

ORDER

Accordingly, it is **ORDERED** that the action by the Weymouth Township Board of Education to suspend petitioner, J.L., is hereby **REVERSED.** It is **ORDERED** that petitioner be **IMMEDIATELY REINSTATED** to the Board's seventh grade, without any conditions.

Petitioner's other pleas for relief are not considered here.

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

25 April 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

lmh

OAL DKT. NO. EDU 2323-00
AGENCY DKT. NO. 103-3/00

B.B., on behalf of minor child, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included audiotapes of the hearing conducted at the Office of Administrative Law (OAL) on April 20, 2000, along with the Initial Decision and Order of the Administrative Law Judge (ALJ) granting emergent relief have been reviewed.

Upon such review, the Commissioner determines to affirm the decision of the ALJ since he is persuaded that, under the circumstances existing here, petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), *i.e.*, the existence of irreparable harm absent the requested relief, settled legal principles governing the right to relief in the controversy, a reasonable probability of ultimate success on the merits, and a balancing of the relative hardships to the parties favoring the grant of temporary relief.

Accordingly, the recommended Order of the ALJ granting petitioner's Motion for Emergent Relief is affirmed. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 03 2000

Date of Mailing: MAY 03 2000

* This decision, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MC HARRIS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF NORTH BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	
_____	:	

SYNOPSIS

The Board certified a second set of tenure charges of unbecoming conduct, identical to ones previously dismissed on procedural grounds, against respondent teacher. Respondent submitted a motion to dismiss which raised threshold procedural issues that had to be decided before further proceedings could be conducted.

The ALJ found that the Board did not cure the defects noted. The ALJ concluded that the certification of tenure charges was once again not in accord with *N.J.S.A.* 6:18A-11. Thus, the certification of charges was defective and had to be dismissed without prejudice to the Board's further consideration of the charges pursuant to statute. The Board was ordered to pay all back wages and provide any benefits to which respondent would have been entitled had the Board taken no action against him.

The Commissioner determined to set aside the Initial Decision and to dismiss the charges since they were rendered moot by virtue of the State Board's recent decision in *McHarris*, which dealt with the Board's prior certification to the Commissioner of the exact tenure charges at issue herein. With respect to these initial charges, the Commissioner had found that the Board's failure to provide respondent with 15 days, as required by law, to respond to the charges was a fatal defect necessitating dismissal, without prejudice, of the charges. The State Board reversed the Commissioner's decision concluding that, because respondent's initial attorney had invoked his rights pursuant to *Ott*, the Board was restrained from completing certification of its tenure charges against respondent pending disposition of the criminal charges filed against him. Consequently, this matter, dealing with the Board's second attempt to certify the identical tenure charges had to be dismissed as moot.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00081-00S
AGENCY DKT. 343-11/99

SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BRUNSWICK,
Petitioner,
v.
DANIEL McHARRIS,
Respondent.

Anthony B. Vignuolo, Esq., for petitioner (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl and Clarkin, attorneys)

Ben A. Montenegro, Esq., for respondent (Wilbert and Montenegro, attorneys)

Record Closed: January 6, 2000 Decided: February 1, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter comes before the Office of Administrative Law ("OAL") following transmittal of the tenure charges filed against respondent McHarris by the Board of Education of the Township of North Brunswick ("Board"). The Commissioner of Education ("Commissioner") transferred the case without requiring that respondent file an answer, as he has raised procedural challenges to the Board's certification of charges to the Commissioner in a Motion to Dismiss filed on November 30, 1999, and the Commissioner has chosen to obtain an interlocutory ruling on those challenges from the Office of Administrative Law ("OAL") rather

than decide the issues directly. *See* letter to counsel from Deborah Antanaitis, Director, Bureau of Controversies and Disputes, dated December 28, 1999.[1]

The Board has certified six charges against respondent. The first Charge alleges that he "used excessive force and inappropriate professional judgment in connection with his students," for which the charge alleges he was issued a letter of reprimand dated January 4, 1999. The second Charge alleges that on May 13, 1999, he "used inappropriate and unprofessional language with four (4) students calling them "asshole" in the presence of remaining class members and a school aide." The third Charge asserts that he "used inappropriate and unprofessional language with one L.L., a minor student . . . making suggestive comments and offering to have sexual contact with her. Mr. McHarris placed his hands on her body touching her breasts and buttocks." The Charge notes McHarris' "supervisory and disciplinary power over L.L." It also notes that the statement of L.L. and the investigative report of the Middlesex County Prosecutor's Investigator are presently confidential and available only through the Prosecutor's Office. Charge Four claims that McHarris "violated his public office between September 1, 1998 and May 27, 1999 by acting to obtain a benefit for himself and to injure L.L., . . . by specifically committing an act of sexual contact upon L.L. . . ." between those dates. Once again the Charge refers to the statement of the student and the investigative report, their confidential nature and availability only from the Prosecutor. Charge Five is similar in language to Charge Three, except that it alleges similar sexual contact and suggestive comments to A.D., another minor student. Charge Six again alleges a violation of Mr. McHarris' public office in language similar to Charge Four, this time in regards to the purported conduct towards A.D. Both Charges Five and Six refer to the statement of A.D. and the Prosecutor's Investigator's report, each also confidential and available only from the Prosecutor.

The Statement of Evidence in support of these charges was prepared by Superintendent Alan G. Elko. It refers to and incorporates documentary evidence contained in an Appendix of Exhibits annexed thereto. This Appendix consisted of a January 4, 1999, letter of reprimand issued to McHarris; a May 27, 1999, letter to McHarris from Assistant Superintendent Skriloff

[1] The Commissioner previously dismissed these tenure charges, without prejudice, based upon a challenge to a different procedural irregularity, which is not the subject of the present motion. *See* Commissioner's Letter Opinion dated October 21, 1999. The Board subsequently recertified the charges on November 16, 1999, and voted to suspend Mr. McHarris, without pay, pending the determination of the tenure charges.

notifying McHarris of his suspension with pay for three days due to his use of offensive language with students on May 13, 1999, and in addition, notifying him that a recommendation would be made to withhold his increment and relieve him immediately of his duties as an assistant football and assistant basketball coach and as head track coach; a June 29, 1999, letter from Board Counsel Vignuolo advising him that the Board had voted to withhold his increment for the 1999/2000 school year and to relieve him of his coaching responsibilities and advising him of his right to appeal those actions; a copy of a Complaint signed against him in the North Brunswick Municipal Court by Prosecutor's Investigator R. Colatrella charging him with violating *N.J.S.A.* 2C:14-3b and *N.J.S.A.* 2C:30-2 respectively, the former for his alleged criminal sexual contact and the latter for violating his public employment by the unauthorized exercise of his official functions, each in relation to minor L.L.; a second Complaint signed by Colatrella for the same criminal offenses, this time in regards to A.D.

The Board issued a Certificate of Determination, dated November 17, 1999, in which its Secretary reported that the Board had determined that "there is probable cause to credit the initial Tenure Charges and Evidence in support of the charges; and that the Charges and Evidence are sufficient, if credited, to warrant dismissal or a reduction in salary of Daniel McHarris, a tenured teacher." The Certification relates that the Board held a Special Meeting on November 16, 1999, with prior notice to McHarris and his counsel, and that at that meeting a determination was made to suspend him, without pay, pending a determination of the charges.

In his motion, McHarris argues that the tenure charges must be dismissed (1) because the Board failed to comply with *N.J.S.A.* 18A:6-11 in that the Superintendent failed to submit evidence in support of the charges upon which the Board could certify the charges, citing *In re Wallwork*, 85 *SLD* 946 and (2) because the Board failed to articulate plainly the reasons for its determination that probable cause existed to credit the charges, citing the need for such articulation as emphasized in *Manalapan-Englishtown Education Association v. Board of Education*, 187 *N.J. Super.* 426 (App. Div. 1981).

In regards to the first point, McHarris asserts that the exhibits presented to the Board in support of the Charges showed only that the Board had previously resolved the issues alleged in Charges One and Two and that as to Charges Three thru Six, the investigative report of the

Prosecutor's investigation and the statements of the two students were not presented, but were only referred to as confidential and in the Prosecutor's exclusive possession and besides this reference to undisclosed reports and statements only the copies of complaints signed against McHarris were presented. In regards to the second point, he claims that the Board's Certification of Determination filed with the Commissioner merely "parroted the required language of 18A:6-11" and therefore the Board failed to articulate its reasons for its conclusion that probable cause existed.

In addition to these positions, in its reply brief, counsel for McHarris contends that the presentation of evidence by the Superintendent to the Board at its November 16, 1999, closed session was violative of *N.J.S.A.* 18A:6-11 and mandates dismissal of the charges. Further, McHarris seeks to recover full pay and emoluments and pre-judgment interest.

The Board responds to McHarris' attack upon its action by asserting that the evidence presented to the Board in support of the Charges was more extensive than that condemned in *Wallwork* and was sufficient to allow the Board to act and that the Board adequately articulated its determination. In addition, it defends the Superintendent's presentation at the Board meeting as well within the allowable limits.

N.J.S.A. 18A:6-11 provides

> Any charges made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.

In *In re Wallwork,* Administrative Law Judge Sybil Moses considered a case in which Wallwork, a tenured employee, was arrested and charged with five counts of aggravated assault, with possession of a controlled dangerous substance and with terroristic threats. The Board of Education issued tenure charges, which stated "On or about October 11, 1984, Michael Wallwork was charged with sexual abuse of a minor student, possession of a controlled dangerous substance and making terroristic threats." The Statement of Evidence in support of the charges was essentially the same as the charges themselves, only adding that (1) a statement had been filed with the Orange Police Department on behalf of each minor supporting the charges and (2) the complaints filed on behalf of the minors were reviewed by an Essex County assistant prosecutor and were found to charge indictable offenses and the charges were forwarded to the Essex County Grand Jury. No indictment had been returned by the Grand Jury and no criminal charges had ever been tried against Wallwork.

Judge Moses found that the Board had failed to comply with the requirement of *N.J.S.A.* 6A:18-11, as the evidence which purportedly supported the tenure charges, was not set forth in any detail and only referred to the charge and arrest. The Statement of Evidence did not state any details either, merely referring to a statement of the minors without any indication of the details of their allegations, and the complaints that had been reviewed and found to charge indictable offenses, in and of itself a statement of no evidential worth in establishing any of the details of the charges. Thus, she dismissed the tenure charges. The Commissioner affirmed, agreeing that at no time was Wallwork "provided with the '<u>evidence in support</u>'" of the tenure charges pursuant to the provisions of the statute. He modified the initial decision to provide that the Board could use its discretionary authority under *N.J.S.A.* 6:18A-8.3 to suspend Wallwork with pay pending the investigation, or with or without pay if charges were brought "pursuant to law . . . as provided in chapter 6 . . . ."

In the present matter the charges brought against McHarris include Charges 1 and 2, which refer to matters that had been previously resolved by the Board without reference to the Commissioner. It appears that these previously resolved matters do not constitute the actual core of charges upon which dismissal or reduction in pay is sought, but are more akin to a statement of prior disciplinary history which could be used to enhance the penalty for the violations of professional responsibilities charged in the remaining Charges 3 through 6. Examination of

Charge 3 and Charge 5 reveal that they refer to the use of inappropriate and unprofessional language during a specified period of time from the Fall of 1998 through May 27, 1999, and then specify that McHarris both made suggestive comments and offered sexual contact with two specifically identified (albeit by initials) minor students. Specific information as to the nature of the contact alleged to have occurred with each student is stated, that is, the placing of his hands on the female students' breasts and buttocks. The professional relationship to the students is stated and Charges 4 and 6 assert the violation of the teacher's public office by his specific act of sexual contact with the specified students. It is clear that the allegations in these charges go well beyond the *Wallwork* charges, as there is no indication in that opinion that the charges there did anything but recite that Wallwork had been arrested and charged with offenses. While the Statement of Evidence in *Wallwork* mentioned that statements from "each minor" were on file at the Police Department, neither the charge nor the Statement of Evidence identified the student(s) even by initial, much less stating the nature of the "sexual contact" (or as alleged in *Wallwork*, the "physical abuse") said to have occurred here. Thus, while it is unclear from the case law exactly how detailed the charge must be, the statement of the charges here is more detailed and at least to some degree more informative than the bare bones statement of the charge against Wallwork. As for the Statement of Evidence, here the picture is indeed unclear. In both cases, the Statement of Evidence refers to minors' statements in the custody of police or prosecutorial authorities, and in each case the actual statements were not supplied to the Board for examination. In each case copies of the complaints filed against the teacher were presented. Once again, in the present matter the evidence of the prior Board actions issued in response to McHarris' previous disciplinary matters appear more properly to be proof related to the degree of any sanction to be imposed if Charges Three through Six or any of the four were sustained. Thus while the specification of the allegations in the charges themselves were somewhat more specific and informative than what the Board in *Wallwork* said, the evidence presented to McHarris, the "evidence in support" of the essential tenure charges, was actually no more than that given to Wallwork.

Given that the "evidence in support" as set forth in the Statement of Evidence and as provided in documentary form to McHarris was no more sufficient than that found wanting in *Wallwork,* the next question is whether the Board could, and if so, whether it did, cure the deficiency by providing to the Board at its hearing something evidential which supplemented the

documentation set out in the Statement of Evidence and which, either on its own or combined therewith, was enough to allow the Board to properly determine whether the charges should be certified to the Commissioner. In his Certification Superintendent Elko relates that both Charges 1 and 2, the "previous disciplinary actions," were investigated by Dr. Rimmer, the High School Principal, under Elko's supervision, and each had resulted in a hearing before the Board which had involved a discussion with the Board of the "details . . . of the specifics of this Charge." He further relates that Rimmer also received the complaint regarding McHarris' conduct towards students and was directed to investigate and to interview "affected students," including L.L. and A.D. "The contents of those written statements which I have seen and reviewed formed the basis of the continuing suspension of Mr. McHarris . . . They were also discussed with the Board . . . at the time of his suspension in June of 1999 and again at the time of its consideration of the Tenure Charges on November 16, 1999."

The Board points out that McHarris was notified of the date, time and location of the Board's November 16, 1999, meeting, the purpose of which was to consider the charges against him, and that he did not appear at the meeting and/or file any statement of position of any evidence. Therefore, the "evidence submitted to the Board is uncontroverted and is presumed to incorporate all of the evidence filed and presented into the Board's findings of probable cause."

The Board asserts that Superintendent Elko's statements to the Board in discussion of the information obtained from the two minor students was information which the Board could properly use in its assessment of the evidence against McHarris. It relies upon the approval of the use of hearsay evidence by a Board authorized in *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). In *Cowan*, the court analogized the Board's role in assessing the evidence prior to a decision as to whether to certify charges to the Commissioner as akin to that of the Grand Jury. The Grand Jury may rely upon hearsay, and so may the Board. However, the specific hearsay evidence presented to the Board in *Cowan* consisted of two sworn statements, one by the high school principal and the other by the vice principal. These sworn statements were first presented to Cowan as part of the statement accompanying the charges. In the sworn statements the affiants, who had not personally witnessed the events described, nevertheless presented a recitation of that which named people having personal knowledge of the events had reported to the affiants. The court found that the use of this sort of hearsay evidence

satisfied the statutory requirements of *N.J.S.A.* 6:18A-11. Again referring to the Grand Jury, the court noted that the Grand Jury "may return an indictment based wholly on hearsay statements recounted or presented by a witness under oath, so long as the declarants of the statements had personal knowledge of the facts stated. *State v. Vasky*, 218 *N.J. Super.* 487, 491-92 (App. Div. 1987)."

In the present matter, Superintendent Elko made no written statement that was presented to the respondent as a part of the Statement of Evidence proffered by the Board to McHarris under its statutory obligation. There is no evidence that he made any *sworn* statement to the Board in June or on November 16, reporting therein what he had been told by investigating Principal Rimmer. Neither is it offered that Rimmer appeared before the Board and made any sworn statement, or that a sworn statement of Rimmer reporting the information gleaned from the two students was prepared and presented to the Board, or to McHarris. The facts here are not consistent with the allowance of hearsay as authorized in *Cowan.* The Board therefore has not cured the defects noted above. The Board's consideration of these tenure charges was once again not in accord with *N.J.S.A.* 6:18A-11. The certification of the tenure charges is therefore defective and the charges must therefore be **DISMISSED, WITHOUT PREJUDICE** to the Board's further consideration of the charges pursuant to statute. The matter is therefore remanded to the Board for such further consideration. As the charges have not been properly certified, Mr. McHarris is entitled to be paid until such time as a proper suspension without pay is accomplished. Therefore, the Board shall pay all back wages and provide any benefits to which he would have been entitled had the Board taken no action against him. The pendency of any review of the Commissioner's first order for back pay in regard to the dismissal of the first set of certified charges is irrelevant to this issue, which arises solely from the Board's failure to act properly regarding the second attempt to certify charges. However, while the Board did not act properly, I do not find that it acted in bad faith. The fact that it did not present an adequate case for certification in line with the guidance of prior case law, and that counsel for the respondent pointed out deficiencies, does not, without more, convert the Board's action to one tainted by "bad faith," or to one done "deliberately" in violation of *N.J.S.A.* 18A:6-11. Therefore, no pre-judgment interest is awarded.

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

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

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

January 1, 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Feb. 2, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 3 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

Brief dated 12/8/99 with attached Certification of Dr. Alan G. Elko dated 12/7/99

Petitioner's letter memorandum in response to respondent's reply brief with Attachment A, unsigned letter from Alan G. Elko to Daniel McHarris dated 11/9/99

FOR THE RESPONDENT:

Respondent's Legal Brief in Support of Motion to Dismiss with attached Exhibit A, Complaint and Warrant #W36560, dated 8/16/99; Exhibit B, Letter dated 8/24/99 from Robert I. Turco to Daniel McHarris enclosing a statement of initial tenure charges together with a statement of evidence; Exhibit C, Acknowledgement of receipt of tenure charges certified to the Commissioner on 9/21/99; Exhibit D, Letter dated 9/29/99 from Deborah Antanaitis to counsel; Exhibit E, Letter from Commissioner Hespe to counsel dated 10/21/99; Exhibit F, Statement of Initial Tenure Charges dated 10/28/99 with attachments; Exhibit G, form letter from Roslynne Novack to counsel dated 11/5/99 acknowledging receipt of documents; Exhibit H, Letter from Deborah Antanaitis to counsel dated 11/9/99; Exhibit I, Letter from Ben Montenegro to Anthony Vignuolo dated 9/15/99; Exhibit J, Certificate of Determination and Proof of Service dated 11/17/99; Exhibit K, Letter from Deborah Antanaitis to Robert Turco and Ben Montenegro dated 11/19/99; Exhibit L, Letter from Commissioner Hespe to counsel dated 11/18/99

Respondent's Reply Brief in Support of Motion to Dismiss with attached Exhibit A, form letter from Roslynne Novack to counsel dated 11/30/99; Exhibit B, Civil Action Order to Show Cause, *Daniel McHarris v. North Brunswick Twsp. Bd. of Ed.,* Dkt. No. C-316-99, dated 12/17/99; Exhibit C, Letter from Anthony Vignuolo to Ben Montenegro dated 10/27/99

OAL DKT. NO. EDU 00081-00
AGENCY DKT. NO. 343-11/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MC HARRIS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF NORTH BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both the Board and respondent were timely filed pursuant to the directives of *N.J.A.C.* 1:1-18.4.

Upon his independent review, the Commissioner determines to set aside the Initial Decision and to dismiss the within charges since they have been rendered moot by virtue of the State Board's recent decision in *In the Matter of the Tenure Hearing of Daniel McHarris, School District of the Township of North Brunswick, Middlesex County,* State Board Docket No. 45-99, Commissioner's decision No. 332-99L, which deals with the Board's prior certification to the Commissioner of the exact tenure charges at issue herein. In that prior matter, the Commissioner, by letter decision dated October 21, 1999, found the Board's failure to provide respondent with 15 days, as required by law, to respond to the charges was a fatal defect necessitating dismissal, without prejudice, of the charges. On April 5, 2000, the State Board reversed the Commissioner's decision concluding that, because respondent's initial attorney had invoked his rights pursuant to *Ott v. Hamilton Township Board of Education*, 160 *N.J. Super.*

333 (App. Div. 1978), *cert. den.* 78 *N.J.* 336 (1978), the Board was restrained from completing certification of its tenure charges against respondent pending disposition of the criminal charges filed against him. Consequently, the Board's second attempt to certify the identical tenure charges must be dismissed.[1]

Accordingly, the Initial Decision of the OAL is set aside and the instant charges hereby dismissed as moot.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 03 2000

Date of Mailing: MAY 03 2000

[1] Letters received from the Board and respondent, dated April 11, 2000 and April 13, 2000, respectively, are noted for the record.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

D.K., on behalf of minor child, M.O'K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged the Board's determination of suspension of her son, M.O'K., from school for three days and his permanent expulsion from the basketball team for alleged sexual harassment (inappropriate exposure of buttocks and remarks) in November 1999. Petitioner sought reversal of discipline and removal from M.O'K.'s school record.

In light of the testimony of witnesses and the record, the ALJ found that petitioner failed to establish by a preponderance of credible evidence that the allegations in the petition were true. Moreover, the ALJ concluded that the Board's actions were taken based solely on the incidents of November 1999 and were not connected to petitioner's earlier filing of a notice of tort claim. Petition was dismissed.

The Commissioner agreed with the ALJ's conclusion that petitioner had not met the burden of establishing that the Board's actions were arbitrary, capricious and unreasonable. (*J.M. v. Hunterdon Central Regional High School District*) The Commissioner also found that the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony and assessment of credibility. The Commissioner agreed with the Board that M.O'K.'s inappropriate behavior fell within the prohibitions of the District's Student Code of Conduct against sexual harassment and that the sanctions it applied against M.O'K. were consistent with that Code. Commissioner further determined that the Board's action to exclude M.O'K. from participation on the school's basketball team must be reviewed in the context of prior decisions which have consistently held that participation in extracurricular activities is not an entitlement but a privilege. (*Domacasse*) The Commissioner adopted findings and determination in Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 100-00

AGENCY DKT. NO. 9-1/00

D.K., ON BEHALF OF MINOR CHILD

M.O'K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF BELMAR,

Respondent.

Nancy S. Martin, Esq., for petitioner (Kenney, Schaer & Martin, attorneys)

Kenneth B. Fitzsimmons, Esq., for respondent (Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys)

Record Closed: February 22, 2000 Decided: March 20, 2000

BEFORE **BRUCE R. CAMPBELL,** ALJ:

The petitioner challenges the respondent's determination suspending her son from school for three days and his permanent suspension from the basketball team. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F1 through -13.

A motion for emergent relief was heard on February 8, 2000 and denied on February 14, 2000. Through no fault of the parties they did not receive copies of the order denying motion. Thus, they were denied the opportunity to seek interlocutory review of the order.

The matter came on for plenary hearing on February 22, 2000, at the Office of Administrative Law, Trenton. Twelve persons testified and five documents were admitted into evidence.

PAROL AND DOCUMENTATRY EVIDENCE

D.K.

The petitioner testified that M.O'K. began attendance in Belmar in second grade. He has usually been a straight A pupil. He has been on the honor roll consistently. In sixth grade he began to participate in basketball. He won the award for best defensive player of the season. In seventh grade he repeated that honor as well as taking the best player award. He has had no suspension of any kind.

In March 1999, there were several assaults on M.O'K. on the school playground. The witness, through counsel, filed a tort claim notice (J-3). The matter is scheduled for hearing in early March 2000 and M.O'K. will testify.

Both M.O'K. and D.K. have sought counseling because of the assaults. The witness has notified the United States Department of Education's Office of Civil Rights.

D.K. received a copy of the Belmar Elementary School Code of Conduct for 1999-2000 (J-1) at some time at or near the beginning of the school year. She believes the discipline against her son is being meted out according to the provisions under sexual harassment on pages 6-7. The first offense calls for a conference, counseling and a three-day suspension. D.K. stated that no conference or counseling were provided in this case.

The alleged incident took place on Thursday afternoon, November 18, 1999. The witness received a letter dated November 22, 1999 (P-1) from the Superintendent of Schools explaining that M.O'K. was suspended from school for three days and suspended from participation on the basketball team indefinitely. The witness believes the penalty was applied before any investigation.

After the March 1999 playground incidents, the Board offered counseling with a certified psychologist and paid up to $1,000 for the parents and a similar amount for the pupil. M.O'K. attended six or seven sessions and D.K. separately attended, perhaps for six or seven sessions.

In November 1999, D.K. called the consulting psychologist and was told that the Board was not providing any further sessions. The witness concedes that this was incorrect and was the psychologist's error, not the Board's.

Principal Taggart contacted D.K. on November 19 in the early afternoon. He said that a basketball player and his mother had come in that morning and the boy accused M.O'K. of exposing his buttocks, making an obscene gesture described as humping and a remark. D.K. asked the principal what would happen next. The principal replied that he would talk to the basketball team. D.K. asked the principal to keep her informed.

The principal met with the team and then called her to his office at approximately 3:00 p.m. or 3:30 p.m. on Friday, November 19. She, her son, the principal and the superintendent met. She was informed that the administrators had spoken to the team and confirmed that M.O'K. had exposed his buttocks or mooned during a practice. The administrator had had to inform local police.

Later that day, D.K. participated in a telephone conference call. The call occurred at approximately 6:00 p.m. She, the principal, the superintendent and police Lieutenant Van Etten spoke. The witness was advised there would be a three-day suspension and an indefinite team suspension. The Lieutenant expressed the opinion that it appeared that M.O'K. had mooned other players during practice. The witness said she was not aware of what police did on the afternoon of November 19.

R.K.

R.K. is 14 years old and is a friend of M.O'K. He was at basketball practice on November 18, 1999. The coach taught defensive skills, particularly blocking out. The players were instructed to be aggressive and to put their backsides into the persons behind them. The witness saw M.O'K. do nothing inappropriate and he heard nothing inappropriate.

J.R.

J.R., is 13 years old. He is a friend of M.O'K. He attended the November 18 practice. He recalls being instructed to box out defensive players and to be aggressive. There was often contact between players. The players were instructed to put their backsides into their opponent's guts.

The witness saw M.O'K. do nothing inappropriate. He heard nothing inappropriate. He was not aware of any immediate complaints. After practice the next day he became aware that a team member had reported to the principal that M.O'K. had made a humping motion and some noises. He was not aware of any other team member making these allegations.

A.E.

A.E. is 13 years old and is a member of the basketball team. He was at practice on the day in question. He recalls being instructed to be aggressive, go after the ball, put pressure on the opponent and go "belly to butt" when on defense. A.E. stated that he was near M.O'K. most of the time. During a drill M.O'K. played on the witness. The witness saw and heard nothing inappropriate.

He stated that there were approximately 12 boys on the team. At the practice were the team members, the coach and a parent who was observing.

M.O'K.

M.O'K. testified in his own behalf. He stated that he had never been suspended from school, from the basketball team, or from any other activity. He recited his academic and athletic awards.

On November 18, 1999, the coach was teaching defensive techniques. The coach instructed K.J. to use his backside to box out M.O'K. This would cause touching.

M.O'K. was aware of no accusations on November 18. He learned of the accusations the next day, the 19th.

At practice he wears large, baggy shorts. On November 19 he learned that he was accused of mooning, making an obscene gesture and making a comment. He told Principal Taggart that he did not know what the substance of the comment meant. The comment included the phrase "beefy whale." The witness stated that until that day, he had never heard that term.

Peter J. Van Etten

Lieutenant Peter J. Van Etten has been a member of the Belmar Police Department since 1984. He is a Lieutenant in the Detective Bureau. He received a call from Superintendent Richens on Friday, November 19, 1999. He went to the school shortly after 4:00 p.m.

Superintendent Richens and Principal Taggart informed the witness of the allegations. They also represented that K.J. and his father would appear. They did.

The Lieutenant met with K.J. and with Richens. K.J. described the basketball practice of the previous day. At some point, M.O'K. was defending K.J. K.J. clearly stated that M.O'K. pushed his loins into K.J.'s buttocks three or four times. He also made some noises. Further, M.O'K. exposed his buttocks sometime after the first humping incident.

Lieutenant Van Etten identified the Belmar Police Department report (R-1) concerning the matter. The Lieutenant stated that he also interviewed D.A. who said he was at practice but observed no humping. He did see M.O'K. moon. The Lieutenant conducted no other interviews that day.

The witness interviewed J.S. on the following Tuesday. Because of the nature of the allegations, the superintendent and principal notified the Child Study Team and the interviews were scheduled for Tuesday, November 23. J.S.'s parent was present with J.S. and the superintendent and Lieutenant were present. J.S. stated that he did see the mooning incident, but did not see any lewd gestures or hear any sounds.

Lieutenant Van Etten took the formal statement of K.J. on Saturday, November 20 at police headquarters. K.J. and his father read the statement carefully and both signed it (R-1). The Lieutenant found K.J.'s statements generally consistent.

He met with the superintendent and principal after the interviews. As to the alleged humping incident, he found no criminal offense had occurred. What may have occurred was aggressive and/or inappropriate conduct while guarding an opponent in a basketball drill. As to the exposure, the Lieutenant was satisfied that there had been mooning, at least to some extent, because four students had observed it.

No one other than K.J. reporting the humping action or the comments or sounds. When the Lieutenant interviewed K.J. on November 19, he appeared upset, embarrassed and credible. M.O'K. seemed upset by the allegation. However, the coach saw nothing and a parent who was present saw nothing.

Thomas Cox

Detective Thomas Cox has been a member of the Belmar Police Department since 1991. He was involved in the November 23 interview process. He interviewed a pupil, B.B. B.B. stated that M.O'K. pulled his shorts down "not even full way" and kept them that way for a minute or two. B.B. testified that he and M.O'K. were laughing about the incident.

The Detective concluded that there was at least partial exposure of M.O'K.'s buttocks. B.B. seemed upset at the interview.

K.J.

K.J. stated that, on November 18, 1999, the coach was running an offensive drill. M.O'K. was guarding the witness. M.O'K. intercepted the witness at least once.

The coach told K.J. to box out M.O'K. As K.J. backed into M.O'K., M.O'K. made the humping motion and noises. It occurred more than once. Then M.O'K. played off K.J. After this, M.O'K. mooned the team.

Another pupil, J.S., asked M.O'K. what M.O'K. was doing when he made contact with K.J. M.O'K. stated, "Getting him off my beefy whale." K.J. stated that he felt embarrassed. He had never had a similar experience at practice.

K.J. went home directly after practice. He discussed the matter with is mother. K.J.'s father lives about one block away and K.J. saw him that evening. Although embarrassed at first, he told his father of the incidents.

On Friday, Mrs. J. called Principal Taggart. The Principal spoke to K.J. in the principal's office. The principal asked K.J. what had happened and K.J. recited the above facts.

K.J. was not present when the superintendent and principal interviewed the team. Lieutenant Van Etten questioned him while Principal Taggart was present. K.J. also recited the facts to Van Etten. He demonstrated to the Lieutenant what had happened. He also told about J.S.'s question and M.O'K.'s response.

On Saturday, he went to police headquarters and made a statement to Lieutenant Van Etten. He and his father read and initialed each page, made a correction and signed the statement. The statement contains virtually everything that he said the previous day.

K.J. acknowledged that boxing out usually involves contact. There were other players nearby when the humping actions occurred. The witness is aware that the other pupils deny any knowledge of the event. K.J. also stated that M.O'K. had his hands on his knees and was in a semi-crouching position while his pants were pulled about half way down his buttocks.

K.E.J., Sr.

K.E.J., Sr., testified. On Thursday, November 18, 1999, K.J. and his sister paid a regular visit to him. K.J. and the witness eventually talked. K.J. recited the above events including the inappropriate movements and sounds. K.E.J., Sr., stated that K.J. seemed quite bothered by the events. He asked K.J. why he had not told his father sooner. K.J. replied that he was embarrassed and bothered by the events.

On Friday, November 19, the witness went to school with his son. He was present while Lieutenant Van Etten interviewed K.J. On Saturday, November 20, he accompanied K.J. to headquarters. He was again present when Van Etten interviewed K.J. He and his son read and signed K.J.'s statements. The statements made orally on Friday and reduced to writing on Saturday were consistent with what K.J. had told his father on Thursday.

K.E.J., Sr., made no threat of complaint. He asked that the code of conduct be followed. He became aware that no other boy corroborated K.J.'s version of the humping and comments incidents. He asked for suspension for M.O'K. from the basketball team.

D.A.

D.A. was present at practice on November 18, 1999. He met with Principal Taggart after school on November 19, 1999, at 4:30 or 5:00 p.m. He was asked a series of questions by Lieutenant Van Etten.

D.A. told the Lieutenant that M.O'K. mooned the team. He pulled his pants down about halfway, pulled up his shirt and assumed an offensive position, which is a semi-crouch. D.A. has played with M.O'K. since the event and has not felt threatened.

Richard W. Taggart

Principal Taggart testified that he has been in the Belmar school systems for 29 years. On November 19, between 9:00 and 9:30 a.m., he returned a telephone call from K.J.'s mother. The mother reported what K.J. had told her, including all the details recited above.

The principal went to K.J. and inquired about events of the previous day. K.J. reported essentially what his mother had reported. There were no inconsistencies between the recitations.

The principal then went to J.F. J.F. stated nothing occurred at practice and that he saw M.O'K. do nothing untoward. But he did say that he told M.O'K. to "stop fooling around."

The principal then went to D.A. D.A. claimed to have seen nothing. The principal returned to his office and called M.O'K. to his office.

The principal explained the allegations to M.O'K. The pupil denied everything. The principal also advised M.O'K. that a parent had complained and that the principal was obliged to make the matter known to the superintendent of schools.

That afternoon, the principal brought the superintendent up to the moment on the matter and suggested a telephone call to M.O'K.'s mother in order to inform her of the allegations and to advise her that they would speak to the team that afternoon at about 3:00 p.m. K.J. and M.O'K. would be excluded from that meeting.

At the team meeting, the superintendent explained the complaint. J.S. stated M.O'K. had mooned. This was inconsistent with J.S.'s earlier statement.

The principal called Mrs. K. and asked to meet with her in the principal's office. The superintendent was also present when Mrs. K. arrived. The two men advised her of what had happened. The superintendent called Lieutenant Van Etten at or about 4:00 p.m. The lieutenant was at the school within ten minutes. M.O'K. and his mother had left. K.J. and K.E.J., Sr. had arrived.

Lieutenant Van Etten interviewed K.J. about the whole series of events. K.J. stated that M.O'K. had exposed himself three times. He also described the humping motion, the noises and the comment. After the K.J. interview, the lieutenant called in D.A. D.A. stated that he had seen M.O'K. mooning twice.

After the interviews, the principal, superintendent and lieutenant discussed the matter. They called Mrs. K. at approximately 6:00 p.m. She was advised that there would be a three-day suspension from school and then indefinite suspension from the basketball team.

The witness was aware last spring of a notice of tort claim and of the Office of Civil Rights complaint. He learned about the boxing out drill when lieutenant Van Etten interviewed K.J. The witness was aware that no other pupil verified the humping motions or the comment. He believes the coach was at one end of the floor with two pupils and the balance of the team was practicing at the other end of the gym. He also learned that at least one-half of M.O'K.'s buttocks were exposed.

Lester W. Richens

Dr. Richens has been in the district since 1973 and currently serves as superintendent of schools. He learned in the early afternoon of November 19 from Principal Taggart of the allegations made by K.J.'s mother. He decided that the school should contact M.O'K.'s mother, advise her of the allegations and advise her of how the school would proceed.

He met with the basketball team, excluding K.J. and M.O'K. One pupil said that M.O'K. had not exposed himself. Mrs. K. was called and asked to come in. She did. The witness and the principal filled her in on what had happened to that point. She was not advised of the

suspension because that had not yet been decided. The matter was reported to the Belmar Police Department at approximately 3:45 p.m. through Lieutenant Van Etten. The investigation was turned over to him at that point. The superintendent recited the series of interviews and statements that Van Etten reported in his testimony.

The principal and superintendent called Mrs. K. while Van Etten was present. At this point, they advised her of the allegations, of the three-day school suspension and of the indefinite suspension from the team. The superintendent then advised Board of Education members by telephone and memorandum over the weekend.

On Tuesday, November 23, the witness was present at police interviews. J.S. corroborated that M.O'K. had exposed himself. The superintendent discussed the matter with Lieutenant Van Etten, Detective Cox and a Captain Hope. They found no criminality.

D.K.'s husband called the superintendent during the week of November 22. He was unhappy with the sanctions and asked for an appeal to a Board committee. The witness advised him that the appeal would be to the full Board.

The Board offices and schools were closed for the Thanksgiving holiday. In the following week, D.K., her husband, M.O'K. and an attorney appeared before the Board. They gave testimony as well as argument. Three pupils also testified. The superintendent and principal reported what they had done, observed, and learned. The Board after considering all of the information presented decided on a three-day school suspension and an indefinite suspension from the team.

Opportunity was made for D.K. to pick up M.O'K.'s work (P-1). Other arrangements were also made. The witness said there had been some confusion between the consulting psychologist and the witness' office. This was straightened out and on December 8, resumption of counseling was authorized. An appointment on December 9 was canceled by D.K.

The witness identified and discussed the code of conduct (J-1). Harassment calls for a three-day suspension and counseling. There has been only one incident since the events that

underlie today's hearing. This involved a member of the wrestling team. He received a three-day suspension from school and permanent suspension from the team.

The penalties called for by the code are invoked where an allegation of contact is made. The witness knew that the Belmar Police Department still regarded the investigation as open when M.O'K. was suspended. The witness also knows of the tort claim and the Office of Civil Rights complaint that appeared to have been filed. The witness also stated that M.O'K. had no previous disciplinary record, seems to have been a good student and had received awards in the past.

SUMMATIONS

The petitioner stresses that no one other than K.J. corroborates the alleged humping actions and comments. M.O'K. did have some area of his buttocks exposed. However, pupils' testimony is inconsistent. The facts are far from clear. Further, there has been an overreaction to what was established. This constitutes retaliatory action. The Board acted before the police had completed their investigation. Thus, they have been arbitrary, unreasonable and capricious.

The Board argues that the report by K.J. to his parents, to school personnel and the police were consistent. Even though there was no corroboration, K.J.'s testimony is evidentiary and can be credited in whole or in part. Three pupils confirmed the mooning incidents. That it was "incomplete" is immaterial. The Board may and must consider the incident and address it.

The Board considered all testimony. The three-day suspension was consistent with policy and the team suspension was entirely proper. Since that time, a wrestler has received the same type of discipline.

The petitioner says that the discipline involved here is retaliatory because of a tort claim notice filed a year ago. M.O'K. was a victim last year. That matter was only brought to the Board's attention because of investigation of another matter, not because of a complaint by D.K. The mere existence of notice does not cause school business to stop. The school must administer education notwithstanding. In this matter, the Board and its agents did what needed to be done.

Because of a sexual contact allegation, the administration relied on the handbook and imposed a three-day school suspension and an indefinite team suspension.

At the special hearing before the Board, it heard all sides and made a decision. The petitioner still must carry the burden of showing that it was somehow arbitrary, capricious and unreasonable. What happened here is serious. The Board has not abused its authority. Even though the petitioner wants to ignore the contact, the noises and the remark, they are part of the record. And K.J. did testify clearly. Thus, there has been no arbitrary decision. The decisions have been made on evidence. The Board carefully considered everything and M.O'K. was given multi-level reviews. He had a review of the principal's actions by the superintendent, he had the benefit of Belmar Police Department investigation and he had the benefit of Board consideration.

DETERMINATION AND ORDER

From a review of the entire record, I **FIND**:

1. During basketball practice on November 18, 1999, at the Belmar Elementary School, pupil M.O.'K. knowingly exposed the upper portion of his buttocks, either more than once or for several moments;

2. During the same practice session, M.O'K. knowingly brought his pelvis forward while defending K.J. so that he made contact with K.J.'s backside, particularly the buttocks;

3. The motions were accompanied by guttural sounds;

4. K.J. testified that another pupil, J.S., asked M.O'K. what M.O'K. was doing and M.O'K. replied, "Getting him off my beefy whale." J.S. did not testify. M.O'K. denies the exchange. K.J.'s testimony was the more credible;

5. K.J. reported the incidents to his parents that evening;

6. On the morning of November 19, K.J.'s mother telephoned the principal and informed him of the events of the previous day;

7. K.E.J., Sr., went to the school later in the day;

8. The principal went to K.J. and inquired about the incidents;

9. The principal also spoke to J.F. and D.A.;

10. The principal called M.O'K. to the office, explained the allegations and heard M.O'K. deny all assertions;

11. The principal informed the superintendent of schools and suggested that M.O'K.'s mother be telephoned and informed of the allegations and advised that the principal was going to speak to the team that afternoon outside of the presence of K.J. and M.O'K.;

12. The principal and superintendent did call in Mrs. K. and advised her of what had happened;

13. The principal and superintendent spoke with the team and heard their versions of the incidents;

14. Lieutenant Van Etten was called at approximately 4:00 p.m. and was at the school within ten minutes;

15. The lieutenant interviewed K.J. and another pupil, D.A.;

16. After the interviews, the principal and superintendent discussed the matter and telephoned Mrs. K. at about 6:00 p.m. advising of a three-day suspension from school and an indefinite suspension from the team for M.O'K.;

17. In further discussions with the lieutenant, a detective and a captain, the administrators agreed no criminality was involved;

18. Mrs. K.'s husband telephoned the following week, expressed dissatisfaction with the sanctions and requested an appeal to the Board;

19. Appearance before the Board was arranged for the following week. D.K., her husband, M.O'K. and their attorney appeared;

20. The Board heard the parties and affirmed the actions of the principal and superintendent;

21. Arrangements were made for M.O'K. to receive his school work during the three-day suspension and further arrangements were made in connection with counseling.

22. During basketball practice on November 18, 1999, at the Belmar Elementary School, pupil M.O'K. knowingly exposed the upper portion of his buttocks, either more than once or for several moments;

The first finding is grounded in the credible testimony of K.J. and the report of lieutenant Van Etten. The lieutenant's reference to an admission by J.S. that M.O'K. had mooned is hearsay. However, it is an accurate report of what J.S. said to the officer. It thus may be used to support K.J.'s testimony, which is legally competent evidence. *N.J.A.C.* 1:1-15.5(b). Findings 2 and 3 are similarly grounded. D.A.'s testimony corroborated that of K.J.

Of course, there is conflicting testimony in this case. New Jersey courts have held that testimony should be admitted even if it is suspect or tainted by motive or interest. *Lazorick v. Brown*, 195 *N.J. Super.* 445, 456 (App. Div. 1994). "[M]otive and interest go to the weight to be given to testimony, not its admissibility." And credibility does not depend on the number of witnesses. A fact finder is not bound to believe the testimony of any witness. *In re Perrone*, 5 *N.J.* 514 (1950). In an administrative hearing, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. V. Murdoch*, 73 *N.J. Super.* 511 (App. Div. 1962).

Nor do I **FIND** any reason to presume the testimony of the children in this matter is inherently unreliable. While I do not agree that all were equally truthful, I do not **FIND** that testimony from children of this age is to be credited only with caution. *See, In the Matter of the Tenure Hearing of Richard Wolf*, 1987 *S.L.D.* 1447-1477.

In sum, the petitioner did not carry the burden of persuasion. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. *In re Polk*, 178 *N.J. Super.* 191 (App. Div. 1981). This tribunal, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." *Jackson v. D.L. and W.R.R.*, 111 *N.J.L.* 487, 490 (E. & A. 1933). One factor that must be considered in a determination as to which party's version of an incident has the "reasonable probability of truth" is that "the interests, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), certif. den. 10 *N.J.* 316 (1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

I further **FIND** and **CONCLUDE** that the actions of the Belmar Board of Education in respect of M.O'K. were taken based solely on the incidents of November 1999. There is no connection established in this record between the events of November 1999 and D.K.'s earlier filing of a notice of tort claim. The possibility of the existence of an event does not tend to prove its probability. *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 *F.*3d 69, 75 (3rd Cir. 1996).

The petitioner having failed to establish by a preponderance of the credible evidence in the record that the allegations in the petition of appeal are true, it is **ORDERED** that the petition be and is hereby **DISMISSED**.

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

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

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

MAR 2 0 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3-21-00
DATE

Debbie Matamoros /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Jh

WITNESSES

For petitioner:

D.K.

R.K.

J.R.

A.E.

M.O'K.

For respondent:

Peter J. Van Etten

Thomas Cox

K.J.

Kevin E. Jones, Sr.

D.A.

Richard W. Taggart

Lester W. Richens

EXHIBITS

Petitioner's:

P-1 Letter, Richens to Kopceuk, November 22, 1999

Respondent's:

R-1 Belmar Police Department, II Loop Report, December 10, 1999, 14 pp. with Statement of K.J., 8 pp. and Statement of M.O'K., 6 pp.

Joint:

J-1 Belmar Elementary School Code of Conduct, 1999-2000, 12 pp.

J-2 Letter, Taggart to Parents, November 2, 1999

J-3 Notice of Claim for Damages against Belmar Board of Education and four named defendants and an unspecified number of John and Jane Does, April 2, 1999, 8 pp. with 2 pp. narrative attached

OAL DKT. NO. EDU 100-00
AGENCY DKT. NOS. 9-1/00 AND 395-12/99

D.K., on behalf of minor child, M.O'K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions in large part recast her arguments as raised before and considered by the Administrative Law Judge (ALJ), essentially contending that the discipline relating to M.O'K. should be reversed and removed from his school record. Petitioner also urges, *inter alia,* that:

> 1. The ALJ made findings and conclusions relative to J.S. Yet J.S. did not testify and the ALJ's findings are contrary to J.S.'s statements in the police report.
>
> 2. The ALJ made findings and conclusions that M.O'K. "knowingly" exposed the upper portion of his buttocks and "knowingly" brought his pelvis forward. These "knowingly" determinations are contrary to all the evidence presented.
>
> 3. The ALJ ignored that the School's Code of Conduct would not support a finding of sexual harassment, warranting a three-day suspension and permanent removal of M.O'K. from the school's basketball team. The School's Code of Conduct does not support a determination that the actions were sexual harassment.

4. The ALJ's findings that M.O'K. accompanied his contact with K.J.'s backside with guttural sounds is not supported by any of the evidence presented.

5. The ALJ's referring to another student who allegedly received the same discipline is inaccurate, as this incident regarding a member of the wrestling team, involved exposure of frontal nudity. Moreover, the wrestling season was concluding and the basketball season for M.O'K. had just begun.

6. The ALJ ignored the compelling evidence that the superintendent, the principal, and the Board, severely disciplined M.O'K because D.K. had filed a Notice of Tort Claim against them and others related to incidents that occurred in March 1999.

The Board's reply exceptions rebut each point raised in petitioner's six primary exceptions. The legal arguments advanced by the parties with respect to each of petitioner's exceptions have been duly considered by the Commissioner in reaching the final determination herein.

Upon a comprehensive and independent review of the record in this matter, including the parties' exceptions, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ that petitioner has not met the burden of establishing that the Board's actions in the instant matter were arbitrary, capricious, or unreasonable. It is well-established "***that actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *J.M. v. Hunterdon Central Regional High School District*, 96 *N.J.A.R.*2d (EDU), 415, 419, citing *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288 (App. Div. 1960).

A major thrust of petitioner's exceptions attack findings and conclusions which are grounded in credibility determinations made by the ALJ. It is noted by the Commissioner that the record before him does not include transcripts or an audiocassette tape recording of the hearing conducted at the OAL. In the absence of transcripts or tapes from the hearing, due

regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965). Likewise, the Commissioner may not properly reject such findings of fact without reviewing those portions of the transcript(s) or tape recording of the testimony upon which the ALJ's findings were reached. *Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 75 (App. Div. 1985). *In re Morrison*, 216 *N.J. Super.* 143, 159 (App. Div. 1987).[1]

Having thoroughly examined the record before him, the Commissioner finds the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony and assessment of credibility. *Lazorick, supra; In re Perrone, supra; Middletown Tp., supra; In re Wolf, supra; Jackson, supra; State v. Salimone, supra; and Congleton, supra.* Moreover, the Commissioner finds no cause to challenge the credibility assessments made by the ALJ or to disturb the ALJ's findings of fact. Further, the Commissioner agrees with the Board's contention that, even though J.S. did not testify and he might have made a contrary statement in the police reports, this does not contradict the findings of fact made by the ALJ. As correctly stated by the Board, "the ALJ's findings relating to J.S.' statements to Lieutenant Van Etten are not misplaced. The ALJ's findings were grounded in what is characterized as the credible testimony of K.J. and the report of Lieutenant Van Etten [Initial Decision at 15]. The thrust of Petitioner's objections appear[s] to hinge upon whether the mooning was full or partial exposure. Neither act need be condoned by the Board of Education." (Reply Exceptions at 4)

The Commissioner is also in full agreement with the Board's position that the inappropriate conduct engaged in by M.O'K. may be deemed to fall within the prohibitions of

[1] As held by the court in *In re Morrison* at 158-159, it is the responsibility of those challenging such determinations to provide the Commissioner with such portions of the transcript, and no obligation arises for the Commissioner to review them before issuing a final decision regarding the findings and recommendations of the ALJ.

the District's Student Code of Conduct against sexual harassment and that the sanctions it applied against M.O'K. were consistent with that Code. As to petitioner's exception with respect to M.O'K.'s discipline being more severe than that applied to the student wrestler, the Commissioner fully concurs with the Board's argument that "[i]nappropriate exposure of a student's private parts is unacceptable behavior. Petitioner attempts to excuse M.O'K.'s actions by trying to differentiate between partial and complete exposure, and whether exposure was frontal or rear nudity. Both violations warranted appropriate disciplinary action by the Board of Education." (*Id.* at 8) The Commissioner further determines that the Board's action herein to exclude M.O'K. from participation on the school's basketball team must be reviewed in the context of prior decisions which have consistently held that participation in extracurricular activities is not an entitlement but a privilege, which can be revoked for infraction of school rules or failure to act in accordance with Board policy. *Martin A. Domacasse v. Board of Education of North Warren Regional School District, Warren County*, State Board of Education decision dated April 17, 1996, citing *Camden City Board of Education v. NJSIAA*, Docket #A2802-91T2 (App. Div. 1992); *Burnside v. NJSIAA*, 1984 *S.L.D.* 1696 (App. Div. 1984), *cert. denied*, 101 *N.J.* 236 (1985). *See also P.K., on behalf of R.K. v. Board of Education of the Morris Hills Regional School District, Morris County et al.*, decided June 17, 1998. The Commissioner's review of the record in this matter fails to demonstrate that the Board's disciplinary actions with respect to M.O'K. were arbitrary, capricious or unreasonable; therefore, his suspension for the entirety of the basketball season may not be disturbed.

Lastly, the Commissioner affirms the ALJ's determination that there is no connection established in the record of this matter between the events of November 1999 and D.K.'s earlier filing of notice of a tort claim against the Board and its agents.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 05 2000

Date of Mailing: MAY 05 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

NEW BRUNSWICK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY	:	DECISION
RESPONDENT.	:	

May 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6352-98

NEW BRUNSWICK EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUWSWICK,
Respondent.

David L. Rosenberg, Esq., for petitioner, (Klausner, Hunter & Rosenberg, attorneys)

George F. Hendricks, Esq., for respondent, (Hendricks & Hendricks, attorney)

Record Closed: March 22, 2000 Decided: March 22, 2000

BEFORE **ROBERT S. MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 23, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to 13.

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

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

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

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

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

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

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

March 22, 2000
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

3/24/00
DATE

Deborah Gattenuso
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

STIPULATION OF SETTLEMENT

WHEREAS the New Brunswick Board of Education ("Board") is the duly appointed Board of Education statutorily charged with supervising and operating the New Brunswick School District; and

WHEREAS the New Brunswick Education Association ("Association") is the Certified bargaining agent of all non-supervisory certificated and non-certificated employees of the Board; and

WHEREAS the Association recently filed a Petition of Appeal before the Commissioner of Education of New Jersey, OAL Docket NO. EDU 6352-98, wherein the Association alleged that the Board and its administrative staff failed and refused to comply with and enforce the provisions of **N.J.S.A.** 18A:37-1 **et. seq.** by refusing to investigate, suspend and hold disciplinary hearings for students who were involved in physical assaults or had physically assaulted or threatened to assault school district employees and/or who carried or possessed concealed weapons on school premises; and

WHEREAS the Board denied such allegations and asserted that it fully complied with **N.J.S.A.** 18A:37-1 **et. seq.**; and

WHEREAS the parties desire to adjust their differences amicably.

WHEREFORE, the parties hereby agree as follows:

1. The Board and its administrative staff will hereby acknowledge that the Board and only the Board has authority to hold expulsion hearings pursuant to **N.J.S.A.** 18A:37-1 **et. seq.** for students who allegedly become involved in physical assaults,

threats to assault upon school district employees, threats to school district employees and/or who have carried or possessed concealed weapons on school premises, and the Board herewith agrees that it will hold such expulsion hearings in the future in all warranted cases in a timely fashion;

2. Board Administrators district-wide will be trained in the law regarding violence against staff members including but not limited to expulsion hearing procedures, the law as it pertains to special education classified individuals, what constitutes an assault, and confiscation of weapons or other devices.

3. The Association upon execution by both parties of this Stipulation of Settlement shall request that the Administrative Law Judge and Commissioner of Education permit the withdrawal of the pending Petition of Appeal and/or have the said Stipulation of Settlement incorporated in a binding decision by the Commissioner of Education.

By: _____

President of the New Brunswick Board of Education

BY: _____

President of the New Brunswick Education Association

OAL DKT. NO. EDU 6352-98
AGENCY DKT. NO. 127-5/98

NEW BRUNSWICK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 08 2000

Date of Mailing: MAY 08 2000

145-00

SANG YEON KWON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

May 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9814-98
AGENCY DKT. NO. 395-9/98

SANG YEON KWON,

Petitioner,

v.

BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Andrew J. Karas, Esq., for Petitioner (Karas, Kilstein, Hirschklau, Feitlin & Youngman, attorneys)

Rodney T. Hara, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: March 8, 2000 Decided: March 16, 2000

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

Petitioner filed a petition with the State Department of Education (DOE) on September 1, 1998, seeking a determination that he was entitled to a free public education by respondent. Respondent filed an answer and a counter-claim, and petitioner filed an answer to the counter-claim. The DOE transmitted the matter to the Office of Administrative Law on October 29, 1998, for determination as a contested case pursuant *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted throughout the proceedings, and the parties conferred regarding a resolution of the matter. An executed Settlement Agreement was filed on March 8, 2000, on which the record was closed. Attached herewith is a copy of the Settlement Agreement.

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

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

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

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

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

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

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

March 16, 2000
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3-22-00
DATE

Debbie Costanzo/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 2000
DATE

Barbara A Kamen
OFFICE OF ADMINISTRATIVE LAW

pb

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STATE OF NEW JERSEY
OFFICE OF [illegible]
MAR 8 1 11 PM '00

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 391-3340
(201) 391-3432 FAX
Attorneys for Respondent
Pascack Valley Regional High
School Board of Education
Our File No.: 116

SANG YEON KWON, Petitioners, vs. PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent/Counter-claimant/Third Party Petitioner, JIN H. KWON and JIN Y. KWON, Third Party Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 395-9/98 OAL Docket No.: EDUOS-09814-98N **SETTLEMENT AGREEMENT**

THIS AGREEMENT made this _____ day of August, 1999, by and between the PASCACK VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION, which has offices located at 46 Akers Avenue, Montvale, New Jersey 07645 (the "Board"), SANG YEON KWON, who resides at 629 Baldwin Drive, River Vale, New Jersey 07675, JIN H. KWON, who resides at 20 Fieldstone Road, Bedminster, New Jersey 07921, and JIN Y. KWON, who resides at 2800 East Coast Highway, Corona Del Mar, California.

WITNESSETH:

WHEREAS, Sang Yeon Kwon is an eighteen year old boy who was enrolled in the Pascack Valley Regional High School for the 1997-1998 and 1998-1999 school years;

WHEREAS, a dispute has arisen between the parties regarding whether or not Sang Yeon Kwon is entitled to a tuition free

education in the Pascack Valley Regional High School pursuant to N.J.S.A. 18A:38-2 for the 1997-1998 and 1998-1999 school years;

WHEREAS, the parties are desirous of amicably resolving the above-referenced litigation; and

WHEREAS, the parties are desirous of memorializing the terms and conditions of their agreement.

NOW, THEREFORE, based upon the foregoing premises and mutual promises and covenants contained herein, the parties agree to resolve the above-referenced litigation and be bound by the following terms and conditions:

1. Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon shall pay to the Board the total sum of $12,000.00, in accordance with Paragraph 2, in settlement of the Board's counterclaim against Sang Yeon Kwon and the Board's third party claim against Jin H. Kwon and Jin Y. Kwon.

2. Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon shall pay to the Board the sum of $2,000.00 upon their execution of this Agreement. Thereafter, Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon shall pay to the Board the sum of $350.00 on the first day of each month, for the next twenty-eight (28) months following the execution of this Agreement, and $200.00 on the first day of the twenty-ninth (29th) month following the execution of this Agreement.

3. If the Board does not receive the requisite payment from Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon upon execution of this Agreement and by the seventh day of the month in which the payment is due, as set forth in Paragraph 2, the Board may apply to the Court, upon notice to the other parties, for a Judgment against

Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon in the amount of $12,000.00 less any payments which the Board has already received from Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon. Furthermore, if Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon default on any payment of the settlement monies and the Board applies to the Court for a Judgment, Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon shall be liable to the Board for all reasonable attorneys' fees and costs which the Board incurs as a result of Sang Yeon Kwon's, Jin H. Kwon's and Jin Y. Kwon's default and noncompliance with this Agreement.

4. Upon the Board's receipt of the total settlement sum of $12,000.00, the above-referenced litigation shall be dismissed with prejudice.

5. Both parties shall bear their own costs, including, but not limited to attorneys' fees, arising out of and/or related to the above-referenced litigation.

6. The terms of this Settlement Agreement shall remain strictly confidential and shall not be divulged by any party, except to the party's attorney and/or accountant/auditor unless such disclosure is required under applicable federal, state and/or local law and/or if such disclosure is required as a result of a legal proceeding.

7. This Settlement Agreement is the compromise of disputed claims regarding Sang Yeon Kwon's enrollment in the Pascack Valley Regional High School for the 1997-1998 and 1998-1999 school years, and this Settlement Agreement shall never be treated as an admission of wrongdoing or liability by either party for any purpose whatsoever.

8. This Settlement Agreement represents the full and final settlement of all claims which Sang Yeon Kwon may have against the Board, its officers, agents, servants and employees, and all claims which the Board, its officers, agents, servants and employees may have against Sang Yeon Kwon, Jin H. Kwon and Jin Y. Kwon, including, but not limited to any and all claims relating to Sang Yeon Kwon's enrollment in the Pascack Valley Regional High School for the 1997-1998 and 1998-1999 school years. However, expressly excluded from these claims are any claims which the parties may have solely regarding the enforcing of the terms and conditions of this Agreement.

9. This Settlement Agreement contains the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges and agrees that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Settlement Agreement, which alone fully and completely expresses all agreements between the parties.

10. The parties respectively acknowledge that each has consulted with and obtained independent legal advice from counsel of his or her own selection; that each fully understands the facts; that each has been fully informed by his or her attorney as to his or her legal rights and obligations and the legal effect of the provisions of this Settlement Agreement on those legal rights and obligations; that each has had ample opportunity to evaluate and carefully consider his or her decision to enter into this

Settlement Agreement; that each has had a full opportunity to ask any questions which they may have concerning this Settlement Agreement; and that based on the advice received and knowledge gained, and having had all questions which were asked, fully answered to the satisfaction of each such party, each is signing and entering into this Settlement Agreement freely and voluntarily without any undue influence, coercion or duress of any nature whatsoever.

11. The parties acknowledge and agree that all the provisions of this Settlement Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them by the other party and/or his or her independent legal counsel; that they have given due consideration to such provisions and questions, understand them clearly, that the settlement terms embodied in this Settlement Agreement is in all respects acceptable to them; and that they, therefore, accept these provisions in full and final settlement and satisfaction of all claims and demands which have been raised or which could have been raised in any litigation relating to Sang Yeon Kwon's enrollment in the Pascack Valley Regional High School for the 1997-1998 and 1998-1999 school years and voluntarily agree to be bound by the settlement terms expressed in this Agreement.

12. A modification or a waiver of any of the provisions of this Settlement Agreement shall be effective and enforceable only if made in writing and executed with the same formality as this Settlement Agreement. The failure of any party to insist upon strict performance of any of the provisions of this Settlement Agreement shall not be construed as a waiver of any subsequent

default of the same or similar nature or of a continuation of an existing default.

13. Each of the parties shall, from time to time, at the reasonable request of the other, execute, acknowledge and deliver to the other party such other and further instruments which are or may be reasonably necessary or required to give full force and effect to all of the provisions of this Settlement Agreement.

14. All parties acknowledge and agree that they have received sufficient and ample consideration for the covenants, promises and agreements which each of them makes pursuant to this Settlement Agreement, and each party hereby waives any claim as to the failure of consideration, inadequacy of consideration or lack of consideration, as well as any other defense to performance of all obligations, contemplated or required by this Settlement Agreement.

15. This Settlement Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey. All parties acknowledge and agree that all litigations arising out of, relating to or concerning this Settlement Agreement or any instrument executed or made pursuant to the terms of this Settlement Agreement shall be venued solely in the State Courts of the State of New Jersey or in the United States District Court for the District of New Jersey; and all parties agree that any action venued in any other jurisdiction shall be transferred to the State Courts of New Jersey or the United States District Court for the District of New Jersey. The provisions of this paragraph shall be deemed to be irrevocable.

16. The Board has ratified the terms and conditions of this Settlement Agreement at a duly organized meeting of the approved and based upon a majority vote of the Board. (The Board's Resolution ratifying this Settlement Agreement is incorporated herein by reference.)

IN WITNESS WHEREOF, the parties have hereunto set their hand and seals the day and year first above written.

WITNESS:

By: _____
PATRICIA GIANNOTTI
Board Secretary/
Business Administrator

Dated:

PASCACK VALLEY HIGH SCHOOL
REGIONAL BOARD OF EDUCATION

By: Leta Gordon
LETA GORDON
Board President

Dated:

WITNESS:

By: Gene Fose

Dated: 2/17/00

Sam Kwon
SANG YEON KWON

Dated:

WITNESS:

By: Gene Fose

Dated: 10/19/99

JIN H. KWON

Dated: 10.19.99

WITNESS:

By: _____

Dated:

JIN Y. KWON

Dated: 11/24/99

OAL DKT. NO. EDU 9814-98
AGENCY DKT. NO. 395-9/98

SANG YEON KWON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 08 2000

Date of Mailing: MAY 08 2000

IN THE MATTER OF THE TENURE	:	
HEARING OF GRACE FOLGER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges of excessive absenteeism, unbecoming conduct, insubordination, and/or other just cause against respondent teaching staff member.

The ALJ found that in light of the number of days respondent was absent during the 1994-95, 1996-97, 1997-98 and 1998-99 school years, such absences, on their face, constituted excessive absenteeism. Respondent had been given notice of the Board's goals regarding absenteeism, yet she was absent much more than the average teacher in the District. The number of absences and the fact that they had a substantial negative impact on her students warranted termination relevant to Charges one through four. The ALJ dismissed Charges five through nine and eleven through thirteen (failure to follow administrative directives and insubordination), concluding that the Board did not prove said charges by a preponderance of credible evidence. The ALJ did conclude that the Board proved Charge ten (noncompliance with Board directive on beepers and cellular phones) and that withholding of an increment was the appropriate penalty. The ALJ ordered respondent terminated relevant to Charges one through four and ordered respondent's personnel file to reflect the withholding of an increment regarding Charge ten.

Upon examination of the record, including the transcripts of the matter, the Commissioner found that the Board met the standard for termination of a tenured employee for excessive absenteeism. (*In re Lena White*) Moreover, the Commissioner found nothing in the record to indicate that the Board based its decision to certify tenure Charges one through four against respondent solely upon the application of a mechanistic, mathematical or statistical formula. The Commissioner noted that he was in agreement with the ALJ that action could be taken against a teacher for excessive absenteeism even if such were the result of work-related injuries. The Commissioner also agreed with the ALJ that the Board proved Charge ten but the Commissioner declined to accept the recommended penalty to the extent that such increment withholding was intended to be prospective. Commissioner ordered respondent terminated from her teaching position and a copy of this decision forwarded to the State Board of Examiners for action as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7379-99
AGENCY DKT. NO. 163-6/99

ORANGE BOARD OF EDUCATION,
Petitioner,
v.
GRACE FOLGER,
Respondent.

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

Nicholas Celso, III, Esq., and **Joseph R. Morano**, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Record Closed: December 21, 1999 Decided: March 20, 2000

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

PROCEDURAL HISTORY

On June 15, 1999, the Orange Board of Education (petitioner or Board) certified tenure charges against Grace Folger (Folger or respondent), a tenured teacher employed by the Board. Respondent filed an Answer and Affirmative Defenses with the State Department of Education (DOE) on June 29, 1999. The DOE issued a Notice of Referral to the Office of Administrative Law (OAL) on June 19, 1999 and transmitted the matter to the OAL on July 9, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

An initial telephone prehearing conference was conducted on July 22, 1999; and a status telephone conference, on September 10, 1999. The discovery period was extended pursuant to *N.J.S.A.* 52:14B-10.1(b).

Hearings were conducted on October 25, October 26, and November 4, 1999. The parties subsequently obtained transcripts of the hearings. The last initial and reply briefs were filed on December 14 and 21, 1999, respectively. The record was closed on December 21, 1999. The deadline for the issuance of an initial decision was extended because of illness in the judge's family

NATURE OF THE PROCEEDINGS

Petitioner certified fourteen charges, alleging excessive absenteeism, unbecoming conduct, insubordination, and/or other just cause for dismissal relevant to the 1994-95, 1996-97, 1997-98, and 1998-99 school years.

The ultimate issues, broadly, are whether petitioner has proven, by a preponderance of the credible evidence, the charges and, if so, what discipline, if any, should be imposed on respondent.

STIPULATIONS[1]

The parties stipulated to the following facts:

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

2. On or about September 1, 1990, respondent was employed by the Board as a Special Education teacher at the Orange Middle School

[1] The stipulations and the attachments thereto are in evidence as Exhibit J-138.

(Orange Middle). Respondent worked at Orange Middle until June 30, 1995.

3. On or about September 1, 1995, respondent was transferred to the Park Avenue School (Park Avenue), where she presently remains.

4. Respondent received tenure as a Special Education teacher on or about September 2, 1993.

5. Respondent is the holder of a Standard Teaching Certificate with an Elementary Education endorsement issued by the State Board of Examiners (State Board) in June 1968; a Teacher of the Handicapped endorsement, issued September 1976; a Learning Disabilities Teacher Consultant (LDTC) endorsement, issued September 1976; and a Nursery School endorsement, issued September 1976.

6. During the 1990-91 through 1994-95 school years, respondent's immediate supervisor was George Noble (Noble), Principal of Orange Middle.

7. During the 1995-96 through 1998-99 school years, respondent's immediate supervisor was Maxine G. Johnson (Johnson), Principal of Park Avenue.

8. During the 1994-95 school year, respondent was absent from work on 27 occasions.

9. During the 1995-96 school year, respondent was absent from work on 12 occasions.

10. During the 1996-97 school year, respondent was absent from work on 69 occasions.

11. During the 1997-98 school year, respondent was absent from work on 122.5 occasions.

12. During the 1998-99 school year, respondent was absent from work on 104 occasions.

13. On or about May 21, 1999, the Assistant Superintendent of Schools, Michael Cohn (Cohn), filed sworn tenure charges of excessive absenteeism, unbecoming conduct, insubordination, and/or other just cause against respondent, together with a sworn statement of evidence in support of the charges, with Ronald R. Lee (R. Lee), the Board Secretary. A copy of the charges was also served upon respondent.

14. On or about June 15, 1999, after consideration of the charges and evidence against respondent, together with her attorney's written submission, the Board determined to proceed to certify the charges to the Commissioner of the DOE (Commissioner) for a hearing, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

15. Thereafter, on or about June 17, 1999, the above charges, together with the sworn statement of evidence and a certificate of determination, were filed by the Board with the Commissioner and served upon respondent, pursuant to *N.J.S.A.* 6:24-5.1.

16. On or about June 28, 1999, an Answer was filed on behalf of respondent.

GENERAL FINDINGS

Certain facts are general in nature, provide context, relate to more than one charge, and/or relate to discipline. The following facts are not disputed by the parties.

Based upon a review of the entire record, I **FIND** the following to be facts.

There are approximately 250 students at Park Avenue, in pre-kindergarten through sixth-grade classes. The school has approximately 45 self-contained classes,

which are attended by classified students. Classified students also attend a resource room.

Folger teaches a self-contained classroom. She therefore is responsible for all "base subjects," *i.e.*, Reading, Language, Mathematics, Spelling, Science, Social Studies, and Computer Technology (Tr., 10/25/99, p. 80). Respondent's classroom was located on the second floor at Park Avenue. A teacher's aide was assigned to the class.

"Special Education students", in contrast to "regular students", are not necessarily assigned to a different class each year. (*Id.* at 81.) Classified students are assigned relevant to their chronological ages as well as their classifications. A student therefore is often in the same class for two or three years.

Johnson is certified as an elementary teacher, *i.e.*, grades K through 8. She also is certified in Student Personnel Services and as an administrator, that is, a supervisor for grades K through 12. Johnson has a Bachelor's Degree in Elementary Education and a Master's Degree in Student Personnel Services. She was previously a teacher for fifteen years and an Assistant Principal for eight years. She has been Principal at Park Avenue for ten years.

Cohn is respondent's Assistant Superintendent of Operations and Human Resources. He holds certificates as an Administrator, a Principal, and an Elementary Teacher. He has been employed in education for 33 years. Cohn previously taught for ten years and was a Principal for sixteen years. He has been an Assistant Superintendent with the Board for seven years.

Cohn's responsibilities include hiring of personnel, maintenance of records, including attendance records, Human Resources matters, and the general daily operations of petitioner's schools, which number ten.

Respondent is a self-insured school district. Risk Enterprise Management (REM) is administrator for the Board's compensation plan. Stephanie James (James), an employee of REM, is responsible for petitioner's plan.

Every certified staff member of the Board must prepare an annual Professional Improvement Plan (PIP), stating goals and objectives for the coming school year, at the end of a school year. The PIPs are thereafter assessed mid-year and at the end of a school year to determine whether those goals and objectives have been achieved.

An observation of Folger's Science class was conducted on May 1, 1992. Pertinent to professional and personal qualities and relationships, Folger was rated "Strong" in two of the items; and "Effective", regarding the remaining five items (Exh. J-40, p. 1.) Respondent was rated as "Effective" in 10 of 11 items pertinent to professional ability; and as needing improvement regarding one item, meeting pre-planned objectives. Written comments noted that the activity presented " . . . stimulated pupil interest and students worked effectively with each other in teams" and that respondent continued " . . . to exhibit instructional strengths in her ability to structure and implement appropriate teaching strategies." Although lesson plans were apparently unavailable for review, it was also noted that respondent generally met pre-planned written objectives in her lesson plans. (*Id.* at 2.)

A classroom observation of Folger's Science lesson on November 9, 1992 resulted in an evaluation finding her strong in three categories pertinent to professional abilities; and effective, in the remaining categories. She was rated as either strong or effective regarding all categories pertinent to professional abilities and professional/personal qualities and relationships. The observation concluded that Folger " . . . consistently demonstrated her knowledge of the subject matter with a high degree of enthusiasm." Instructional techniques were appropriate, and content was on grade level. (Exh. J-42, p.2.)

A classroom observation of Folger was conducted on May 13, 1993. She was rated strong in all categories pertinent to professional abilities, except for one, in which she was rated effective. Folger was rated as strong or effective in all categories

pertinent to professional/personal qualities and relationships. Written comments made by the principal noted, in part, that respondent continued " . . . to be a strong, original and effective teacher . . ." and that, relevant to her PIP, she had been " . . . an excellent Team Leader, even without the necessary District support for her team." The comments concluded that respondent was " . . . a pleasure to work with" and that the evaluator looked " . . . forward to working with her next year." (Exh. J-44, p. 3.)

Classroom observations of Folger were conducted in March 1994. Folger was rated as either strong or effective in all categories pertinent to professional abilities and professional/personal qualities and relationships. The written comments reflected that Folger was working within the scope of her PIP and that she served as the team leader for the Special Education program, working in that capacity consistent with the job description.

An observation of a Reading class was performed on March 1, 1995. Respondent was rated as either strong or effective in all categories regarding professional abilities and professional/personal qualities and relationships. Pertinent written comments noted, in part, that respondent's lesson plans " . . . were readily available an [*sic*] accurate." (Exh. J-46, p. 1.) The comments concluded that the lesson " . . . was an excellent example of how to prepare students for standardized tests and encourage critical thinking." (*Id.* at 2.)

Classroom observations of Folger were conducted on October 24, 1994 and March 1, 1995. The pertinent performance/evaluation report rated Folger as either strong or effective in all categories regarding professional activities and professional/personal qualities and relationships. Written comments were that respondent " . . . demonstrates excellent teaching techniques. She exhibits a genuine care for students [*sic*] welfare and her classes are both interesting and informative." (Exh. J-47, p. 3.)

Classroom observations were conducted on December 14, 1995 and March 8, 1996. Respondent was rated as either strong or effective in all categories regarding professional abilities and professional/personal qualities and relationships. Written

comments stated that respondent continued " . . . to implement an excellent instructional program. She supports supplementary activities for her students. Letters have been written by parents commending her for their children's progress and achievements." (Exh. J-49, p. 3.) The observations were conducted by Clark and Johnson, and the pertinent Performance/Evaluation report was, on its face, prepared by Clark.

An observation of Folger's Mathematics class was conducted on January 14, 1997. The relevant Instructional Staff Observation report rated Folger as outstanding in all performance factor categories. Written comments regarding each category were consistent with those ratings. However, comments pertinent to effective organization and planning noted that although respondent's plan book was current, instructional groupings were not consistent with the students' IEPs goals and objectives should be evident in the teacher's section. The evaluation, which was prepared by Barbara Clark (Clark), petitioner's Director of Social Services, was dated January 19, 1997.

Johnson, Ken Wiggins (Wiggins), a New Jersey Education Association representative, Folger, and Clark attended a meeting on November 17, 1998. Clark and Johnson sent Cohn a memorandum dated November 18, 1998, requesting that a 90-day PIP be developed for respondent because she was " . . . in need of this PIP to improve her teaching performance and to help her to succeed." (Exh. J-27.)

The requested PIP was not the equivalent of an annual PIP. In Johnson's view, it was requested to "assist" respondent address concerns previously expressed. The memorandum referenced 90 days because such time period is the "indicator". (Tr., 10/25/99, p. 197.) That time period was agreed upon by Clark and Johnson during the November 17 meeting. At the time, Johnson, and apparently Clark, " . . . knew Ms. Folger could improve." (*Id.* at 198.)

Folger subsequently sent Johnson a memorandum dated November 19, 1998. Respondent noted that Johnson had agreed to provide examples of lesson plans from other teachers at Park Avenue meeting the "principal's expectations." Folger requested that she be provided some before the coming weekend so she could review them

before preparing her lesson plans for the week of November 23. The memorandum, on its face, indicates that a copy was sent to Wiggins. (Exh. J-29.)

Wiggins sent Clark a memorandum, dated November 24, 1998, summarizing his understanding of the agreements reached during the meeting on November 17, 1998. Wiggins referenced lesson plans, text books, an observation to be conducted by Clark, personnel folders pertinent to respondent, and expectations that Folger would have input into the development of a PIP and that the final PIP would be the result of joint efforts by Folger, Johnson, and Clark. The memorandum indicated, on its face, that copies were sent to respondent and Johnson.

TENURE CHARGES

Most of the facts are not materially disputed. The disputes relate to the interpretations and connotations to be placed on various occurrences. Johnson and Cohn testified, relative to charges one through four, regarding the impact of Folger's absences on her students. Their testimony was not discredited on cross-examination, and I am persuaded by it.

Charges 1 - 4

Charges 1 through 4 allege excessive absenteeism during the 1998-99 school year, the 1997-98 school year, the 1996-97 school year, and the 1994-95 school year. The charges also aver that the absences resulted in a disruption of the proper operation of Park Avenue, interfering with the instructional process, resulting in a detrimental impact on the educational environment, and that the absences constitute excessive absenteeism and/or other just cause for dismissal.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

"State" monitoring regulations require each public school district in New Jersey to maintain a 96.5% attendance rate for certified staff. Stated another way, the "allowed" absentee rate is 3.5%. (Tr., 10/2/5/99, p. 13.)

The calculation of a district's absenteeism rate does not include in the number of absences "Worker's Compensation absences", "funeral days", "jury duty days", or "[P]rofessional days" (*Id.* at 71-73). Petitioner includes "personal days" in its own calculation of absences to determine if a 96.5% overall attendance rate has been achieved. (*Id.* at 73.)

If a district's absenteeism rate exceeds 3.5%, the DOE can delay certification of the district. The district is required to develop a "corrective action plan". (*Id* at 53.) Cohn is not aware of any "directive or rule" regarding discipline of individuals having an absenteeism rate exceeding 3.5%. (*Id.* at 54.)

Petitioner's school year consists of a minimum of 180 days. To satisfy the monitoring criteria, the average number of absences for each certified staff member would have to equal approximately four to five days annually. The "average" number of annual absences for a teacher is four days. (*Id.* at 14.) The overall absenteeism rate for certified staff at Park Avenue during 1998 was 3.4%. Park Avenue's cumulative absenteeism rate for the 1997-98 school year was 2.4%; and the district's cumulative absenteeism rate, 3.5%.

The "Worker's Compensation absences" not included in the total number of absences are those absences "submitted" and for which respondent has received "approval," *i.e.*, those absences which have been "substantiated" and are to be put in a teacher's record as "being agreed upon."

Petitioner's business office monitors the status of employees' Worker's Compensation claims. Cohn's office eventually receives a form indicating whether an employee has been approved for compensation time. Until such is received from the business administrator, absences are treated as personal illness days (PIDs). The records are changed if a form is received stating the exact day that compensation

commenced. Any such days relevant to Folger are currently "in litigation" in Workers' Compensation Court and are not "agreed upon". (*Id.* at 72.)

Petitioner does not "allow for light duty work" for teachers, although it makes accommodations if teachers have certain kinds of " . . . handicaps or whatever, to offset what the handicap was". However, such is not referred to as "light duty." The "full instructional program" is expected to be implemented. For example, if an employee utilizes a wheelchair, personnel will insure that one is available at a certain door to the school building. Such accommodations will always be made, "upon request." (Tr., 11/4/98, p. 55.)

Petitioner has a written attendance policy. Non-tenured teachers are allowed ten PIDs a year, and twelve-month, non-tenured teachers are allowed twelve PIDs yearly. Tenured teachers are allowed more than ten PIDs a year, depending on their years of experience. PIDs are cumulative. Both non-tenured and tenured teachers are allowed three personal business days (PBDs) yearly. All allowances are based upon contractual agreements.

Pursuant to petitioner's attendance policy, the school principal is to meet with an employee who has more than six days of "incidental absenteeism," *i.e.*, non-consecutive days of absenteeism, to determine the "problem" and to be "as supportive as possible." The principal again meets with the individual after eight days and sends a form, "Form D", to Cohn, indicating that there is an "attendance problem". (*Id.* at 12 & 22.) If the employee has twelve days of incidental absenteeism, he/she may be required to meet with the Superintendent. Sanctions, including withholding of an increment or termination, may be imposed if there continues to be a problem.

Several "Form Ds" were completed regarding Folger, subsequent to her transfer to Park Avenue. (Tr., 10/25/99, p. 22.) Those forms are not completed regarding long-term absences. If an employee is absent for one single day, the Board requires that he/she complete a form. Employees " . . . just put your name down - - and just that you are out for illness." (Tr., 10/26/99, p.32.)

Respondent employs a system, referenced as "Code-A-Phone", pursuant to which certified employees are required to call a certain phone number if they are going to be absent on a given day. (Tr., 10/25/99, p.65.) A full-time employee, "Ms. Blanton" (Blanton), receives the calls, generally on tape, makes efforts to arrange for substitute teachers, if possible, and informs the appropriate principal of the situation. (*Id.* at 151.)

Folger's PIP for the 1991-92 school year stated objectives regarding staff attendance to be to help maintain a 3.5% attendance rate at Orange Middle, as mandated by the "District/State." To achieve that goal, respondent would utilize personal days for "emergency matters"; and sick days, "for illnesses only." (Exh. J-39.) To petitioner's knowledge, such a goal was contained in the PIPs for all teachers. Respondent's PIPs for the 1992-93 and 1995-96 school years stated the same goal and methodology. The latter document stated that sick time would be utilized only when necessary; and personal days, only when "business cannot be conducted after school." (Exh. J-48.)

During the 1994-95 school year, respondent was absent on a Monday, a Friday, or a day before or after a holiday on ten different occasions, not including any Mondays, Fridays, or holidays during long-term absences of a week or longer. Of the 27 days Folger was absent during the 1994-95 school year, three were designated as personal days; eight as PIDs; and sixteen, as work-related injuries.

Folger was "Absent-Ill" on September 14, October 7, October 12, October 17, and November 14, 1994. (Exh. J.-138(a), pp. 1-4.)

While Folger was assigned to "lunchroom duty" on December 16, 1994, a Friday, during the fourth period, she was involved in an incident with students. (Tr., 10/26/99, p. 10.) The next period, she attended her own lunch period. She taught her sixth-grade class, Mathematics. She thereafter went to the school nurse, reporting that she had been involved in an accident with students during lunch and that she needed "a form". (*Id.* at 11.)

Folger completed an Employee's Accident Report (EAR). She stated therein that at 11:30 a.m., two students, who were "fighting and running fast" in the cafeteria, "plowed into her", shoving her into a table, which she struck with her back right hip. (Exh. J-58.)

Respondent did not complete her seventh-period assignment, which was as an in-class support teacher. She returned to the nurse's office, reporting that she was in pain, and the nurse gave the EAR to Noble.

Noble interviewed Folger and, apparently, the students in question. At the end of the interviews, at approximately 3:30 p.m., Folger asked Noble if she "could go to the comp doctor that day." (Tr., 10/26/99, p.12.)

Respondent was absent on December 19 and 20, 1994. Ultimately, Folger was authorized to see Dr. James M. Lee (Dr. Lee), an Orthopedic Surgeon, who examined her on December 21, 1994, at approximately 2:30 p.m.

Respondent reported that an accident had occurred and that she had commenced experiencing pain on the right side of her hip, radiating down her leg. Dr. Lee diagnosed: "traumatic Contusion" and "Traumatic Sprain" of the Lumbar Spines L-4 - L-5 with Right Para vertebral Myofascitis. He recommended anti-inflammatory medication and physiotherapy and, because respondent lived "way up in Denville", that she rest for a week and that if she continued "to be symptomatic", she would start physiotherapy when returning to school. (Exh. J-62.) Dr. Lee completed a Disability Certificate indicating diagnosis of a sprain and that respondent would return to work on January 3, 1995.

Christmas recess commenced on December 23, 1994. Folger again saw Dr. Lee on January 3, 1995. Dr. Lee executed a Disability Certificate stating that Folger would be absent until January 13, 1995, a Friday, and would return on January 16, 1995 and that she was receiving physical therapy (PT.)

January 16, 1995 was a school holiday. Folger was absent on January 17 and returned on January 18, 1995. She was present on January 23, on which date she saw the school nurse at approximately 8:00 a.m. The nurse put a Band-Aid on Folger's knee and cleaned cuts on her hands. Folger completed an EAR stating that she had tripped and fallen on steps while coming into school, resulting in cuts and abrasions to her right knee and hand and that it was not a recurring injury. Respondent went to Orange Memorial Hospital (Orange Memorial) at approximately 2:30 p.m., where her right knee was stitched.

Dr. Lee completed a State Department of Labor (DOL) Division of Worker's Compensation Employer's First Report of Accidental Injury or Occupational Illness on January 23, 1995. He referenced cuts and abrasions to her right hand and knee. A health insurance claim form regarding the incident was subsequently completed by Rueben Nichols, M.D., apparently a physician at Orange Memorial, on February 18, 1995, pertinent to costs incurred by the hospital in treating Folger. The diagnosis was "open wound leg". (Exh. J-68.)

Folger was again authorized to see Dr. Lee, who completed a Workers' Compensation Medical Reference form on January 24, 1995, indicating that Folger would return to work, "Full Duty", on January 26, 1995. (Exh. J-69.) Folger was present at school on January 24 but was absent January 25 through January 27, 1995. She was present on January 30 and 31, 1995.

During the period from approximately January 25 to January 27, 1995, she saw her "private physician", Dr. Paul Spreiser (Spreiser). (Tr., 10/26/99, p. 20.). Spreiser is a "chiropractor," a "CHIROPRACTOR/APPLIED KINESIOLOGIST". (*Id.* at 6 & Exh. J-71). The pertinent attendance records list Folger's absences on December 19 and 20, 1994 and during January 1995 as "Absent Sch. Acc." (Exh. J-138, Exh. A., p. 5.)

Folger was "Absent-Ill" on February 1 and 2, 1995 and absent because of a PBD on February 6, 1995. (*Id.* at 7.) Dr. Lee examined Folger on February 8, 1995. He sent facsimile transmissions to James and an employee in Cohn's office on February 10, 1995, noting, in part, that:

> "Overall she is much better and she is to attend therapy three times a week for enhancement. She should be able to walk ¾ of a mile without significant problems. She is to be seen in follow up in 4 – 6 weeks.
>
> [Exh. J-70.]

Folger was absent on February 21, 1995, a personal injury day, and February 28, 1995, a PBD. Schools were closed for winter vacation from February 20 through 24, 1995. Respondent was absent because of a personal day on March 21, 1995. She was not absent during April 1995. Schools were closed for spring recess from April 17 through April 21, 1995. Folger was not absent in May and June 1995. June 23, 1995 was the last scheduled school day.

The 1996-97 school year commenced for staff on September 3, 1996; and for students, September 4, 1996. Folger was not absent during September 1996.

Folger was absent from October 2 through October 11, 1996, a Friday, which absences are designated on her attendance record as "Absent-Ill". (Exh. J-138(b), p. 3.) She saw Spreiser subsequent to October 2 "for other chiropractic work". (Exh. J-71.) Spreiser gave Folger a note, dated October 3, 1996, which respondent gave to Board employees. That note read as follows:

> Grace Folger has been under my care for a sprained ankle.
>
> She will be unable to return to work until 10/14/96.
>
> [Exh. J-71.]

Schools were closed on October 14 because of a school holiday.

Folger was not absent during November 1996. Schools were closed on November 28 and 29, a Thursday and Friday, respectively, for Thanksgiving recess. Schools reopened the following Monday, December 2, 1996. Respondent did not return that day. The pertinent attendance record designates that absence as "Absent-Ill". (Exh. J-18(b), p. 5.)

Schools were closed for winter recess from December 23, 1996 until January 2, 1997. Folger was not absent during January 1997. She was absent on February 3 and 4, 1997, taking PBDs, and was "Absent-Ill" on February 12, 1997. (*Id.* at 7.) Schools were closed from February 17 through February 21, 1997 for winter vacation. Respondent was "Absent- Ill" on March 6, 1997. (*Id.* at 8.)

At approximately 8:30 a.m. on March 23, 1997, consistent with the procedures at Park Avenue, Folger went from the school building to a playground to meet her class, which was lined up next to that of another teacher, a Mrs. Wilson (Wilson). An altercation developed between two students in Wilson's line. A school aide intervened, and when Folger went to assist the aide, she was hit in the face by one of the students. Respondent immediately went to the school nurse's office. Folger executed an EAR. The nurse transported respondent to the emergency room (ER) at Orange Memorial, where x-rays were taken.

On March 25, 1997, Johnson completed a Supervisor Accident Investigation Report (SAIR), indicating, in part, that a student punched Folger in the face and respondent's cheek was "Swollen and Deformed", her eye was "injured", and her teeth "hurt". (Exh. J-73.) Johnson also completed an Incident Report, indicating that two staff members were injured when attempting to stop students from fighting and that one of them suffered an injury to her hand; and the other, Folger, to her eye.

Folger was subsequently referred to Dr. Lee, who at some point completed a State Employer's First Report of Accidental Injury or Occupational Illness. Dr. Lee indicated that Folger's left cheek and eye were "SWOLLEN AND DEFORMED" and that her "TEETH HURT". (Exh. J-72.). The form contains a statement that the filing thereof does not constitute an admission of liability.

Folger consulted several physicians during this time period. She first saw her dentist, Dr. Donald Cousineau. She also consulted a "plastic surgeon" regarding swelling and her eye; and Spreiser, "continuously." (Tr., 10/26/99, p. 20.) Folger spoke with her "eye doctor," Dr. Donald Walker, "on the phone" and consulted Dr. Morton Wertheimer (Wertheimer), an Endontologist." (*Id.* at 41-42.)

In approximately mid-May 1997, the Board authorized Folger to see Dr. Lee. He saw her on May 15, 1997 and authorized PT at the Essex County Work and Sports Injury Center (Sports Injury Center).

Schools were closed from April 21 through April 25, 1997 because of spring vacation; and on May 26, 1997, because of a school holiday.

Spreiser executed a note, dated May 26, 1997, stating that Folger had been under his care since March 26, 1997 for a "severe neck trauma" and that she would "probably return to work at the end of June." (Exh. J-78).

During this time period, Folger contacted Board personnel, indicating that Wertheimer had determined that she required surgery relative to an abscess under her teeth and gum. She was told to obtain a referral from Dr. Lee. Folger saw Dr. Lee on May 15, 1997, advising that she had pain in her teeth and indicating that the Board had requested a referral. Dr. Lee referred her to Wertheimer. Wertheimer performed surgery on or about June 9, 1997. Respondent again saw Dr. Lee on June 18, 1997. Dr. Lee executed a Disability Certificate stating that Folger could return to "work full duty on June 19, 1997." (Exh. J-79.)

Folger was initially evaluated at the Sports Injury Center on June 19, 1997. Folger received PT on June 19, 20, 23, 25, and 27, 1997. However, respondent was apparently discharged on June 24, 1997.

On June 20, 1997, Folger reported feeling "very tight" in the cervical area and the area between her shoulder blades. On June 23, she indicated that she "felt a lot better"

after the last visit. The next day, she reported that her neck "felt a little better." On June 25, Folger reported "soreness in the left cervical area upon awakening. On June 27, Folger indicated that she was "feeling a little better in the cervical area" and that she was leaving to go on vacation. (Exh. J-82.) The pertinent Discharge Summary, dated June 24, 1997, indicates that respondent had reported that her neck was "feeling much better" but that she was not progressing in certain respects and was not returning to PT. (Exh. J-81.) Folger felt, that as a result of services provided by the Sports Injury Center and Spreiser, she was "less painful." (Tr., 10/26/99, p. 48.)

On June 20, 1997, Folger saw an associate of Wertheimer, Gerald C. Selke, DDS (Selke). Selke executed an Excuse Slip, dated June 20,1997, stating that respondent was "out sick 6/19/97 because of infection". (Exh. J-80.) Folger did not return to work on June 20 and 23, 1997, a Friday and Monday, respectively. She returned on June 24, 1997, the last day of the school year.

Folger's absences from March 26, through June 23, 1997 are designated on the pertinent attendance records as "Absent-Sch. Acc." (Exh. J-138(b), pp. 9-11.) Folger was paid without loss of sick days, except that absences "not related" to the incident occurring on March 25, 1997 were "taken from" her "sick time." (Tr., 10/26/99, p.45.) Respondent followed the Code-A-Phone procedure regarding her absences during the 1996-97 school year.

Folger was not absent during September 1997. Respondent went to the school nurse's office on October 7, 1997, requesting a Band-Aid. She reported that while adjusting clips holding maps over a chalkboard, the clips "moved suddenly and then stopped", cutting a finger. (Tr., 10/26/99, p. 49, & Exh. J-83.) Folger completed an EAR.

She was absent on October 8, 1997. That absence was not related to the incident occurring on the prior day. Respondent was absent because she " . . . was just not feeling well." (Tr., 10/26/99, p. 49.) Schools were closed on October 13, 1997, a school holiday. Folger was absent on October 27, 1997, taking a PID.

She was not absent during November 1997. Schools were closed on November 13 and 14 and 26 through 28 because of a teachers' convention and Thanksgiving recess, respectively. November 28 was a Friday, and schools reopened the following Monday, December 1, 1997.

Respondent was present on December 1 and December 2, 1997. Respondent was thereafter absent from December 3, 1997 through June 23, 1998, the last day of school. The pertinent attendance records reference the absences during that time period as "Absent-Comp." (Exh. J-138(c), pp. 5-11.)

Folger completed an EAR on December 2, 1997, in which she stated that she tripped over loose tile while walking down a hallway at 10:35 a.m., "flying" into a fire door and onto the floor. She described the relevant physical disability as: "severe pain rt. knee, hip, elbow, shoulder, unable to bear weight". (Exh. J-85, p. 1.) Johnson completed an SAIR stating that Folger had fallen/tripped on loose floor tile, that respondent had used common safety "sense", and that action had been taken to correct the floor tile. (*Id.* at 2.) Respondent was taken to Orange Memorial, where x-rays were performed.

Folger subsequently saw Spreiser, who took x-rays, and called Dr. Lee. She had a scheduled appointment with Dr. Lee on December 3, 1997, as a "follow-up" to the March 25, 1997 incident, and queried if she could still come in regarding the incident of December 2, 1977. Dr. Lee told Folger that he could not see her on the scheduled date because of the "intervening accident", until authorized to do so. (Tr., 10/26/99, p. 52).

Folger saw Dr. Lee on January 13, 1998. Dr. Lee sent James a letter dated January 28, 1999, noting, in part, that Folger stated that she had sustained injuries to the right elbow and hand and still had pain in her right knee, arm and elbow. Dr. Lee summarized his examination as follows:

> Clinically, this patient has an internal derangement of the knee by history. Clinically she has a normal knee examination. I want to get an MRI to make sure there is no pathology that is seen. She has a sprain basically of the right knee, improved. She has a sprain of the right elbow and right hip. Sprain of the lower back.

> There is no significant pathology. No therapy is indicated at this time.
>
> [Exh. J-87, p .2.]

Dr. Lee recommended that if the MRI were negative, Folger continue her "normal activities" and return to see him "as necessary." (*Ibid.*)

Bertram M. Kummel, M.D. (Kummel) examined Folger on February 6, 1998, at James' request. Kummel administered x-rays. An MRI had not been taken as of that date. Kummel sent James a letter dated February 6, 1998. The content of that document is as stated in Exhibit J-89.

Folger reported that she experienced pain in her right knee on December 2, 1997, as well as on her entire right side from the shoulder to the leg. Apparently, x-rays of the right knee taken by Dr. Lee were negative.

Folger's "PRESENT COMPLAINTS" were headaches in 'different places', aching of the right shoulder, soreness in the back of her shoulder to the touch, burning in the right shoulder after usage of the arm, "itching and ringing in both ears", pain in the right elbow and under the right ribs, aching in the right knee, and pain in her right "big toe" when it was touched. (Exh. J-89, p. 3). She was taking medication, Motrin, as needed.

Kummel concluded that Folger " . . . suffered a contusion of the ribs" and had a "derangement of the right shoulder" and that if the shoulder did not improve, additional x-rays would be ordered. In addition, if Folger continued to have symptoms regarding the right groin and hip, additional x-rays in that area might be ordered. Kummel advised Folger that she would be treated "conservatively". (*Id.* at 6.) He also advised her it would be helpful if she lost weight. He referred her to a physical therapist and prescribed Naproxen.

As of February 6, 1998, Spreiser was administering "Manipulations" weekly, "tapering down to every other week." (*Id.* at 1.)

Philip K. Keats, M.D. (Keats), an associate of Kummel, examined respondent on February 27, 1998, on which date he sent James a letter. The content of that document is as stated in Exhibit J-90.

Respondent reported continued pain in her right shoulder, that her right knee "gives away without any locking", pain in the right knee "and a strange sensation", and continued chest and hip pain. Noting that Folger did not undergo physiotherapy as recommended by Kummel, Keats indicated that Folger had stated she was never told by the physician's office where to "actually go for the therapy or when." (Exh. J-90, p. 1.) Keats concluded as follows:

> Ms. Grace Folger is disabled from all of the activities required as a teacher. She would be capable of a purely sedentary type job that required no prolonged standing, walking, or stair climbing and required no lifting, pushing, or pulling over five pounds. Ms. Folger will be set up by my office for physiotherapy at St. Clare's Medical Center in Denville. She will have therapy three times a week for three weeks. She will be re-examined in two weeks. Further reports will be forthcoming.
>
> [*Id.* at 2.]

Keats referred Folger to Life Performance Center (LPC) for PT, three times weekly for three weeks.

Folger returned to work on March 2, 1998, a Monday. Folger told Johnson that she was not able to walk and that the physician had told her that she was to "just come in and sit down someplace." Johnson indicated that she had no information in that respect and that she would "get back to respondent". (Tr., 10/26/99, p. 67.) Respondent went to a first-floor classroom and "sat down." She worked "very passively" with "a few of the students" of another special education teacher whose classroom was apparently located on the first floor of the building. (*Id.* at pp. 65-66.) At some point during the day, Johnson told respondent that Cohn wanted to meet with Folger.

Cohn was "shocked" to see Folger. He had received no communications from anyone, including the Board's business office and Johnson, regarding a return to work

by Folger. Cohn was in the building because of a problem with a boiler, not in anticipation of greeting Folger. A teacher was already in Folger's classroom, and Folger was not assigned a classroom at Park Avenue.

Cohn greeted Folger and inquired why she was at school. Folger responded that she had been given authorization by her physician to return to work "under a light duty constraint" and that she needed to go for PT. (Tr., 11/4/98, p. 54.) Cohn asked Folger what "light duty meant" and if there were any accommodations that petitioner could implement in that regard. (*Id.* at 55.) He did not receive a response. Cohn told Folger that school personnel had no knowledge of any communications between James and the Board regarding limitations on Folger's functioning and that upon her return to work, she would be expected to perform her duties in the usual manner. Cohn also told Folger that it was important, to his knowledge, based upon communications with R. Lee, that PT be rescheduled for evening appointments or late afternoon. Folger indicated that she would attempt to do so.

After speaking with respondent, Cohn went to Johnson's office to ascertain if she had any information. Johnson had been "just as surprised" as Cohn, "if not more so," to learn that Folger was present. (*Id.* at 56.) Generally, Cohn, as principal, would advise Johnson if a teacher were returning after an absence.

At some point thereafter, R. Lee, who was present at Park Avenue, apparently because of the problem with the boiler, asked Folger to "just sit down". Johnson, R. Lee, and Cohn then went downstairs to the boiler room. Cohn's "expectation was to deal with the issue when I came upstairs." (*Id.* at 56.) When Cohn returned upstairs approximately one-half hour later, he learned that Folger was not present. Cohn, and apparently Johnson, were informed by a secretary, Annette Dreher (Dreher), that Folger had left because she "was reinjured." (*Id.* at 57.) Cohn did not speak to Folger again that day.

Folger called Keats' office regarding the matter, either that afternoon or the next day. Folger was absent on March 3, 1998.

Respondent was initially seen at LPC on March 3, 1998. Stephanie Edwards (Edwards), a physical therapist at LPC, sent Keats a letter dated March 10, 1998. The treatment plan at that time was for therapy three times weekly for three weeks. Edwards noted that Folger had been referred for treatment of her right shoulder, ribs, hip, and knee.

Keats again examined Folger on or about March 13, 1998, at James' request. He sent James a report, the content of which is as stated in Exhibit J-94.

Keats noted, in part, that Folger had reported returning to work on March 10, 1998 and that after sitting for three hours, she experienced "severe increase in right hip and leg pain as well as right shoulder pain" and that she did not return to work the next day because her pain was "too severe." Folger also reported that she went to her own physician, a chiropractor, who advised her that PT "is good but at the present time it is 'moving things around.' " Folger told Keats that 45 minutes after returning from her first PT session, she could not move and went to her chiropractor for "relief of her symptoms." (Exh. J-94, p. 1.) Keats concluded as follows:

> Ms. Grace Folger has multiple symptoms with minimal objective physical findings. She states that she cannot carry out the duties of a school teacher and that eight hours, even sitting with the ability to stand and walk causes severe pain. She states that the School Board will not allow her to work shorter hours. Therefore, based on her subjective complaints and the fact that one attempt to return to work produced increased symptoms, means to me that any attempts that returning to work at this point in time will be met with increased symptoms and inability to perform her job. Therefore, I would recommend that Ms. Folger continue her physical therapy and remain out of work until further diagnostic testing can be carried out. This would include an MRI of the right knee to rule out a torn meniscus or other intra-articular pathology; and MRI of the lumbo-sacral spine to rule out a herniated disc and an MRI of the right shoulder to rule out any damage to her rotator cuff. If no surgical condition is seen on any of these MRIs, then, further orthopedic treatment for her right condition and her lumbo-sacral spine condition would not be necessary. If her right shoulder MRI does not show a rotator cuff tear then she should have one injection of steroid into the subacromial bursa and then treatment would be finished and she would be at maximum medical benefit. For all these reasons I would respectfully request your authorization for these imaging studies since I do not believe there

> will be any other way to resolve this situation to make definite diagnoses and determine what, if any, further treatment is medically reasonable and necessary.
>
> [*Id.* at 2-3.]

Keats issued another prescription for PT, three times weekly for three weeks, and prescriptions for MRIs of the right knee and shoulder and the spine. Folger continued PT during this time period.

MRIs were taken at MRI Imaging of Morristown on March 24, 1998. Hal Ginsberg, M.D. (Ginsberg), wrote a report of the results. The content of that document is as stated in Exhibit J-97. Referencing an examination of the right knee, Ginsberg stated his "IMPRESSION" as: "MODERATE JOINT EFFUSION. MODERATE POPLITEAL CYST. ANTERIOR CRUCIATE LIGAMENT NOT SEEN AND PRESUMABLY TORN. GRADE II SIGNAL MENISCI." (Exh. J-97.)

Keats examined Folger on April 3, 1998 and sent a report to James that day. Folger reported to him that undergoing the MRIs resulted in "increased pain in her lower back and right shoulder" and "continued pain in her right shoulder and lower back with a feeling of instability in her right knee." (Exh. J-101, p. 1.) Keats recommended that Folger use a brace "when standing or walking for long periods of time" on her right knee. (*Id.* at 2.)

Keats noted, in part, his belief that there was a pre-existing "degenerative disc disease as well as a pre-existing spondylolisthesis of the lumbo-sacral spine which at most was aggravated by the work related fall of 12/2/97." The MRI of the right shoulder showed "some pathology involving the rotator cuff" but it was not clear whether there was a complete tear. However, Keats concluded that that condition was "causally related" to the incident occurring on December 2, 1997. (*Id.* at 2.) He concluded at follows:

> Ms. Grace Folger remains disabled from her normal occupation as a teacher. I believe she would benefit from additional physiotherapy for two weeks to improve her right shoulder and lower back conditions. If her right shoulder symptoms persist I

> believe she would be a candidate for arthroscopic evaluation and if a full thickness rotator cuff tear was confirmed then she would require rotator cuff repair. Following this projected course of physiotherapy, I believe Ms. Folger would have reached maximum medical benefits for her lower spine condition. Once Ms. Folger was fitted for the appropriate brace for her right knee I believe she would be at maximum medical benefit for that condition as well. Ms. Folger will be re-examined in two weeks and further reports will be forthcoming.
>
> [*Id.* at 2-3.]

Keats again examined Folger on April 17, 1998 and sent James a report. Keats concluded that the MRI of the right knee was "consistent with a tear of undetermined age." The findings of the MRI of the right shoulder were consistent with rotator cuff pathology, but not of a "complete or significant rotator cuff tear." The MRI of the lumbar spine showed no "surgical condition", evidencing changes of a pre-existing spondylolisthesis and degenerative changes. (Exh. J-103, p. 1.)

Keats' examination showed "minimally restrictive range of motion of the lumbo-sacral spine", that Folger was able to walk on her heels and toes, that the right knee evidenced "no effusion", and that the right shoulder showed "essentially full range of motion." Keats reported that he did not believe surgical treatment was required, that the only treatment indicated was a steroid injection into the subacromial bursa, and that Folger required a custom-made brace "to stabilize her right knee" prior to returning to her "normal occupation." Keats noted that although Folger was sedentary most of the time, "she does do stair climbing and has to walk in the hallways and my sense is that there would be another injury and fall unless a brace was on her knee." He therefore authorized her to be absent from work pending approval of a brace. Keats requested authorization for a custom-molded brace of the right knee, a "Townsend brace." Finally, he noted that Folger had indicated that she was taking her MRIs to obtain "other opinions regarding her conditions." (*Id.* at 2.)

Folger saw William Gomez, M.D. (Gomez), an orthopedist, on or about May 7, 1998 for a "second opinion", reporting "persistent pain in her right shoulder, right hip and right knee. She reportedly sustained an injury at work on December 2, 1997." (Exh. J-104, p. 1.) Gomez recommended, in part, that Folger undergo a PT program

and use a brace. His summary of the examination indicates that a copy thereof was sent to "Workers Comp." (*Id.* at 3.)

Folger saw Keats on May 8, 1998. She received an injection of steroid and local anesthesia. Keats issued a prescription for a Townsend brace for respondent's right knee.

Respondent initially consulted with Garden State Orthopedic, Inc. (Garden State), upon referral by Keats, on May 20, 1998, on which date she was casted for a knee brace. (Tr., 10/26/99, pp. 79-80.) She received the brace on May 28, 1998, at which time it was fitted. Folger expressed concerns regarding the brace at that time, as well as in June 1998. Garden State returned the brace to Townsend on June 10, 1998 for an adjustment, and the brace was refitted on Folger on June 18, 1998.

In the interim, she saw Keats on May 22, 1998, reporting that she 'felt great' upon leaving his office on the prior visit, that she was in "severe pain" for two days after the local anesthesia wore off, and that "slowly her right shoulder got better", which "improvement" continued, although her right shoulder was starting to 'twinge'. Keats sent a report to James, noting, in part, that examination of the right shoulder demonstrated "full range motion". (Exh. J-108.)

Folger was again examined by Keats on June 5, 1998, on which date he sent a report to James. Keats noted that respondent reported that after wearing the knee brace for eight hours, she developed a skin breakdown and irritation behind her knee and had not been able to wear it. She advised that the brace was modified.

Folger also reported that she was experiencing 'tinges' of pain in her right shoulder. However, Keats found that she had "full mobility." Examination of respondent's right knee showed "an area of healing abrasion"; and an examination of her right shoulder, "full range of motion." (Exh. J-113, p. 1.) Keats concluded that:

> Ms. Grace Folger continues to be disabled from her normal occupation as she is not able to wear her custom knee brace until modifications are carried out and her skin breakdown heals. . . .

[*Id.* at 2.]

Keats sent another report to James by letter dated June 9, 1998, noting that Folger had developed a "skin breakdown secondary to the stabilization brace . . ." which had "disabled her from returning to work as a teacher because without the brace her knee would be unstable and she would likely sustain further injury to her right knee while at work." (Exh. J-14.) Keats concluded:

> In my opinion the stabilization brace for her right knee is the last treatment I have to offer her. She is at maximum medical benefit once the brace fits appropriately. I have no further treatment to offer her following that. If further problems continue it may be worthwhile to seek further opinion from another physician since I have nothing more to offer her. . . .
>
> [Exh. P-114.]

Keats sent a "final" report to James by letter dated June 19, 1998, on which date he examined Folger. He found that her right knee brace, with modification, "now fits appropriately." Folger was wearing a "cotton stockingette" under the brace to avoid "skin irritation and breakdown." Folger reported recurring "right shoulder symptoms", although she denied "any new history of trauma." (Exh. J-15, p. 2.)

Keats found that the skin irritation behind the right knee "has essentially resolved . . . ", that the brace "fits the knee appropriately", and that respondent "ambulates easily with the brace without any difficulties." (*Ibid.*) He injected medication for her shoulder symptoms and issued a prescription for post-injection pain. Keats concluded as follows:

> At this point in my opinion Ms. Folger has reached maximum medical benefit from orthopedic treatment. She is capable of her normal occupation with her right knee brace on starting 6/22/98. I have no further treatment to offer her either for her right shoulder or right knee condition.
>
> [*Id.* at 3.]

Keats told Folger that she should wear the brace for one hour daily, until her skin "had adjusted" to it. (Tr., 10/26/99, p. 83.)

Folger received her full salary for all days on which she was absent during the 1997-98 school year. She was paid for either "comp or sick" days. (*Id.* at 85.) During that school year, she contacted respondent regarding her absences, utilizing the Code-A-Phone procedure. She did not always call on a daily basis, usually calling either on a Friday or Sunday, regarding the following week.

Folger's Worker's Compensation attorney communicated with certain physicians by letter dated August 18, 1998, regarding charges related to ER treatment on March 25, 1997. Counsel expressed his opinion that the related charges should be paid by respondent. The letter, on its face, indicates that a copy was sent to James.

Cohn communicated with Folger by letter dated August 25, 1998, advising that he had been informed by "your doctor" that she had been released as of June 22, 1998 and that additional treatment was not necessary. The letter advised that:

> You are to return to work at Park Avenue School on September 1, 1998. I want to make it perfectly clear that if you do not report to your assignment on September 1, 1998, it will be a direct indication that you have officially abandoned your position.
>
> [Exh. R-3.]

The letter indicates that copies were sent to Dr. Columbus Salley (Salley), the Board's Superintendent at the time, R. Lee, Johnson, and respondent's personnel file.

Folger responded by letter dated August 31, 1998, indicating that she was "totally bewildered" by Cohn's correspondence. Folger also indicated that she had spoken to Cohn during the week commencing June 22, 1998, informing him of her medical status, which she then summarized. Folger noted that Keats had advised that she should continue to "adapt" to her knee brace and that if additional adjustments were needed, she was to contact Garden State. Additionally, if she "experienced further problems" with her "right side," she was to contact Keats. Respondent stated,

additionally, that she had advised Keats, on at least three occasions, of continuing "problems" with her ears and that he had indicated he would "again" contact REM regarding a referral to a neurologist. (Exh. J-4, p. 1.)

Folger also expressed disappointment with REM's performance and James's "attitude," as well as a refusal by REM to pay Wertheimer's bill pertinent to an "assault" sustained by respondent on March 25, 1997, when she was struck in the face by a student with a "Bocce ball." Folger also referenced "outstanding" physician and/or hospital bills regarding the "March 25 assault" and the "December 2nd injury." (*Ibid.*) She expressed dissatisfaction for not being able to see Dr. Lee until six weeks subsequent to the December 2, 1997 incident. Folger also referenced, in part, telephone communications with Cohn on January 5 and January 9, 1998. She concluded that she was "abandoned and ostracized" by respondent and advised that she had retained counsel. (*Id.* at 2.)

Folger returned to work on September 1, 1998. During the first thirteen weeks of that school year, respondent was absent on a Monday, Friday, or a day before or after a holiday on six occasions. After the thirteenth week of school, Folger was essentially absent until May 1999.

Respondent was not absent during September 1998. Folger was absent on October 13, 1998, a Tuesday, which day followed a school holiday, Columbus Day. She was also absent on October 26 and 27, 1998, a Monday and Tuesday, respectively. Those three absences are designated on her attendance record as "Absent-Ill Days". (Exh. J-138(d), p. 3.)

She saw Dr. Karen Wirthshafter (Wirthshafter), an ear, nose and throat specialist, on October 13, October 19, and October 30, 1998. On October 13 and 19, Wirthshafter diagnosed "olitis externa"; and on October 30, an ear infection in the right ear. Wirthshafter prescribed medications. Folger saw Wirthshafter for the last time on December 10, 1999. Wirthshafter diagnosed "wax build-up", "gensorinaral hearing loss", and "tinnitius." (Exh. J-117.)

In mid-October 1998, Folger contacted the "Board office", requesting to be seen by "the comp. Doctor" again, assuming that she would see Keats. (Tr., 10/26/99, p. 90.) However, authorization was given to see Kummel.

Petitioner filed two Worker's Compensation claim petitions with the DOL on November 9, 1998. One involved the incident on December 2, 1997. The pertinent petition states that the relevant injury regarded her "ENTIRE RIGHT SIDE", including the knee, leg, hip, shoulder, hand, elbow, ribs, back, and "DIZZINESS" and "RINGING IN EARS." (Exh. J-19, p. 1.) The other petition regarded the March 25, 1997 incident. The statement of injury referred to the head, face, left eye, jaw, teeth, neck, and shoulder, and "HEADACHES". (*Id.* at 2.)

Those matters are still pending in Worker's Compensation Court. At some point, Cohn requested that petitioner's business office advise him when they were resolved, because his office would need a final update to determine PBDs, PIDs, and "compensation days" to which the district would agree. (Tr., 10/25/99, p. 16.)

Respondent was absent on November 23, 1998, taking a PBD day. She was also absent on November 30, 1998, apparently taking a PID.

Schools were closed because of Thanksgiving recess from November 25 through November 27, 1998. Folger was "Absent- Ill" the following Monday, November 30. (Exh. J-138(d), p. 4.)

She was examined by Kummel on December 2, 1998, at James' request. Kummel sent James a report, the content of which is as stated in Exhibit J-118.

Folger reported problems with her ears and right knee shoulder, elbow, thumb, and arm and exhaustion and headaches. She also told Kummel that commencing in October 1998, her left knee began to 'slide out' and she had pain in her left heel. (Exh. J-118, p. 2.) However, she reported no accidents nor injuries since Kummel's prior examination. He directed increased physiotherapy. Kummel concluded as follows:

> Disability with regard to the shoulder is equal to 2 ½ % of total. The history relates this to the 12/2/97 incident. At the present time the back demonstrates no clinical evidence of disability. There is the spondylolisthesis but this is a condition which existed prior to 12/2/97. The examination today shows that there has been no permanent aggravation of the previous existing condition. Therefore, there is no disability related to the back due to the 12/2/97 incident. Disability in relation to the right knee is equal to 7 ½% of the leg secondary to the anterior cruciate insufficiency. The history relates this to the 12/2/97 incident. In my opinion this lady has reached the maximum benefit from all treatment.
>
> [*Id.* at 6.]

Folger called James on December 4, 1998 and several days thereafter, requesting authorization to see Kummel. On or about December 4, 1998, James told Folger that Kummel had advised that "he had nothing to offer" respondent. (Tr., 10/26/98, p. 98). Kummel told respondent that he was authorized to examine her but not to treat her. Respondent was absent from December 4, 1998, a Friday, until some time in June 1999.

Folger was authorized to see Dr. William Oppenheim (Oppenheim), an orthopedic and reconstructive plastic surgeon, who examined her on December 28, 1998. Oppenheim sent James a report, the content of which is as stated in Exhibit J-119. After relating extensive history reported to him by Folger, Oppenheim noted the results of his examination of respondent's left knee and foot and right shoulder.

He found that petitioner appeared to evidence a "positive impingement sign on the right shoulder side", and, noting that two prior injections appeared not to have long-term results, found that Folger had the option of undergoing "operative decompression." (*Id.* at 3.) He also noted that if she chose not to do so, it appeared that she "will have reached her maximum medical benefit as additional injections would only tend to weaken the rotator cuff and not provide her with longevity with regard to her recovery." Additionally, he noted that there appeared to be "some injury" to respondent's left knee, apparently related to the accident of February 2, 1997. Oppenheim concluded in that respect that respondent should have an MRI of the left knee and that bracing of the left side might "be able to be as successful as it was to the right side." Oppenheim also found, regarding Folger's left foot, "some degree of plantar calcaneal heel syndrome

which could be attributed to her favoring the left side and could also be attributed to her size." He felt that a pair of orthotics, inserts in shoes to provide support for the feet, could be provided for that condition, as well as a course of medication, but felt, that based upon respondent's "response" to prior PT, a course of PT would not be beneficial.

Based upon an indication by Folger that she did not want to have an operation, Oppenheim concluded that subsequent to "these few conservative treatments", respondent would have reached her "maximum medical benefit". In light of "the number of complaints" which Folger had, it was uncertain whether she would be able to return to work, and Oppenheim felt that a "functional capacity evaluation could be obtained." (*Ibid.*) Respondent's left knee and foot had not "bothered her in prior years." (Tr., 10/26/99, p. 94.)

James subsequently authorized an MRI of Folger's left knee, which was performed on January 22, 1999 at the Northfield Imaging Center (Northfield.) Ronald C. Schliftman, M.D., a physician with Northfield, sent Oppenheim a report dated January 25, 1999, the content of which is as stated in Exhibit J-120. Schliftman's "IMPRESSION" was "JOINT EFFUSION WITH OSTEOARTHRITIS", "QUESTION OF ANTERIOR CRUCIATE LIGAMENT TEAR", and "TEAR OF THE POSTERIOR HORN OF THE MEDIAL MENISCUS." (Exh. J-120.)

Oppenheim thereafter examined Folger on January 28, 1999. Folger noted a "degree of discomfort within the right shoulder region, as well as the plantar fascia. The knee has been only occasionally somewhat bothersome." (Exh. J-21, p. 1.) Oppenheim issued prescriptions for orthotics and PT, referring her, in the latter respect, to Physical Therapy Services of Morristown (PTS). In his notes regarding the examination, Oppenheim concluded as follows:

> On this date, it was my feeling that she does require a pair of orthotics. It is hoped that this plus her therapy regimen for her shoulder, as well as her plantar fascia will eliminate these problems. She will be receiving a brace for the left side which she could use if she is going to exert herself. Other than this, I do not believe that any additional treatment would be indicated and this

> was explained to her. At the time of evaluation, in addition, the MRI was reviewed with her. She will be re-evaluated in 3 weeks.
>
> [*Id.* at 1-2.]

Folger was initially evaluated at PTS on February 2, 1999 and thereafter completed six PT sessions. Thomas Trezza (Trezza), a physical therapist at PTS, sent Oppenheim a report dated February 17, 1999. Trezza noted that if continued treatment were deemed appropriate, another prescription would be needed. He summarized the status of the PT sessions which had occurred as follows:

> Ms. Folger has had fair success with physical therapy. She is very deconditioned and has low exercise tolerance. Her left foot is less painful and she is tolerating Achilles and plantar fascia stretches well. She has poor body awareness and doing one exercise leads to strains and soreness in unrelated areas. Her gait is antalgic and rigid. She has full ROM at her shoulder but has much cracking and popping. Treatment has been focusing on her left lower extremity, to get her ambulatory with less pain and able to tolerate prolonged standing. He[sic] upper extremity is fair, with a painful arc and a positive impingement sign. Her left lower extremity is weak and tight. She has poor tolerance to lower extremity strengthening and stretching. Her poor tolerance to exercise has been problematic because when we attempt to an exercise for one body part she has other complaints of pain of muscle cramping at another area. She may benefit from a water based exercise program and orthotics.
>
> [Exh. J-125.]

In the interim, Nancy Glaser (Glaser), an employee of REM, communicated with Kummel regarding "more problems" being experienced by Folger. (Exh. J-123.) Kummel responded by letter dated February 4, 1999. He noted that Folger had "complaints" of pain in many joints as well as in the spine. He recommended that she be seen by a rheumatologist to determine if there were "some systematic condition causing these complaints" and that certain tests be authorized. (*Ibid.*) Folger was not advised at that time by REM of any further consultation with Kummel.

Folger was reexamined by Oppenheim on February 18, 1999. His notes regarding that examination concluded as follows:

> On this date, a discussion with her with regard to her orthotics was conducted and this is going to be built to her endurance. She does feel better than she did and it is also somewhat uncertain to what extent she will be able to improve from this point with regard to her overall conditioning particularly considering her size, physical condition and dedication if she only did make 6 therapy sessions in 3 weeks. It would be my feelings at this time that she should continue with her physical therapy. Discussion with regard to her weight were also conducted. Whether she will do anything with this is unclear. She will be re-evaluated in 3 weeks.
>
> [Exh. J-124, p.2.]

In the interim, in January 1999, Folger was diagnosed with breast cancer. Respondent underwent surgery on approximately March 3, 1999. She was able to drive by approximately March 14, 1999, but she was not able to attend PT for approximately three weeks because of the surgery.

Folger again saw Oppenheim on March 18, 1999. She inquired regarding the status of a brace for the left knee, and he responded that he thought it had already been ordered. He thereupon called James, who authorized the brace, and Oppenheim issued a prescription for it. Respondent also had not received the orthotics as of that date.

Respondent was casted for a left knee brace at Garden State on March 25, 1999. She failed to appear for an appointment on April 9, 1999 because of confusion regarding various appointments. The brace was fitted on April 14, 1999. It was "a very good fit". Folger was able to attend PT with it. "After a month's practice with it," Garden State did "a little adjustment on it" on May 14, 1999. (Tr., 10/26/99, p. 102, & Exh. J-131.)

Oppenheim examined Folger on April 8, 1999. Folger reported that she had experienced "appreciable improvement" since obtaining her orthotic and that she did not encounter any problems taking medication. Although she still favored the left side "to a large extent", she mobilized "much better." Oppenheim concluded that respondent should continue PT three times weekly for the next four weeks and that it " . . . would be

anticipated that between taking her Celebrex that she should be able to return to work, hopefully regular duty at that time." (Exh. J-132.) His notes indicate that he discussed that situation with Folger and that she would be re-evaluated in four weeks.

During this time period, R. Lee, or his designee, told Cohn that the absences in questions were "unauthorized." (Tr., 10/25/99, p. 39.) It was communicated that R. Lee was uncertain whether the days were "valid days", *i.e.*, they would have to be deemed to be PIDs until they were "resolved". However, Folger was arguing that they were not PIDs. Since they were not approved comp days, they were, in that situation, deemed to be "unauthorized absences." Cohn felt he should "put Ms. Folger on record", *i.e.*, advise her that they would be deemed to be unauthorized prospectively, "so she could do whatever she needed to do". (*Ibid.*)

Cohn communicated with Folger regarding her absences during the 1998-99 school year by letter dated April 8, 1999. He stated that petitioner's records indicated that she had been, and at that time was, absent without leave and not following proper procedures in requesting a leave of absence. Cohn directed that Folger return to work "immediately" and provide "official documentation" of the specific reasons for her absences, including medical verification of the exact nature of any condition which may have "hampered" her ability to return to "normal activity" at any time during the school year. (Exh. J-36). The letter also stated that a failure to respond within five days would constitute insubordination and evidence of abandonment, resulting in the filing of tenure charges of dismissal with the Commissioner.

Folger responded by letter dated April 14, 1999, stating, in part, that she had never been on, and was not on, a leave of absence, that she was under Oppenheim's care, and that Cohn and James had access to all medical information in light of the fact that Oppenheim was authorized to treat Folger for injuries resulting from the fall occurring on December 2, 1997.

Folger also addressed a conversation with Cohn on April 1, 1999, regarding a "withdrawal" from her checking account of her "electronically deposited paycheck." (Exh. J-37, p. 1.) She noted that Cohn had referred her to Faith Richardson and R. Lee

and that Cohn, R. Lee, and the Board's counsel had met to discuss "this issue" for several months. Folger stated that Cohn had not advised her of any additional "procedures" to be followed regarding her "medical condition" and had not referenced any concerns regarding unauthorized absences. (*Ibid.*)

She also indicated that she had not received responses from Cohn to letters to him dated June 29 and August 31, 1998, nor responses to any of her "many telephone calls." She concluded as follows:

> . . . I am willing to fulfill my contractual obligations, but I must have some clarity to the issues.
>
> Please contact me as soon as possible so that we may resolve any perceived problems.
>
> [*Id.* at 2.]

Folger included with the letter a note from Oppenheim, dated April 12, 1999, indicating that respondent would remain absent from work until May 13, 1999.

All absences in December 1998 are referenced on the pertinent attendance record as "Absent- Ill"; and all in January through April 1999, as "Absent-Comp". (Exh. J-138(d), pp. 5-9.)

Folger was absent from May 3, 1999 until May 18, 1999, absences designated as "Absent-Comp". (*Id.* at 10.) Folger went to the nurse's office on approximately May 19, 1999. The regular nurse was absent, and Folger saw a nurse assigned from a different school. Respondent was absent on May 20, 1999. The pertinent attendance record indicates "Absent-1/2 Personal Day" for May 24, May 25, June 1, and June 7, 1999, a Monday. (*Ibid.*)

Oppenheim examined Folger on May 13, 1999. He wrote a note, indicating that Folger should be allowed to leave work early on Mondays, Wednesdays, and Fridays for PT. His notes regarding the examination are as stated in Exhibit J-135. Oppenheim concluded that Folger could return to employment at her regular position as

a teacher and that when she did so, she would be released early, three times weekly, to continue therapy regarding her foot.

Oppenheim had placed no restrictions on Folger during this time period. Employees of respondent executed a Worker's Compensation Claim of Injury form on May 20, 1999, indicating that Folger was approved to return to work on May 17, 1999 and was "no longer on Workman's Compensation." (Exh. J-136.) The last day of school was June 23, 1999.

Folger was suspended on June 9, 1999, which suspension, to her understanding, was "rescinded." (Tr., 10/26/99, p. 116.) She has been continuously suspended since June 15, 1999.

Folger continued to consult with Oppenheim. He placed no limitations on her ability to return to work subsequent to May 17, 1999. However, Folger still has to "be careful", and she wears braces on both knees. (*Id.* at 116.) Folger continued PT from the end of March until approximately July 1999.

Folger was paid her full salary for all periods of absence until March 15, 1999. Her pay was withheld, commencing in March and continuing into April 1999. She subsequently was paid for March 15, 1999 and March 16, 1999 in the form of worker's compensation temporary benefits.

Orange Middle does not employ "long-term substitutes". (Tr., 10/25/99, pp. 20-21.) The school hires substitute teachers for up to a maximum of 20 days. If substitutes are certified, they can be hired for longer than 20 days.

Johnson did not have definitive information regarding Folger's anticipated return dates at all times. Sometimes respondent reported absences on a "weekly basis". Johnson was unable to obtain substitute teachers during the 1997-98 and 1998-99 school years. As a result of respondent's absences, her students had substitute teachers, sometimes substitutes who could work up to 20 days; and sometimes, numerous substitutes. If a substitute teacher were not available for one of respondent's

classes, the class "would be split" among other special education teachers. (Tr., 10/25/99, p. 151.)

The situation negatively impacted on the "continuity of instruction". (*Id.* at 20.) Many of Folger's students were assigned to her class for two to three years. Folger's students would most likely need "a great deal of remedial work" because of the number of respondent's absences. (*Id.* at 21.) Folger's students, who "were handicapped to begin with," would "never be able to make up that time that they lost relevant to their instruction". (*Id.* at 125. *See also, Id.* at 127.) It generally is very difficult for a substitute teacher to teach a "special education class" because of a lack of "continuity." (*Id.* at 126.) In general, the absences of Folger, who was a "special ed teacher with years of experience", had a negative impact on her students. (*Id.* at 63.)

It was never "reported to" Cohn that Folger had ever violated the Code-A-Phone procedure pertinent to any of her absences. (*Id.* at 66.) At some point, when Cohn believed he no longer had "an understanding" of respondent's long-term attendance, he asked the Superintendent for permission to offer a contract to an individual, not a "long-term situation". Respondent would pay extra funds regarding salary and benefits. However, Cohn did not believe that petitioner would be " . . . hiring individuals who had the expertise and ability to teach the children if she was there each and every day." (*Id.* at 64.) The school did not "budget" for having two individuals certified "in the same positions", thereby paying "benefits" to respondent as well as someone else. (Tr., 10/25/99, p. 20.)

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9. A tenured local school employee shall not be dismissed, or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, "or other just cause." *Id.* at § 6-10.

The Legislative will must be interpreted as written, "not according to some supposed unexpressed intention." *Hoffman v. Hack*, 8 *N.J.* 397, 408-409 (1952.) *Accord International Broth. of Elec. Workers v. Gillen*, 174 *N.J. Super.* 326, 329 (App. Div. 1980). In construing a statute, its language is the first indicator used. If a statute is by its terms clear and unambiguous on its face, ". . . we need delve no further than the Act's literal terms to define the Legislature's intent." *State v. Butler*, 89 *N.J.* 220,226 (1982).

Statutory language should be given its ordinary meaning " . . . absent specific intent to the contrary." *Renz v. Penn Central Corp.*, 87 *N.J.* 436,400 (1981). *Accord, International Broth., supra*, at 329-330. Even if there is some ambiguity, the facial meaning of statutory language controls. *International Broth.*, at 329. When the language of a statute is plain, there is no need to resort to the rules of statutory interpretation which come into play when the meaning of a statute is on its face doubtful. *Caminetti* at 485.

The plain language of *N.J.S.A.* 18A:30-2.1(b) prohibits withholding an increment because of absences resulting from an injury caused by an accident arising out of and in the course of employment. However, it does not prohibit, nor even address, the imposition of other sanctions, including dismissal, because of excessive absenteeism resulting from such an accident. It is not illogical for the Legislature to have determined that if a local board of education decides, for whatever reason, not to seek to terminate a tenured employee because of absences, that that employee should be deemed to have satisfactory performance, vis-à-vis attendance considerations, to justify the award of an increment, but not to preclude a district from determining that absences, even if resulting from a compensable injury or accident, warrant termination. Such is especially so in light of the long-standing principle that excessive absenteeism, whatever the reason, necessarily disrupts the continuity of education and that such, even if because of valid medical reasons or compensable accidents, can result in termination. Although, as Folger argues, the holding in *Kacprowicz*, which involved the withholding

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minimum of ten school days in any school year. *N.J.S.A.* 18A:30-2. *N.J.S.A.* 18A:29-14 addresses the withholding of increments.

Any charge made against any employee of a local board of education under tenure during good behavior and efficiency shall be filed with the board, in writing, and a written statement of evidence under oath supporting the charge shall also be presented to the board. The board shall provide the employee copies of the charge and the statement of evidence and an opportunity to submit a written statement of position and evidence under oath. *Id. at* 11.

After considering the matter, the board shall determine whether there is probable cause to credit the evidence in support of the charge and whether the charge, if credited, is sufficient to warrant a dismissal or reduction of salary. If the board finds that probable cause exists and the charge, if credited, is sufficient to warrant such action, it shall forward the written charge to the Commissioner for a hearing, together with a certificate of such determination. *Ibid.* The burden of proof in a case such as this is on petitioner by a preponderance of the credible evidence. *See*, *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962).

Chronic or excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal. *Trenton Bd.* of *Educ. v. Williamson*, 1986 *S.L.D.* 1462. *State-Operated School District of Jersey City v. Pellecchio*, 92 *N.J.A.R.* 2d (EDU) 269, *aff'd,* State Board of Education, 93 *N.J.A.R.* 2d (EDU) 30 (*Pellecchio*). *Passaic Bd. of Ed. v. Viani*, 92 *N.J.A.R.* 2d (EDU) 76.

The determination of what constitutes excessive absenteeism initially falls within the prerogative and discretionary authority of the local board of education. *Pellecchio, supra*. Dismissal may be warranted even without an opportunity to improve attendance. *Board of Education of the City of Camden v. Rucker*, 94 *N.J.A.R.2d* (EDU) 190, *aff'd, State Board of Education*, 95 *N.J.A.R.2d* (EDU) 350, (*Rucker)*.

There are no absolute standards regarding when an absence becomes chronic or excessive. However, " . . . this boundary is crossed when the performance of students begins to suffer." In *The Matter of the Tenure Hearing of Monica Meade-Stephens*, 92 *N.J.A.R.* 2d (EDU) 550, 553.

It is not necessary, however, for a school district to prove a direct correlation between student achievement and teacher attendance in order to validate concerns about the effects of a teacher's absence on the educational program. *Kacprowicz, supra.* As the Commissioner has recognized, " . . . the repeated absence of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the District and the most fundamental obligation of an educator to his student." In *The Matter of the Tenure Hearing of Jerome Kacprowicz*, 93 *N.J.A.R.* 2d (EDU) 147,153, *aff'd,* State Board of Educ., 93 *N.J.A.R.* 2d (EDU) 604, *aff'd,* App. Div. 95 *N.J.A.R.* 2d (EDU) 105 (Docket No. A-6211-92T3, dated December 21, 1994) (*Kacprowicz*). Excessive absenteeism of a teacher disrupts the continuity of the instructional process. In *The Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City*, 1977 *S.L.D.* 403.

Folger's argument that there is no requirement of the DOE that a violation of monitoring guidelines result in discipline of a tenured teacher is without merit. Those guidelines are relevant to the extent of establishing one reasonable standard for determining whether absenteeism is excessive.

As the Board argues, respondent's testimony regarding the reasons for certain absences was contradictory and suspect on its face. Folger also did not return to employment on dates reasonably expected by her physicians. In addition, the fact that respondent exhibited a pattern of absences occurring before and after weekends and school holidays also raises questions regarding her credibility. However, it is not necessary to reach issues in that respect.

Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled and even if the teacher's classroom performance was sufficient. *Kacprowicz, supra. Pellecchio, supra.* In addition, chronic or excessive absenteeism may be found to warrant discipline, including dismissal, even when the individual was entitled to days off pursuant to a contract. *Rucker.*

As petitioner argues, it has not yet been determined whether any of respondent's alleged school injuries arose out of and in the course of her employment, and such determination is within the jurisdiction of the DOL's Division of Workers' Compensation. *Forgash v. Lower Camden County Sch.*, 208 *N.J. Super.* 461 (App. Div. 1985.) However, action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries. *Kochman v. Board of Education of the Borough of Keansburg*, 94 *N.J.A.R.* 2d (EDU) 154, State Board of Education, *aff'd,* App. Div., 95 *N.J.A.R.* 2d (EDU) 212, Docket No. A-1510-93T2 (dated May 5, 1995). *See also, Board of Education of the Twp. of Irvington v. Pearson*, 97 *N.J.A.R.* 2d (EDU) 329.

Folger argues that *N.J.S.A.* 18A:30-2.1(b) prohibits the imposition of a sanction on a tenured school employee because of work-related absences. I am not persuaded by that argument.

The provision in question, which was effective June 5, 1997, provides that leave taken by an employee pursuant to subsection (a) shall constitute satisfactory service, pursuant to *N.J.S.A.* 18A:29-14, and any other provision, statutory or contractual, relating to employment, adjustment, or other increments and shall not constitute inefficiency or other good cause for the withholding of an employment or adjustment increment. *N.J.S.A.* 18A:30-2.1(b). Sub-section (a), in turn, provides that whenever an employee, who is entitled to sick leave, is absent as a result of a personal injury caused by an accident arising out of and in the course of employment, the employer shall pay the employee the full salary or wages for the period of the absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave. *Id.* at § (a).[2]

It is a long-standing principle of statutory construction that the plain and unambiguous terms of a statute are controlling. *Caminetti v. United States*, 61 *L. Ed.* 442, 455 (1916) *(Caminetti).* That standard has been adopted in New Jersey. *Greenway Development Co.*, 185 *N.J. Super.* 86 (App. Div. 1982).

[2] *N.J.S.A.* 18A:30-2 provides that all individuals holding any office, position, or employment in a local school district who are "steadily employed" by the Board who are protected by tenure, except individuals in the classified civil service, shall be allowed sick leave with full pay for a

of an increment, may no longer be valid, the general principles discussed hereinabove, relied on by the Board, are still applicable.

Respondent also argues that it is reasonable to conclude that the Board discriminated against her, *vis-à-vis* the filing of tenure charges, because she filed Worker's Compensation claims. I am not persuaded that the evidence supports such a conclusion.

It is unlawful for an employer to discharge, or in any way discriminate against, an employee regarding employment because the employee has claimed, or attempted to claim, worker's compensation benefits. *N.J.S.A.* 34:15-39.1. It is questionable, however, that the Commissioner has jurisdiction to consider such claims. Administrative relief is available from the DOL. *Lally v. Copygraphics*, 173 *N.J. Super.* 162 (App. Div. 1980), *aff'd,* 85 *N.J.* 668. In any event, it is not necessary to reach Folger's arguments in that respect. The tenure charges can be determined based on the evidence introduced regarding the substantive allegations.

If tenure charges are proven, factors relevant to a determination of discipline include the nature and length of a teacher's prior service. *In Re Tyler*, 13 *N.J.A.R.* 297. " . . . each such matter shall be judged in light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem." *In The Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver*, 1972 *S.L.D.* 531-541. Evaluation of tenure charges is generally a matter of total impression, "based upon observations made over a period of time." *Newark Bd. of Ed., v. Burnside*, 13 *N.J.A.R.* 867 (October 25, 1988).

In light of the number of days Folger was absent during the school years in question, such absences, on their face, constitute excessive absenteeism. Folger was given notice of the Board's goals regarding absenteeism, and she was absent much more than the average teacher in the district. The fact that she complied with Code A-Phone procedures is not relevant to the question of whether her absences were excessive. The number of absences, and the fact that they had substantial negative

impacts on her students, argue for a penalty. I am persuaded that termination is an appropriate penalty relevant to Charges one through four.

CONCLUSIONS

I **CONCLUDE** that Charges one through four should be affirmed and that termination is an appropriate penalty.

INEFFICIENCY

Folger argues that Charges five through thirteen in effect constitute charges of inefficiency and should be dismissed because petitioner did not comply with pertinent procedural requirements. I am not persuaded by that argument.

If a tenure charge is one of inefficiency, prior to making a determination regarding certification, a local board of education must provide the employee a written notice of the alleged inefficiency, specifying the nature thereof, and allow at least 90 days in which to correct and overcome the inefficiency. *N.J.A.C.* 18A:6-11. Upon receipt of the charge and the written statement of evidence, the board shall cause copies to be transmitted to the employee within three working days. The employee must be informed, in writing, that unless the inefficiencies are corrected within the minimal 90-day period, or any longer period provided by the board, the board intends to certify the charge to the Commissioner. At the same time, the board shall direct that there be a modification of the pertinent PIP to assure that it addresses the specific charges of inefficiency and comports with the timelines established for correction. *N.J.A.C.* 6:24-5.1(c)2-4.[3]

Upon completion of the period for improvement, the individuals responsible for bringing the charges to the attention of the board shall notify the board, in writing, of

[3] Every local board of education is required to adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel. *N.J.A.C.* 6:3-4.3(a). An annual summary conference between supervisors and teaching staff members shall be held before a written performance report is filed. *Id.* at § (e). The resulting annual written performance report shall include an Individual Professional Improvement Plan developed by the supervisor and the teaching staff member. *Id.* at § (f).

what charges, if any, have not been corrected. The board of education shall thereafter notify the affected employee, in writing, that all of the inefficiencies have been corrected or, alternatively, which have not been corrected. Such notification shall be provided within 30 calendar days from the expiration of the improvement period. If certain charges have not been corrected, the employee shall have an opportunity to respond within 15 days of receipt of the notification of inefficiency by filing a statement of evidence under oath in opposition to the charges. The board of education shall thereafter determine, within 45 days, whether there is probable cause to credit the evidence in support of the charges and that such charges, if credited, are sufficient to warrant a dismissal or reduction in salary. If the board so finds, it shall file the written charges and the required certificate of determination with the Commissioner, in addition to proof of service upon the employee. *Id.* at §§ 5.9.

The intent of the pertinent regulations is to promote correction of inefficiencies pursuant to carefully supervised specific guidelines established at the time a teacher has been formally apprised of the nature of inefficiencies. *In The Matter of the Tenure Hearing of Julio Triana, School District of the City of East Orange*, 1987 *S.L.D.* 1691-1697. A failure to adhere to the regulations constitutes a "flaw fatal" to tenure charges of inefficiency, requiring dismissal. *Id.* at 1696.

As petitioner argues, the types of charges pertinent to the instant matter have not been deemed to constitute charges of inefficiency. The substantive merits of the tenure charges are addressed. (Initial Brief, pp. 45-54.)

Charge 5

This charge alleges that during the 1998-99 school year, Folger failed to follow a specific administrative directive requiring her to inform her principal of a scheduled attendance at a mandatory professional day and that such conduct constitutes unbecoming conduct, insubordination, and/or just cause for dismissal. Charge 5 references a memorandum from Johnson dated November 11, 1998.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

During the 1998-99 school year, Clark arranged for Folger to take a professional day so that respondent could observe another special education teacher, Sharon Fink (Fink), at the Board's Cleveland School (Cleveland). Clark had arranged the observation in efforts to provide assistance to Folger regarding concerns that Johnson, as well as others, had regarding Folger "relevant to working with her groups, writing her lesson plans, and managing her classroom relevant to the instructional level the students were to be instructed on . . ." (Tr., 10/25/99, p. 122.)

Clark and Johnson had previously discussed the matter with Folger on October 7, 1998. Johnson gave Folger a memorandum on or about October 7, 1998, apparently telling respondent that she should contact Blanton regarding the specific date. Folger subsequently spoke with Fink, and the two eventually agreed upon a date.

Folger went to Cleveland on October 19, 1998 to observe Fink. On that day, Johnson received communications, via the Code-A-Phone system, indicating that Folger was not at Park Avenue because of a "professional day, a conference day, or something . . ." (Tr., 10/25/99, p. 121, & Exh. J-24.) Folger had not previously communicated directly with Johnson regarding the scheduled day.

Johnson subsequently sent Folger a memorandum dated November 11, 1998, stating that respondent had not followed a "directive" of October 7, 1998 to advise Johnson of the scheduled professional day prior to attending. Johnson concluded that she continued ". . . to be concerned regarding your lack of professional responsibilities." (Exh. J-24.)

Folger responded by memorandum dated November 16, 1998. Respondent noted that she had been contacted by telephone by Clark regarding observing Fink, that

Clark had told Folger to advise Clark when a day had been chosen, that respondent made the arrangements with Fink for October 19, and that she called Clark's office and left a message to that effect. Folger also noted that she had adhered to the "normal procedure" of arranging for a substitute by communicating with Blanton, stating that she had not informed Blanton that she would be attending a conference, but had told her it would be a professional day. (Exh. J-25.)

DISCUSSION

A failure to follow administrative directives constitutes insubordination and/or unbecoming conduct. *See, In the Matter of the Tenure Hearing of April Renee Bradley, Bd. of Ed. of the City of Newark,* 1990 *S.L.D.* 790, *aff'd. St. Bd. of Ed.,* 1991 *S.L.D.* 2521, (*Bradley*).

Folger testified that it was not her understanding that she was to notify Johnson of the specific date on which she would be observing Fink prior to doing so. Folger noted that Johnson, as well as Clark, were aware that she would be observing Fink and that respondent had never observed another teacher employed by the Board prior to that time. Johnson testified that she sent respondent a memorandum dated October 7, 1998, specifically instructing Folger to notify the principal, in advance, regarding the day on which respondent would be observing Fink.

In light of the conflicting testimony, I am persuaded that the Board has not met its burden of proof.[4] In addition, there is nothing in the record to indicate that respondent intentionally failed to follow a directive of Johnson. Her testimony that she did not believe she was required to notify Johnson in advance of the date in question was not discredited. The fact that she followed the proper procedures regarding the Phone-A-Code system supports her testimony.

[4] In its initial brief, respondent noted that the October 7, 1998 memorandum was not produced during the hearings nor moved into evidence. Petitioner indicated in its reply brief that that document was inadvertently omitted, noting the large amount of documents moved into evidence, and offered to provide a copy, if requested by this Judge. This Judge did not do so. It is noted that stringent time limits are placed upon tenure cases pursuant to *N.J.S.A.* 52:14B-10.1.

CONCLUSION

I **CONCLUDE** that the Board has not proven, by a preponderance of the credible evidence, Charge 5.

Charge 6

This charge asserts that during the 1998-99 school year, Folger failed to follow an administrative directive from Johnson, dated November 11, 1998, requiring all staff members to submit lesson plans in a timely manner and that such failure constituted unbecoming conduct, insubordination and/or other just cause for dismissal. As a review of the evidence demonstrates, this charge relates to an incident occurring on November 9, 1998.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

Consistent with her general practice, Johnson requires that lesson plans are "due" to her every Monday by 9:00 a.m. (Tr., 10/25/99, p. 87.) Johnson discussed that requirement, as well as others, during a general staff meeting on or about September 1, 1998. Johnson is a "structured person", who advises her staff members every school year of her "expectations".

Johnson distributed a detailed agenda at the September 1998 meeting, which provided, in part, that lesson plans were to be submitted to her every Monday, by 9:00 a.m., commencing on October 5, 1998. That requirement is part of Johnson's "management system", *i.e.*, her efforts "to stay on top of what's going on relevant to an instruction of student." (*Id.* at 88.) The agenda was discussed at the meeting.

Johnson did not receive Folger's lesson plan on November 9, 1998, a Monday, until 12:30 p.m. Folger " . . . had just forgotten to put" her lesson plan on the "desk

downstairs", going directly upstairs to her classroom. (Tr., 10/26/99, p. 189.) Johnson contacted respondent via the intercom communications system, "to remind her that her lesson plans were due." (*Id.* at 88.) Respondent was in a computer lab with her class when Johnson called.

Johnson sent Folger a memorandum dated November 11, 1998 regarding the matter. Folger responded by memorandum dated November 16, 1998. Folger noted that her class did not return from the lab to the classroom until subsequent to 11:00 a.m.; that her classroom aide was not available to take the lesson plan to the office; and that because Folger had no breaks on Monday, her lunch period was the first opportunity she had to go to the office, which she did at that time, bringing the lesson plan.

DISCUSSION

As noted hereinabove, failure to follow a directive can constitute insubordination and/or unbecoming conduct by a teacher. *Bradley, supra.* More specifically, a failure to timely file required documents constitutes insubordination. *In the Matter of the Tenure Hearing of Ronald Richardson,* OAL Dkt. EDU 5560-97, June 1, 1998, *aff'd.*, Commissioner of Ed., July 15, 1998, *aff'd.* State Bd. of Ed., January 6, 1999.[5]

Folger testified that when Johnson contacted her via the intercom system, the lesson plan was in her locked classroom. Respondent noted that her aide was not present at the time and that she did not want to send a student with keys to unlock the classroom, locate the plans, and take them to Johnson. She therefore waited until she was free, at 12:30 p.m., to take the lesson plans to the office, which she did. Johnson testified that she contacted respondent at 9:00 a.m. and that respondent indicated she would bring the lesson plans to the principal as soon as possible.

I am persuaded that the Board has not proven Charge 6. Folger was candid in her testimony that she neglected to deliver the lesson plan to the principal's office. The

[5] The Board filed copies of unpublished decisions referenced in its briefs. Respondent did not object, and those decisions are noticed by this Judge.

record does not support a conclusion that her failure to do so was the result of an intentional determination to not comply with Johnson's directives, which had been communicated during the general meeting held in September, nor that respondent intentionally failed to immediately bring the lesson plan to the principal's office after being contacted by Johnson. Folger's testimony regarding the reasons why she did not do so was not discredited. Although not determinative, respondent's reliance upon the fact that there was no evidence indicating she had ever failed to timely provide a lesson plan prior to November 9, 1998, nor subsequent thereto, has merit, especially regarding the charge that her failure to do so on the date in question constituted unbecoming conduct. Petitioner's argument that Folger gave Johnson the impression she would immediately provide the lesson plan, when contacted by Johnson, is not supported in the record.

CONCLUSION

I **CONCLUDE** that the Board has not proven Charge 6 by a preponderance of the credible evidence.

Charge 7

Charge 7 alleges that during the 1998-99 school year, Folger abandoned her classroom to attend an education workshop without prior authorization from her principal and, in addition, failed to follow a specific administrative directive by ignoring the principal's request to immediately return from the workshop to her classroom. Charge 7 references a November 11, 1998 memorandum from Johnson and states that the conduct in question constituted insubordination and/or other just cause for dismissal.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

At a meeting on or about October 5, 1998, attended by Johnson, Clark, and respondent, Folger voiced concerns that "special education" had not been given the same "resources" that "regular classrooms" had, including attendance at various workshops, more specifically, curriculum workshops. (Tr., 10/26/99, p. 142.)

By memorandum of October 20, 1998 to "Elementary Principals", Mildred Cook (Cook), an employee in the Board's Department of Curriculum Testing, advised of a "Staff Development Session" to be conducted from 8:30 a.m. to 3:30 p.m. on November 4, 1998 at the Board's Colgate board room (Colgate). Colgate was the central administrative office at the time. Cook advised that the principals should contact her office by October 30, 1998 to confirm attendance by teachers.

The memorandum noted, in part, that a " . . . district-wide staff development session for Grade 4 regular teachers and special education resource center teachers" had been scheduled and that it was a "mandated workshop" which "staff were required to attend." However, in another section of the memorandum, Cook indicated that "Grade 4 Teachers, Special Education Teachers", were to attend the conference. (Exh. J-10, p. 1.) The memorandum indicated, on its face, that Clark, Cohn and "Grade 4 and Special Ed Teachers", as well as certain other individuals, had been sent copies. (Exh. J-10.) Folger was not listed as one of those individuals. Folger was not a Grade 4 "regular" teacher at the time, nor a special education resource center teacher. (*Id.* at 120.)

Folger received the memorandum in her school mailbox. It was in an envelope addressed to her.

Folger did not report to Park Avenue on November 4, 1998, but went to the conference at Colgate. Folger called Code-A-Phone regarding her attendance. She had also previously called Cook's office, leaving her name, with an indication that she would be attending the conference. The other "self-contained special education teachers" at Park Avenue did not attend the workshop. (Tr., 10/25/99, p. 211). Folger was required to be in school at 8:15 a.m.

Johnson was advised, via the Code-A-Phone system, that Folger was at a "conference" and that a substitute for respondent's class was not available. Johnson "couldn't imagine where she was" because she had not previously approved a conference for that day for Folger. Aware that a workshop was being conducted at Colgate, "which should not have included Mrs. Folger," Johnson immediately called Colgate, between 8:15 and 8:30 a.m., and asked a secretary to ascertain if respondent were present. (Tr., 10/25/99, p. 116.) The secretary did so, and advised Johnson that Folger was present.

Johnson then spoke to Folger, inquiring why respondent was at Colgate, noting that respondent's classroom was "uncovered" and that Folger had not previously been approved to attend the workshop. Folger responded that Clark had given her a "special invitation". (*Id.* at 117.)

Johnson thereafter called Clark, "a little after 9:00 a.m." *(Id.* at 18.) Clark indicated that she had no knowledge of Folger being invited by her to attend the workshop and that she would tell Folger to return to Park Avenue.

Clark informed Folger that she had not sent an "invitation" to respondent and that Folger did not have Clark's "approval" to attend the workshop. (Tr., 10/26/99.) Folger inquired what she should do, and Clark responded that respondent should return to Park Avenue. Folger advised Clark that respondent had to go home to obtain her brace for her right knee and that she would thereafter return to Park Avenue. She had not worn it to the workshop, which was conducted in a room on the first floor of Colgate.

Folger returned to Park Avenue at approximately 11:06 a.m. Folger's class had been "split" among other special education teachers." (*Id.* at 151.) She spoke to Dreher, who gave her a copy of a list of the classes among whom Folger's class had been divided. Folger went upstairs to retrieve her students, and Johnson announced over the public address system that all of respondent's students should go to her class. Respondent taught her class the rest of the day.

At the time, Folger resided in Mount Tabor, New Jersey. It takes approximately four minutes to travel between Colgate and Park Avenue by automobile.

There were a total of four self-contained special education classes at Park Avenue at the time. Dividing a class among special education teachers presents "a problem" because other teachers are not expecting the students in question, had no plans "regarding them" and, " . . . trying to get some materials together for those students to make sure they have a productive day, it – it's a problem." (*Id.* at 214.)

Depending on the circumstances, it may not be possible to divide a special education class among the other special education classes, in which situation students would be divided among a "split list". Folger's "split list" at the time in question included other special education classes as well as "regular classrooms". (*Id.* at 214.) Folger's aide could arrange for the "splitting", consistent with general practices. (*Id.* at 151.)

Johnson communicated with Folger regarding the matter by memorandum dated November 4, 1998. After reciting the events which had occurred, Johnson concluded that respondent's " . . . behavior was totally unsatisfactory." (Exh. J-16.)

Clark sent Johnson a memorandum dated November 5, 1998. Clark noted, in part, that she had been unaware that Folger was attending the conference; that she had not sent Folger any information regarding the workshop, nor had she discussed it with her; and that she had previously given respondent information regarding a conference regarding dyslexia, scheduled for October 23 and 24, but that respondent " . . . did not apply to attend." (Exh. J-17.)

Folger sent Johnson a memorandum dated November 9, 1998. Folger stated, in part, that she had received a copy of the notice regarding the November 4, 1998 workshop "addressed to me personally"; referencing the October 5, 1998 meeting, that she believed Clark had sent her the notice "specifically to remedy that situation"; that self-contained special education teachers from all other schools in the District were present, including Fink; that Folger had told Clark that respondent would have to return home to secure her leg brace; and that Johnson did not request that Folger speak with the principal at any time on November 4, 1998 after respondent returned to Park Avenue. (Exh. J-20.)

A teacher scheduled to attend a workshop or conference, even if the pertinent principal is aware of the matter, is required to contact the Code-A-Phone system because that is the method pursuant to which substitute teachers are provided.

DISCUSSION

Willful disobedience of a substantive nature by a tenured teacher towards a supervisor constitutes insubordination. *Board of Ed. of the Borough of Edgewater v. Scarpignato,* 1983 *S.L.D.* 311, 317, *aff'd., State Board of Ed.* 1983 *S.L.D.* 338, *aff'd.,* App. Div. 1984 *S.L.D.* 2013 (*Scarpignato*). *See also, Bradley, supra.*

Johnson testified that she spoke to respondent at approximately 9:00 a.m., on November 4, 1998, directing Folger to return to Park Avenue, but that Folger did not do so until after 11:00 a.m. Johnson also testified that after speaking to Clark, she again called Folger, at Colgate, at approximately 9:15 a.m., directing respondent to return to Park Avenue immediately, but that respondent did not do so until 11:06 a.m. As found, Colgate and Park Avenue are located approximately four miles apart when traveling by automobile.

On cross-examination, Johnson testified that the October 20, 1998 memorandum "could have been circulated to special education teachers generally." (Tr., 10/25/99, p. 149.) She also testified on cross-examination that she could not

recollect whether Clark had told her, on November 4, 1998, that Folger had told Clark that respondent had to go home prior to returning to Park Avenue.

Folger testified that the meeting in question commenced at 8:30 a.m. and that she had been in attendance approximately 15 to 20 minutes when she was asked to call Johnson. Approximately one-half hour later, Clark spoke with respondent. Folger also testified that when told to return to Park Avenue by Clark, she told Clark that she had to first go home to obtain her brace and that she would thereafter return to Park Avenue. Folger stated that her physician had informed her she needed to wear the right knee brace when traversing stairs or standing on her feet all day. She noted, as reflected in the above findings of fact, that the meeting was in a room on the first floor of Colgate. Respondent testified, in addition, that it took her approximately 20 to 25 minutes to travel from Colgate to her home, and that she left Colgate at approximately 9:30 or 9:45 a.m., changed into her brace, and returned to Park Avenue.

Folger testified on cross-examination that there are six or seven stairs to the outside entrance of Colgate and that she knew, prior to attending the meeting, that it would be conducted on the first floor of the building. She also stated that she did not bring her knee brace because she would not have to traverse "continuous stairs," as she usually did at Park Avenue, some "20 times a day," and that she would be seated throughout the day. (Tr., 11/4/99, p. 29.)

I am persuaded that petitioner has not proven this charge. As reflected in the above findings of fact, respondent's testimony that she received a copy of the October 20, 1998 memorandum in an envelope addressed to her, that she had previously expressed concerns to Clark and Johnson regarding the failure of special education teachers to be included in such conferences, and that she contacted Cook's office to advise that she would be attending was not discredited.

The Board's argument that respondent's testimony to the effect that she received a "special" invitation from Cook to attend the conference is contradictory with her position that the memorandum in question is ambiguous on its face has merit. However, the fact that Folger contacted Cook's office regarding her attendance at the

conference and also followed the Phone-A-Code procedure regarding such lends credence to her testimony. In addition, as respondent argues, the October 20 memorandum is ambiguous on its face. The fact that none of the other recourse room teachers at Park Avenue attended the meeting does not demonstrate that respondent's attendance constituted an abandonment of her position. The record does not address the question of who sent the memorandum to respondent. However, in light of the fact that the burden of proof is on the Board, I am persuaded that the Board has not proven that respondent's attendance at the conference constituted unbecoming conduct, insubordination, and/or other just cause for discipline.

I am also persuaded that the Board has not proven that portion of Charge 7 regarding a failure by Folger to immediately return to Park Avenue when directed to do so. Respondent's testimony regarding why she did not wear her right knee brace to the conference, why she needed to return home to obtain it prior to returning to Park Avenue, and her communications in that respect with Clark was not discredited. Petitioner's reliance on the fact that Folger did not tell Johnson that respondent had to first return home has some merit, but does not support a conclusion that respondent intentionally failed to comply with a directive of Johnson. The Board argues that based upon respondent's own testimony, Folger should have returned to Park Avenue no later than 10:45 a.m. but did not do so, as found hereinabove, until 11:06 a.m. In light of the record regarding Charge 7, I am persuaded that that difference in time is *de minimus*.

CONCLUSION

I **CONCLUDE** that petitioner has not proven, by a preponderance of the credible evidence, Charge 7.

Charge 8

Charge 8, referencing a memorandum from Johnson dated October 28, 1998, avers that during the 1998-1990 school year, respondent failed to follow a specific administrative directive requiring all teachers to submit a list of core curriculum needs to

the Intermediate Team Leader (ITC) and that such conduct constituted insubordination and/or just cause for dismissal.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

Intermediate teachers at Park Avenue teach grades 4, 5, and 7. Folger is an intermediate teacher. Carole Brotspie (Brotspie) is Park Avenue's ITL, a teacher who assists intermediate teachers and is responsible for insuring that all book orders are filled. Teachers are required to submit their book orders to Brotspie.

When respondent returned to work in September 1998, her classroom had been "stripped" of all textbooks that she generally used, a procedure which did not occur on an annual basis in special education classes. Folger therefore went to the "basement" and "scrounged up whatever" she could find. (Tr., 10/26/99, pp. 127-128.)

Folger submitted a book request, dated September 8, 1998, requesting six books for each grade level for grades second, third, and fourth. In addition, she requested a teacher's addition for each text, which is generally in the form of a loose-leaf binder. She also indicated on the order form that she had not yet received individual education plans (IEPs) for all students.

At some point, Folger subsequently requested ten books for each of grade levels 2, 3, and 4. At the time Folger had nine students in her class, who were at various grade levels. To clarify the situation, Brotspie asked Folger to provide a list identifying needs relevant to respondent's students. Because Folger was soon "out", the situation was rectified relevant to the individual who subsequently taught her class. (Tr., 10/25/99, p. 109.)

Johnson communicated with Folger regarding the matter by memorandum dated October 28, 1998. Johnson noted that teachers were instructed to submit a list of core

curriculum needs to Brotspie in September 1998; that Brotspie had indicated Folger did not do so; that during the prior week, Mr. King (King), the Board's Mathematics supervisor, indicated he had met with respondent; that King provided a list of mathematical materials to Johnson which Folger did not have, requesting that Johnson provide them; that Johnson asked Brotspie to obtain a list from Folger; and that Brotspie indicated that she had requested such but had not received a list.

Folger responded to Johnson by memorandum dated November 9, 1998, indicating that she had submitted a list of core curriculum needs to Brotspie on September 8 and attaching a copy of that list. Folger also specified the materials that were sent to her classroom. Folger stated that she had been told by Brotspie at the time in question that those were all "core materials that were available" and that she had not received any other materials to date. Additionally, Folger stated that she had requested King's assistance, that he had provided information regarding "the entire scope of the series," and that she had never been aware of such because "special education" has never been permitted to attend core curriculum workshops. (Ex. J-14)

Brotspie sent Johnson a note dated November 19, 1998. Brotspie noted that Folger was given the opportunity to order books in September 1998; respondent requested ten each for grade levels 2, 3 and 4; Brotspie could not "accommodate" ten books at each level and therefore sent respondent four each for each level; Brotspie received a memorandum in October from Johnson, indicating that Folger needed mathematics material; Brotspie thereafter asked Folger to send her a list of her needs, which respondent did not do; on November 10, Folger advised Brotspie that the latter had never sent her needed books and Brotspie indicated that she had never received a list; Brotspie "personally inventoried" Folger's books; respondent indicated she needed ten of each book at grade levels 3, 4, and 5 for Mathematics; and because respondent no longer needed grade 2 materials for Reading, "according to the group she set up," Brotspie removed the grade 2 Reading materials. (Exh. J-52.)

Subsequent to receipt of Brotspie's note, Johnson spoke with King, who indicated that respondent had advised him that she had not received needed Mathematics materials but that Folger had never given such a request to Brotspie.

DISCUSSION

Johnson testified that personnel attempted to obtain a list of needs "relevant" to the instructional levels of Folger students. (Tr., 10/25/99, p. 109.) She noted in that respect that respondent did not have ten students in her class, ". . . much less ten working on any one grade level." She also testified that when Brotspie returned to Folger to ask for a list identifying the latter's needs relevant to her current students, Brotspie did not obtain a response. (*Ibid.*) However, Johnson did not reference how she had obtained such information, nor the specific or approximate dates of any such communications, and Folger requested specific texts, in September and subsequently, consistent with the Board's practices.

CONCLUSION

I **CONCLUDE** that petitioner did not prove Charge 8 by a preponderance of the credible evidence.

CHARGE 9

Charge 9, referencing a memorandum dated September 2, 1998 from Johnson, asserts that Folger failed to follow specific administrative directives requiring all teachers to attend a mandatory staff meeting and that such conduct constitutes insubordination and/or just cause for dismissal. The meeting in question occurred on September 2, 1998.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

Room 116 was Folger's classroom. At the beginning of the 1998-99 school year, a newly-hired special education teacher, Robin Gumkowski (Gumkowski), was assigned

to Park Avenue "for about a day," Gumkowski was assigned to Room 116, an assignment which had been made by Clark. (Tr., 10/25/99, p. 141.)

On the morning of September 1, 1998, the first day of school, all teachers in the district attended a meeting with Salley at Orange Middle. Upon returning to Park Avenue, Johnson told Folger to call Clark, which respondent did. Clark called Folger the next day.

A staff development meeting, a district-wide meeting, was scheduled for September 2, 1998, a Wednesday, at Park Avenue. Such meetings focus on preparing for the new school year and ensuring that all teachers receive instructions relevant to the Board's "direction" for the school year. (Tr., 10/25/99, p. 112.) An announcement regarding the meeting was made over the intercom system on September 1, 1998. The intercom system, which operates throughout the building, including the playground, is "very loud." (*Ibid.*) The meeting on September 2 lasted all day; there was a recess for lunch.

Johnson "took attendance" at the meeting and realized that Folger was not present. (*Id.* at 11). Johnson subsequently inquired if respondent were present in school and was told that she was. Johnson then went "upstairs" and "found" Folger in room 16. (*Id.* at 111.) Johnson inquired why Folger was not at the meeting, referencing four announcements over the intercom. Respondent, at "first", stated that she did not hear the announcements because of an ear infection. (*Id.* at 112.) Folger also indicated to Johnson that she was packing her materials in Room 116 and that Johnson had told her to do so.

Johnson sent Folger a memorandum on or about September 2, 1998, concluding, after reciting the events occurring that day, that Folger's behavior was "totally unsatisfactory." (Exh. J-5).

Folger responded by memorandum dated September 11, 1998. Respondent stated that on September 1, 1998, Johnson had informed her that her teaching assignment at Park Avenue had been changed, effective August 31, and that

respondent should pack her "personal possessions" in Room 116; that Folger commenced doing so the morning of September 2, 1998; that Johnson came to Room 116 at 9:15 a.m., inquiring regarding Folger's absence at the staff meeting; that Folger "reminded" her that she had been directed to pack her belongings; that Johnson indicated Folger should do both; and that respondent attended the staff meeting the remainder of the day, as well as the next day, September 3. (Exh. J-7.) Folger concluded that she had followed Johnson's directives at all times.

Respondent subsequently remained at Park Avenue, assigned to Room 16. Gumkowski was transferred to another school. Johnson does not have authority to transfer teachers.

DISCUSSION

A failure to attend a mandatory meeting constitutes insubordination and/or unbecoming conduct. *In the Matter of the Tenure Hearing of John Birch, School District of the Borough of West Long Branch,* 1978 *S.L.D.* 63. *Scarpignato, supra.*

Johnson testified that when she asked Folger why respondent was not at the meeting on September 2, 1998, respondent "first" indicated that she did not hear the announcements regarding the meeting, possibly because of an ear infection. However, Johnson did not testify regarding any other explanations offered by respondent. Johnson also testified that there could not have been a "misunderstanding." (Tr. 10/25/99, p. 112.)

Folger testified that on September 1, 1998, she attended the staff meeting conducted by Salley. Folger also stated that upon returning to Park Avenue that day, Johnson told her to call Clark, because respondent's "position was being changed," *i.e.,* she was being transferred to Orange Middle. (Tr. 10/26/99, p. 119.) Folger recollected that both Johnson and Clark had told her that. Folger also stated that when she called Clark, the latter told her that she "wanted to transfer me to the Orange Middle School."

Folger indicated that "it was really very short notice and that I had all my stuff at the Middle. . . at Park Avenue School." Clark then said that "she would think about it." (*Id.* at 120.) At that point, Folger stated that if Clark wanted to transfer respondent, she "would, of course, go." (*Ibid.*) Subsequent to speaking with Clark, respondent went to her classroom, room 116, and started organizing materials and looking for boxes in which to pack them. Gumkowski was present organizing the room, apparently for herself. Folger noted that Gumkowski advised respondent that Gumkowski had been assigned to room 116.

Respondent also testified that Clark called her the next day, stating that "they still wanted to transfer me to the Middle School, but that I would have to write a letter requesting the transfer." (*Id.* at 121.) Respondent replied that because she did not want to transfer, she would not write a letter requesting such, "but that they could transfer me if they wanted to." (*Ibid.*)

Although, as petitioner argues, respondent's testimony regarding why she did not initially attend the meeting in question was somewhat contradictory, I am persuaded that the Board has not proven this charge by a preponderance of the credible evidence. Folger testified that she told Johnson, when questioned regarding her non-appearance at the meeting, that she believed she was instructed to pack her belongings in her classroom because of an imminent transfer and that when further questioned by Johnson, she also told the principal that she did not hear announcements regarding the meeting because of an ear infection. The Board's reliance, in part, on Johnson's testimony that she did not have the authority to transfer Folger is not determinative. Folger's testimony was not discredited. I am persuaded that the Board has not proven a willful defiance of a directive by Johnson. The fact that Folger attended most of the meeting, missing approximately 45 minutes, although not conclusive, also lends support to such a conclusion.

CONCLUSION

I **CONCLUDE** that the Board did not prove, by a preponderance of the credible evidence, Charge 9.

CHARGE 10

Charge 10 alleges that during the 1998-99 school year, Folger failed to follow an administrative directive requiring all teachers to keep beepers and cellular telephones out of sight and to ensure that such were disengaged during the instructional day and that such noncompliance constitutes insubordination and/or other just cause for dismissal. The charge references a memorandum dated November 18, 1998.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

During the staff meeting conducted by Johnson in September 1998, the principal told the teachers at Park Avenue that they should not have cell phones or beepers "going off during the instructional day." Johnson noted that students were not allowed to do so and that staff members were "role models". (Tr., 10/25/99, p. 113.) In addition, in Johnson's view, beepers and cell phones operating throughout the day are a "problem." It has been a longstanding practice at Park Avenue that if a telephone communication to the office references an emergency, the teacher in question is advised immediately; "beepers and cell phones are relatively new". (*Id.* at 115.)

Folger and Johnson met in conference on October 13, 1998. During the meeting, Johnson heard a noise and concluded that a "beeper went off" on Folger. Respondent "reached down and she did something by her waist." Folger appeared to reach down towards "something under clothing". (*Id.* at 145). Johnson did not see any

device. (*Id.* at 114.) Johnson reminded respondent, "in an informal way", that teachers were not to have beepers "going off". (*Id.* at 113.)

Johnson subsequently gave Folger a handwritten note, dated October 13, 1998, which read as follows:

> During our conference, your beeper went off, you are reminded to make sure it is not on during the instructional day. Teachers are role models.
>
> [Exh. J-9.]

Johnson met with Folger, Clark, and Wiggins on November 18, 1998. During the meeting, Johnson saw "something" on respondent's waist and heard a "beep, beep" noise. (Tr., 10/25/99 p. 145). Johnson asked: "Is that your beeper?" (*Id.* at 147). Respondent "reached down" and said that her daughter was "sick in the process reaching down to turn it off." (*Id.* at 114.) Respondent did not leave school early that day.

Johnson subsequently sent Folger a memorandum dated November 18, 1999, referencing the September 2, 1998 meeting, the occurrence on October 13, 1998, and the conference held on November 18, 1998. She concluded: "my concerns continue to escalate. You continue to disregard directives." (Exh. J-28.)

DISCUSSION

There is no dispute that Johnson communicated to teachers during the general meeting in September 1998 that cell phones and beepers should not be utilized during the instructional day. I found Johnson's testimony regarding this charge more credible than that of respondent.

Johnson was extremely specific in her testimony, with excellent recall, and she was not discredited on cross-examination. Johnson's statements to Folger, respondent's responses thereto, and Folger's physical gestures during the meetings in October and November 1998 support a determination that respondent had a beeper on

her person, which was activated during those meetings. In addition, during cross-examination of Johnson, respondent's counsel activated what was described as a micro-cassette recorder. Johnson testified that the noise emanating from that device was not the noise she heard during the meetings in question and that the recorder was not the same size as the device she observed respondent touch at those meetings. Johnson's testimony that the noise emanating from the recorder was not a beeping noise was an accurate one.

The Board argues that, even assuming the noise Johnson heard during the meetings in question were caused by a micro cassette-recorder, secretly taping communications with a supervisor constitutes insubordination and/or unbecoming conduct. I am not persuaded by that argument. Respondent was not charged with such a violation, and petitioner cites no legal authority for its conclusion.

Respondent's failure to comply with Folger's directive relevant to beepers, subsequent to being given clear notice of such, constitutes insubordination and/or unbecoming conduct. *See, Bradley, supra*. This is especially so in light of the fact that respondent violated that directive on two occasions. Teachers " . . . teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher." In *The Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97,98-99.

However, Folger was deemed to be an effective teacher, when present, as evidenced by the pertinent observations and PIPs, and she committed no other infractions, except regarding her attendance. I am therefore persuaded that the withholding of an increment, not termination, is an appropriate penalty regarding Charge 10.

CONCLUSION

I **CONCLUDE** that petitioner has proven Charge 10 by a preponderance of the credible evidence and that the withholding of an increment is an appropriate penalty.

CHARGE 11

This charge alleges that during the 1997-98 school year, Folger failed to follow a specific administrative directive by her continued failure to utilize respondent's adopted texts and that such failure adversely affected the instruction provided her students and constitutes unbecoming conduct, insubordination, and/or other just cause for dismissal. Charge 11 references a memorandum from Johnson dated December 13, 1997.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional facts.

Lesson plans ". . . indicate what's being taught . . . what should be taught. (Tr., 10/25/99, p. 178.) Upon submission of lesson plans by teachers each Monday, Johnson reviews them. If everything is "fine" in a lesson plan book, she dates and initials it. If there are "questions or needs to be addressed," Johnson writes comments on the front page of the lesson plan book and dates and initials it. (*Id.* at 92.) Her expectation is that any such comments will be addressed by the next submission.

Johnson wrote a comment, on October 22, 1998, on Folger's lesson plan book for the 1998-99 school year, which comment stated, in part, that respondent should "Use Core Curriculum Material". (*Id.* at 96 & Exh. J-38, p. 1.) That comment meant that respondent should utilize materials adopted by the district.

In written responses on the lesson plan book to Johnson's comments of October 22, 1998, Folger referenced a schedule in the lesson plan which, on its face, listed text-books. The "Holt Mathematics Book" and "Scott Foresman" were referenced for Mathematics; "HBJ Treasury of Literature" and the "Boning Specific Skills Series" for Reading; "Silver Burdett & Ginn New Jersey, Yesterday and Today" and McMillan-McGraw Hill Social Studies" for Social Studies; and "Silver Burdett & Ginn Science

Discovery Works", for Science. (Exh. J-38, p. 5.) The same schedule was referenced regarding October 28, 1998 comments of Johnson, which stated in part:

> HBJ Reading, Scott, Foresman Math Period, Silver Burdett Science, Macmillan-McGraw Hill Social Studies must be taught-(District's adopted texts).
>
> [Exh. J-38, p. 1.]

"HBJ" refers to the publisher of the Reading series that was utilized by respondent at the time. "Scott Foresman" was the publisher of the Mathematics series utilized by the Board; and "Silver Burdett", of the science series utilized by respondent. (Tr., 10/25/99, p. 97.) The Holt Mathematics book referenced in respondent's lesson plan was not the Mathematics book adopted by respondent. The Scott Foresman Mathematics Book and the HBJ Treasury of Literature were the Board's approved Reading material for Mathematics and Reading, respectively; and Silver Burdett was the approved series for Social Studies and McMillan McGraw-Hill, for Social Studies. Silver Burdett was the approved text for Science. The Holt Mathematics Book could have been used as a "supplemental." (Tr., 10/25/99, p. 181.) It was therefore proper for Folger to list the Holt Book in her lesson plan.

In her memorandum of October 28, 1998 to Folger regarding "core curriculum materials", Johnson concluded as follows:

> I continue to be concerned. All students are to be instructed using the District's adopted text/materials. You continue not to comply. This issue was addressed last year.
>
> [Exh. J-11.]

On or about December 3, 1997, Johnson went to respondent's classroom to assist a substitute teacher who had been assigned to the class. When the principal asked students to take their books out so she could determine which ones they had, the only books the students had were "Holt Math Books"; "Holt," refers to the publisher. The Holt Mathematics books were not the adopted series of respondent. The Board's approved Mathematics series was "Scott-Foresman." (Tr., 10/25/99, p. 89, & Exh. J-1, p. 103.)

Johnson wrote Folger a memorandum, dated December 3, 1997, addressing "Curriculum Expectations". Johnson noted, in part, what had transpired on December 3, 1997; that although it was acceptable to use Holt as a "supplement", all students should have the Board's adopted series in all subject areas; that Reading, Social Studies, and Science books were not available and Johnson did not observe any workbooks or spelling books; and that Johnson had subsequently arranged for text-books to be delivered to Folger's classroom. The memorandum also stated that respondent was ". . . expected to teach according to District guidelines. You are to use the district's adopted text." Johnson concluded that she was ". . . very, very concerned. This is totally unacceptable." (Exh. J-1.)

Johnson subsequently went to respondent's classroom on or about December 10, 1997 to assist an assigned substitute teacher. The principal sent respondent a memorandum, later that day, addressing "Students' Instructional Levels/Grouping". which stated, in part, that it was ". . . accepted that all students in the Orange School District receive instruction via the District's adopted text in all subject areas." (Exh. J-35.

Respondent's lesson plan for the week of November 16, 1997, regarding Language Arts included references to "HBJ Vocabulary Words", as well as another text. (Exh. J-38, p. 9.) The lesson plan relevant to Mathematics referenced "Applying Math 3" and "Class Exploring Math 4". (*Id.* at p. 10.) The lesson plan pertinent to Social Studies referenced "McMillan-McGraw/Hill social studies books," and "New Jersey Yesterday and Today". The McGraw-Hill/McMillan text was the approved series for Social Studies. (Exh. J-38, p. 11.) The lesson plans for Science that week referenced "Silver Burdett Ginn Science Discovery Works," the approved series for Science." (*Ibid.*)

Respondent generally receives internal memoranda in envelopes placed in her "mailbox" at school. Folger, who was absent during the time in question, did not retrieve any mail from her school mailbox subsequent to December 2, 1997. Apparently because of her absences, respondent did not receive Johnson's

memorandum of December 3, 1997 until approximately April or May 1998; she received it at home.

Folgers' lesson plan for the week of January 9, 1998 regarding Language Arts referenced, in part, an "HBJ story." (*Id.* at 182 & Exh. J-38, p. 7.) Language Arts is incorporated in "Reading", and the Holt book was the approved Board series for Reading. (*Ibid*). Respondent's lesson plan for Mathematics for the same week referenced "Exploring Math 3" and "Exploring Math 4." There were different texts in the Mathematics series applicable to each grade level. Folger's class included students at different instructional levels. The "Exploring Mathematics" text generally was the series approved by the Board for Mathematics. (Tr., 10/25/99, p. 184 & Exh. J-38, p. 8.)

DISCUSSION

A failure by a tenured teacher to utilize a district's adopted text books constitutes insubordination and/or unbecoming conduct. See, *I/M/O the Tenure Hearing of Peter Loria,* OAL Dkt. No. EDU 7220-96, Octo. 30, 1997, *aff'd, Comm'r of Educ.* Jan. 26, 1998 (*Loria*).

CONCLUSION

Most of the evidence presented by the Board regarding Charge 11 did not address the 1997-98 school year.

Folger testified that she utilized the district's required texts in her teaching presentations regarding Mathematics, science, social studies, and Reading. She also testified that she commenced listing the text utilized in her lesson plans after being notified of concerns by Johnson. Respondent also testified that she continued to use the Holt Mathematics texts because she did not have a sufficient number of the "Exploring Math" text, although she had "some," and was ". . . having to Xerox things." She also noted that she did not have a teacher's edition "for most of the math materials." (Tr., 10/26/99, p. 172.)

As respondent argues, the lesson plans for the period in question referenced petitioner's approved texts. In addition, the Board did not prove that Folger did not utilize the approved texts in her class presentations.

I **CONCLUDE** that petitioner did not prove Charge 11 by a preponderance of the credible evidence.

CHARGE 12

Charge 12 alleges that during the 1998-99 school year, Folger continuously failed to follow administrative directives. The specifications of the charge are that respondent failed to keep and submit detailed, timely, and appropriate assessments of student progress (Specification A); to complete detailed, timely, and appropriate lesson plans (Specification B); to utilize district adopted text books (Specification C); to teach according to district guidelines (Specification D); to follow proper procedures prior to being absent from class (Specification E); and to attend mandatory Turn-Key Instructional Learning Session scheduled for all teachers (Specification F.) The charge also alleges that such constitutes insubordination and/or other just cause for dismissal.

DISCUSSION

Respondent argues in her initial brief that Charge 12 should be dismissed because it is redundant, *i.e.*, the specifications therein are reflected in the other charges, including Charge 13, which is discussed hereinafter. Although discussing the merits of Charge 12 in its initial brief, the Board states in its reply brief that this charge is "withdrawn." (Respondent's reply brief, p. 30.) Folger's characterization of Charge 12 is accurate.

CONCLUSION

I **CONCLUDE** that Charge 12 should be dismissed.

CHARGE 13

Charge 13 alleges that during the 1997-98 school year, Folger failed to follow a specific administrative directive by failing to group students according to their IEP levels, such failure adversely affected the instruction provided to students in her class, and such constitutes insubordination and/or other just cause for dismissal. The charge references a memorandum from Johnson dated December 3, 1997.

FINDINGS

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

Students classified as Special Education Students have been evaluated by the CST, which determined that they were "handicapped". Students are assigned to special education classes, *i.e.*, "work groups," by respondent's Department of Social Services. (Tr., 10/25/99, p. 82.) Johnson is not involved in that process.

Folger's class, at the time in question, was identified as "neurologically impaired." The "State" subsequently changed the classification to "Learning Disabled". (*Id.* at 81-82.) Students in a self-contained class are to be instructed according to their IEPs, which identify a student's instructional level for each subject taught. Teachers' lesson plans are to address the levels of those students relevant to the IEPs. (Tr., 10/26/99.)

DISCUSSION

A failure by a tenured teacher to group and teach students according to their IEP levels constitutes insubordination and/or unbecoming conduct. *Loria*, *supra*. *Bradley, supra.* However, the Board did not present evidence in this respect regarding the 1997-98 school year.

Johnson testified that most problems in this respect were experienced during the 1998-99 school year. Johnson also testified regarding Folger's lesson plan for the 1998-99 school year and the comments Johnson wrote thereon regarding the perceived deficiencies relevant to the instructional groupings of students.

Folger also addressed Charge 13 in her testimony, focusing on the 1998-99 school year. In fact, Folger testified that in prior years, she had not reflected specific assignments relative to instructional groupings in her lesson plans and had never, prior to the 1998-99 school year, received any memorandum from Johnson indicating that respondent's lesson plans were not acceptable. Folger additionally testified that during the time period in question, in October 1998, Johnson did not observe respondent teaching in her classroom.

Clark and Johnson met with respondent on October 7, 1998 to discuss their concerns regarding instruction. Johnson thereafter sent Folger a memorandum dated October 28, 1998, referencing the meeting.

Clark communicated with Johnson by memorandum dated October 7, 1998, regarding telephone communications from L.C., the guardian of N.C., a student in respondent's class. Clark indicated that L.C. had requested that N.C. be re-evaluated and transferred from Folger's class because the work was "too easy". (Exh. J-8.) Clark requested that Johnson investigate the matter. The memorandum, on its face, indicates that copies were sent to Folger and Cohn.

Johnson communicated with Folger regarding the matter by memorandum dated November 3, 1998. Johnson stated, in part, that Folger had indicated three Reading groups and three Mathematic groups but that respondent's lesson plans did not reflect plans for each group; that students were on various instructional levels, which should be addressed in the lesson plans; and that the lesson plans should reflect planning and instruction relevant to IEPs. Johnson had previously "identified informally" to Folger, by notations on the front of respondent's lesson plan book, that groupings relevant to students being instructed according to IEPs were required, as well as students being

taught all subject areas. (*Id.* at 87.) Folger responded to Johnson by memorandum dated November 3, 1998.

Folger sent Johnson a memorandum dated November 9, 1998. Respondent indicated that the October 7, 1998 meeting was to develop a PIP for the 1998-99 school year, which had not been done. Folger also stated, in part, that her students were grouped according to their levels, as indicated in her lesson plans for Reading and Mathematics. Folger concluded by requesting "examples of teachers' lesson plans in our building that are meeting your expectations..." (Ex. J-13.) The memorandum indicates, on its face, that copies were sent to Cohn and Clark.

Johnson met with Folger, Wiggins, and Clark on November 17, 1998. Respondent subsequently sent Johnson a memorandum, dated November 19, 1998, which read as follows:

> At the meeting on November 17, 1998, you agreed to provide examples of lesson plans from teachers in our building that are meeting you (*sic*) expectations. I would appreciate receiving some before the weekend so that I may have time to study them before working on my plans for the week of November 23-27, 1998.
>
> [Ex. J-29.]

The memorandum indicates that a copy was sent to Wiggins.

At some point during the 1998-99 school year, Johnson spoke to Clark regarding concerns of the principal pertinent to the grouping of students in Folger's class. Clark had indicated that she would arrange for Mrs. Walwork (Walwork), the LDTC on the CST at Park Avenue, to perform an assessment relevant to groupings of students for instruction. Clark transmitted to Folger a copy of the instructional levels identified by Walwork by memorandum dated November 23, 1998. The referenced instructional levels, which were attached to the memorandum, listed each child in Folger's class and the functional grade level of each child in Word Recognition, Passage Comprehension, Computation, and Applied Problems.

Johnson again became concerned when she visited Folger's class on December 10, 1998 to assist a substitute teacher. Johnson sent Folger a memorandum regarding the matter, dated December 10, 1998. She noted therein that the substitute teacher assigned to respondent's class had indicated that there was no indication of groupings for instruction "on the proper materials"; that a memorandum from Clark dated November 23, 1998 indicated that instruction should reflect levels indicated by Walwork's testing and IEP information; that Folger did not "follow through"; that based upon the test results submitted by Walwork and information provided by Folger to Johnson during prior meetings, the principal had established Reading and Mathematics groups and had instructional materials delivered to Folger's classroom, "according to the students' instructional levels." Johnson also referenced an attached copy of the identified groupings and levels for Reading and Mathematics instruction. Johnson concluded that she continued "to be concerned with your lack of planning and organizing for effective instruction and that respondent's students " . . . are to be instructed in groups, according to their levels." She noted, finally, that such concern had been "addressed on many previous occasions." (Exh. J-35.)

In his memorandum of November 24, 1998 to Clark, Wiggins noted that it had been agreed that Johnson would provide sample lesson plans to respondent and that respondent would include all subjects in her plans and document groups in a sequence of skills for such groups; that Folger would be provided all "necessary books" for students as well as teachers editions for the various groupings in her class; that respondent would have input into developing a PIP, which would ultimately be a "joint effort" by Folger, Johnson, and Clark; that Clark would observe Folger subsequently during the school year; and that there would be one personnel folder with information regarding respondent and that matters in the personnel folder should also be in the district office. (Ex. J-34) The memorandum on its face indicates that copies were sent to Folger and Johnson.

I am persuaded that Charge 13 should be dismissed because the Board did not introduce evidence in that respect relevant to the 1997-98 school year.

CONCLUSION

I **CONCLUDE** that petitioner has not proven Charge 13 by a preponderance of the credible evidence.

ORDERS

It is hereby **ORDERED** that Charges one through four be **AFFIRMED**; Charges five through nine and eleven through thirteen be **DISMISSED**; respondent be terminated relevant to Charges one through four; and respondent's personnel file reflect the withholding of an increment regarding Charge ten.

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

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

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

March 16, 2000
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/31/00
DATE

D. M. Catanzaro/k
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

mvh/sej/al

APPENDIX

Witnesses

For Petitioner:

Maxine G. Johnson

Michael Cohn

For Respondent:

Grace Folger

Exhibits in Evidence

J-1 Memorandum dated 12/3/97

J-2 Memorandum dated 5/18/98

J-3 Letter dated 8/25/98

J-4 Letter dated 8/31/98

J-5 Memorandum dated 9/2/98

J-6 Book Inventory dated 9/8/98

J-7 Memorandum dated 9/11/98

J-8 Memorandum dated 10/7/98

J-9 Note dated 10/13/98

J-10 Memorandum dated 10/20/98

J-11 Memorandum dated 10/28/98 to Grace Folger from Maxine Johnson Regarding Core Curriculum Materials.

J-12 Memorandum dated 10/28/98 to Grace Folger from Maxine Johnson Regarding Lesson Plans/Addressing Curriculum Expectations

J-13 Memorandum dated 11/9/98 to Maxine Johnson from Grace Folger Regarding 10/28/98 Letter on Lesson Plans/Addressing Curriculum Expectations

J-14 Memorandum dated 11/9/98 to Maxine Johnson from Grace Folger Regarding October 28, 1998 Letter on Core Curriculum Materials

J-15 Memorandum dated 11/3/98

J-16 Memorandum dated 11/4/98

J-17 Memorandum dated 11/5/98

J-18 Memorandum dated 11/6/98

J-19 Employee's Claim Petitions dated 11/9/98

J-20 Memorandum dated 11/9/98 to Maxine Johnson from Grace Folger Regarding 11/4/98 Abandonment of Position

J-21 Memorandum dated 11/9/98 to Maxine Johnson from Grace Folger Regarding 11/3/98 Letter on Lesson Plans

J-22 Book Inventory, Park Avenue School, dated 11/10/98

J-23 Memorandum dated 11/11/98 to Grace Folger from Maxine Johnson Regarding Lesson Plans

J-24 Memorandum dated 11/11/98 to Grace Folger from Maxine Johnson Regarding Professional Day

J-25 Memorandum dated 11/16/98 to Maxine Johnson from Grace Folger Regarding 11/11/98 Professional Day

J-26 Memorandum dated 11/16/98 to Maxine Johnson from Grace Folger Regarding 11/11/98 Lesson Plans

J-27 Memorandum dated 11/18/98 to Michael Cohn from Maxine Johnson

J-28 Memorandum dated 11/18/98 to Grace Folger from Maxine Johnson

J-29 Memorandum dated 11/19/98 to Maxine Johnson from Grace Folger

J-30 Memorandum dated 11/19/98 to Grace Folger from Maxine Johnson

J-31 Instructional Staff Observation Report dated 11/24/98

J-32 Memorandum dated 12/2/98

J-33 Memorandum dated 11/23/98

J-34 Memorandum dated 11/24/98

J-35 Memorandum dated 12/10/98

J-36 Letter dated 4/8/99

J-37 Letter dated 4/14/99

J-38 Daily Lesson Plan Book for School Year Beginning September 1998 and Ending June 1999

J-39 Professional Improvement Plan dated 10/22/91

J-40 Classroom Observation dated 5/1/92

J-41 Teacher Performance Evaluation dated 5/4/92

J-42 Classroom Observation dated 11/9/92

J-43 Professional Improvement Plan dated 11/18/92
J-44 Teacher Performance Evaluation dated 5/14/93
J-45 Teacher Performance Evaluation dated 3/94
J-46 Classroom Observation dated 3/1/95
J-47 Teacher Performance Evaluation dated 3/30/95
J-48 Professional Improvement Plan dated 5/19/95
J-49 Teacher Performance Evaluation dated 3/28/96
J-50 Instructional Staff Observation Report dated 1/14/97
J-51 Memorandum (no date) to Teaching Staff from Maxine Johnson regarding Plan Books
J-52 Letter dated 11/19/98
J-53 Reading and Math Groupings by Carole Brotspie (no date – but sometime after 11/20/98)
J-54 Lesson Plan Examples Given to Grace Folger by Barbara Clark
J-55 Lesson Plan Examples Given to Grace Folger by Sharon Fink
J-56 Staff Agenda dated 9/98 for 1998-99 School Year
J-57 Employer's First Report of Accidental Injury or Occupational Illness dated 12/21/94
J-58 Employee's Report dated 12/16/94
J-59 Supervisor Accident Investigation Report dated 12/19/94
J-60 Memorandum dated 12/20/94
J-61 Disability Certificate dated 12/21/94
J-62 Doctor's Report dated 12/21/94
J-63 Disability Certificate dated 1/3/95
J-64 Employer's First Report of Accidental Injury or Occupational Illness dated 1/23/95
J-65 Employee's Accident Report dated 1/23/95
J-66 Supervisor Accident Investigation Report dated 1/23/95
J-67 Memorandum dated 1/23/95
J-68 Health Insurance Claim Form dated 2/18/95
J-69 Worker's Compensation Medical Reference Form dated 1/24/95
J-70 Diagnostic Notes dated 2/8/95
J-71 Letter dated 10/3/96

J-72 Employer's First Report of Accidental Injury or Occupational Illness dated 3/25/97

J-73 Supervisor Accident Investigation Report dated 3/25/97

J-74 Employee's Report dated 3/25/97

J-75 Incident Report dated 3/25/97

J-76 Letter to Dr. James Lee (undated) Regarding Authorization for Treatment of Grace Folger on 5/15/97

J-77 Photograph of Grace Folger Taken on or about 4/5/97

J-78 Letter dated 5/26/97

J-79 Disability Certificate dated 6/18/97

J-80 Excuse Slip dated 6/20/97

J-81 Essex County Work and Sports Injury Center Discharge Summary dated 6/24/97

J-82 Essex County Works and Sports Injury Center Reports of Grace Folger

J-83 Employee's Report dated 10/7/97

J-84 Supervisor Accident Investigation Report dated 10/7/97

J-85 Employee's Accident Report dated 12/2/97

J-86 Incident Report dated 12/2/97

J-87 Letter dated 1/28/98

J-88 Memorandum dated January (no year) to Stephanie James from Chrystile Figaro

J-89 Letter dated 2/6/98

J-90 Letter dated 2/27/98

J-91 Return to Light Duty Work Note dated 2/27/98

J-92 Prescription dated 2/27/98

J-93 Letter dated 3/10/98

J-94 Letter dated 3/11/98

J-95 No Work Note dated 3/13/98

J-96 Prescriptions dated 3/13/98

J-97 Letter dated 3/24/98 to Dr. Philip Keats from Dr. Hal Ginsberg

J-98 Letter dated 3/24/98 to Dr. Philip Keats from Dr. Roy Cobb

J-99 No Work Note dated 4/3/98

J-100 Prescriptions dated 4/3/98 and 4/17/98

J-101 Letter dated 4/3/98

J-102 No Work Note dated 4/17/98

J-103 Letter dated 4/17/98

J-104 Doctor's Report dated 5/7/98

J-105 No Work Note dated 5/8/98

J-106 Prescription dated 5/8/98

J-107 No Work Note dated 5/22/98

J-108 Letter dated 5/22/98

J-109 Garden State Orthopaedic Progress Report with First Dated Appointment of 5/20/98

J-110 Letter dated 5/28/98

J-111 No Work Note dated 6/5/98

J-112 Prescription dated 6/5/98

J-113 Letter dated 6/5/98

J-114 Letter dated 6/9/98

J-115 Letter dated 7/7/98

J-116 Letter dated 8/18/98

J-117 Prescriptions Regarding Treatment for Ear Infection (First dated Prescription 10/13/98)

J-118 Letter dated 12/2/98

J-119 Letter dated 12/2898

J-120 Letter dated 1/25/99

J-122 Prescriptions dated 1/28/99

J-123 Letter dated 2/4/99

J-124 Report dated 2/18/99

J-125 Letter dated 2/17/99

J-126 Letter dated 3/16/99

J-127 Prescription dated 3/18/99

J-128 Report dated 3/18/99, with Fax Cover Sheet

J-129 Patient Intake Form dated 3/19/99

J-130 Initial Orthotic Evaluation dated 3/25/99

J-131 Progress Report dated 3/25/99

J-132 Report dated 4/8/99

J-133 Prescription dated 4/12/99

J-134 Letter dated 5/12/99

J-135 Report dated 5/13/99

J-136 Worker's Compensation Claim of Injury Form dated 5/20/99

J-137 Report dated 7/1/99

J-138 Stipulation of Facts, with Attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TO: Bill Speziale, Deputy Clerk

FROM: Diana C. Sukovich, ALJ

DATE: April 6, 2000

RE: Correction to Initial Decision
Orange Board of Education v. Grace Folger
OAL Dkt. No. EDU 7379-99, Agency Dkt. No. 163-6/99

The initial decision in the captioned matter was decided on March 20, 2000.

Pg.1. Appearance Section:

[**Louis P. Bucceri**, Esq., for petitioner (Bucceri & Pincus, attorneys)]

[**Nicholas Celso, III**, Esq., and **Joseph R. Morano**, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)]

Joseph R. Morano, Esq. and **Daniel S. Goodman**, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Louis P. Bucceri, Esq., for respondent (Bucceri & Pincus, attorneys)

Pg.17, fifth line: Wertheimer (Wertheimer), an "Endontologist." (*Id.* at 41-42.)

Pg.69 **[CONCLUSION]**

Pg.70 Subsequent to the third line from the top of the page, add: **CONCLUSION**

\mvh

82 a

OAL DKT. NO. EDU 7379-99
AGENCY DOCKET NO. 163-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF GRACE FOLGER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE, ESSEX COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed.[1] Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent excepts to the Administrative Law Judge's (ALJ) recommended Initial Decision that she be dismissed from her teaching position as a result of the absences set forth in Charges 1 through 4. She does not dispute the number of absences but does argue, however, that nothing in the ALJ's findings establishes that any of these absences were taken without medical cause. Further, respondent contends that, by definition, excessive absences must mean absences in excess of what can be justified by medical verification. She also avers that in suspending her in June 1999, the Board never gave her a chance to prove that she was healthy.

Next, respondent takes exception to the ALJ's finding at page 40 of the Initial Decision that the State monitoring guidelines are relevant to the question of the discipline of an

[1] It is noted for the record that the Initial Decision incorrectly identifies counsel for the parties. Joseph Morano, Esq. and Daniel S. Goodman, Esq. represent the Board. Respondent's counsel is Louis Bucceri, Esq.

individual for absenteeism, arguing that those guidelines may not be used as a standard to judge her absences. With respect to this, respondent contends that the Orange School District did not exceed the State's 3.5% guideline and that a mere statistical analysis based on State guidelines may not be applied to discipline an individual without considering the legitimacy of the reasons for those absences. In support of her position, respondent cites *Montville Ed. Assoc. v. Bd. of Ed.*, 1984 *S.L.D.* 550, *rev'd* St. Bd. of Ed. 559, *rev'd* Appellate Division 1985 *S.L.D.* 1972, *cert. denied* 103 *N.J.* 500 (1986), decision on remand St. Bd. of Ed. 1986 *S.L.D.* 3113.

Respondent further excepts to the finding that she committed the offense listed in Charge 10 relative to possession of a beeper. She avers, *inter alia*, that the proofs were purely a matter of what a single Board witness heard, but never claimed to see, versus respondent's own testimony that she did not have a beeper, but was using a tape recorder that emitted a sound when the tape ran out. Moreover, it is respondent's contention that the penalty assessed for Charge 10 is moot because no increment can be withheld unless she is reinstated and, for the record, she states that a preponderance of evidence does not exist to support the charge.

The Board avers that the ALJ applied the appropriate standard in this matter and that the recommended decision is correct. The Board further maintains that, even though respondent claims to be fit to return to work, her absences in the past have clearly had a negative impact on instruction and compromised her students' education.

As to respondent's exceptions regarding the State's 3.5% monitoring guidelines for staff absenteeism, the Board contends that the ALJ properly found them relevant to the question of a school employee's absenteeism, urging, *inter alia*, that the statistical analysis was not an isolated consideration in judging respondent but only one factor of many. In response to the exceptions relative to Charge 10, the Board argues that the testimony as to whether or not respondent committed the offense listed in that charge is based on a matter of credibility and

reliability. It further avers that the ALJ appropriately reached a determination to sustain Charge 10, urging that the ALJ had the right to hear the evidence, weigh the evidence, and make a determination that respondent was insubordinate for her noncompliance with the school rules regarding such items as beepers and cellular telephones.

Lastly, it is the Board's position that the ALJ had the power to withhold respondent's increment even if she is terminated, arguing that the preponderance of the evidence supported Charge 10 and the ALJ was not precluded from making determinations regarding each individual charge.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with and adopts the ALJ's findings and conclusions with respect to the charges certified against respondent, except as modified below. As to respondent's exceptions with respect to the four charges involving chronic and excessive absenteeism, the Commissioner finds meritless her argument that, by definition, excessive absenteeism must mean absences in excess of what is justified by medical verification. As correctly determined by the ALJ:

> Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled and even if the teacher's classroom performance was sufficient. *Kacprowicz, supra. Pellecchio, supra.* In addition, chronic or excessive absenteeism may be found to warrant discipline, including dismissal, even when the individual was entitled to days off pursuant to a contract. *Rucker.* (Initial Decision at 40)

Likewise, the Commissioner is in full agreement with the ALJ's determination that "action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries. *Kochman v. Board of Education of the Borough of Keansburg*, [supra]. *See also, Board of Education of the Twp. of Irvington v. Pearson,* [*supra*]." (*Id.* at 41) As aptly stated by the Board in the present matter, "From the students' point of view, it does not

matter whether their teacher is absent for an excessive amount of time due to work related injuries, approved leaves of absence, legitimate medical excuses or illegitimate excuses. The bottom line is whether the regularly scheduled teacher is present to teach or whether he/she is absent a majority of the time.***" (Board's Post-hearing Brief at pp. 37-38)

As to respondent's exception contending that the ALJ erred in finding the State's 3.5% monitoring guideline for staff attendance to have relevance in the instant matter, the Commissioner finds that, even accepting her contention *arguendo,* it would be of no consequence in reaching a final decision herein. Clearly, the factual circumstances in the present matter are vastly different than those in *Montville, supra*, the case respondent cites in support of her exception. In the *Montville* case, the board of education added to the district's annual teacher's evaluation an attendance component which correlated the number of days absent with ratings of "satisfactory," "needs improvement," or "unsatisfactory." Even though there was a narrative section included which allowed for an explanation of the absences, the ratings themselves were not affected by the narrative explanation. After a rather tortuous path of litigation, the New Jersey Appellate Court agreed with the Commissioner's rejection of the ALJ's recommendation to uphold the board policy. The Commissioner determined, *inter alia*, that such a policy was not reasonable because the teacher's attendance evaluation was based solely on a cumulative number of days of absence. The State Board reversed the Commissioner's determination but the Court affirmed the Commissioner, holding that, irrespective of the narrative explanation, the assigned rating was mathematical and unaffected by the reason for the absence.

In the instant matter, the Commissioner finds nothing in the record indicating that the Board based its decision to certify tenure Charges 1-4 against respondent solely upon application of a mechanistic, mathematical or statistical formula. As stated by the Board:

> Respondent incorrectly asserted the Board's position with regards to the State's mandated attendance guidelines (Respondent's Brief, at 28). [Assistant Superintendent] Cohn testified that the State requires a 96.5% attendance rate for all of the certificated staff in the district as an entire unit [T1, 53:1-54:5]. [He] never testified that each teacher could not be absent for more than 3.5% of any given school year. Rather, he clearly testified that this 3.5% ratio was a *district-wide average*. Nonetheless, those guidelines are not "irrelevant to the proceeding," as Respondent incorrectly asserted [cite omitted]. Rather, Cohn testified as to the State's requirements in order to inform [the ALJ] as to the excessiveness of Respondent's absences. For the past five years, Respondent was absent from work on three hundred thirty-two and one-half (332.5) occasions, or thirty-six (36) percent of the time. If one were to only look at the four years included in the tenure charges, Respondent was absent from work on three hundred twenty-two and one-half (322.5) occasions, or forty-four (44) percent of the time. [footnote omitted] If one were to simply look at the past three years, Respondent was absent from work on two hundred ninety-five and one-half (295.5) occasions, or fifty-four (54) percent of the time. Finally, if one were to look at just the past two years, Respondent was absent from work on two hundred twenty-six and one-half (226.5) occasions, or sixty-two (62) percent of the time. Clearly, these amount[s] of absences are excessive. The State's 3.5% attendance guideline was introduced into evidence merely to provide [the ALJ] with a reference point as to what attendance ratio is generally deemed acceptable on a district wide basis.*** (emphasis in text) (Respondent's Post-hearing Reply Brief at pp. 6-7)

Contrary to respondent's assertions, the Commissioner finds upon full examination of the record, including the transcripts of the matter, that the Board has met the standard for termination of a tenured employee for excessive absenteeism set forth in *In the Matter of the Tenure Hearing of Lena White,* 92 *N.J.A.R.*2d (EDU) 157, 161; *i.e.*, that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period

of time the absences occurred, not merely after the fact and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of the absences. *See also, In the Matter of the Tenure Hearing of Celese Segall, School District of the City of Elizabeth, Union County*, decided April 17, 2000.

Lastly, as to Charge 10, which alleges violation of the District's beeper/cellular phone policy, the Commissioner finds the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony, and assessment of credibility. *Lazorick v. Brown*, 195 *N.J. Super.* 444, 456 (App. Div. 1984); *In re Perrone,* 5 *N.J.* 514 (1950); *Middletown Tp. v. Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962); *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), *cert. den.* 10 *N.J.* 316 (1952). Moreover, the Commissioner finds no cause to challenge the credibility assessments made by the ALJ or to disturb the ALJ's findings of fact with respect to this Charge.

Having sustained Tenure Charges 1-4 and 10 against respondent, the Commissioner accepts and adopts as his own the recommendation of the OAL that respondent be terminated from her tenured position as a special education teacher in the Orange School District. However, in light of such termination, the Commissioner declines to accept the recommended penalty assessed for Charge 10, to the extent that such increment withholding is intended to be prospective.

Accordingly, respondent is hereby terminated from her tenured teaching position in the Board's employ. Further, a copy of this decision shall be forwarded to the State Board of

Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for review and action, if any, as it deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 15 2000

Date of Mailing: MAY 15 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK MULLEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF CHESTERFIELD, BURLINGTON	:	DECISION
COUNTY.	:	

May 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10177-99
AGENCY DKT. NO. 332-11/99

SCHOOL DISTRICT OF CHESTERFIELD TOWNSHIP, BURLINGTON COUNTY,
Petitioner,
v.
MARK MULLEN,
Respondent.

Frank P. Cavallo, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)

Andrew Babiak, Esq., for respondent

Record Closed: March 1, 2000 Decided: March 27, 2000

BEFORE M. KATHLEEN DUNCAN, ALJ:

The within matter commenced on November 5, 1999, when the Board of Education of the Township of Chesterfield (hereinafter petitioner) filed tenure charges in accordance with the requirements of *N.J.S.A.* 18A:17-20.2 and 18A:6-11 against Mark Mullen (hereinafter respondent). Petitioner certified charges alleging conduct unbecoming a chief school administrator, specifically the making of misrepresentations to petitioner, exhibiting incompetence in the handling of school board issues and in performing his duties as chief school administrator, as well as failing and refusing to adhere to school board policies, failing generally to supervise and direct fiscal operations and instructional programs, failing to facilitate

negotiations between petitioner and the teacher's association and failing to ensure the safety and well being of pupils by relocating the nurse's office to a poorly accessible area of the school building and thereafter by failing to make provision for a substitute nurse in the absence of a full-time employee. On November 19, 1999, respondent filed an answer in which he denied any wrongdoing, and on November 23, 1999, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was conducted on December 7, 1999, at which time hearing dates were scheduled for April 3, 4, 5, 7 and 10, 2000. An in-person settlement conference was conducted on February 17, 2000, at which time the parties reached an agreement, subject to Board approval. Thereafter the parties forwarded a signed stipulation of settlement which was received on March 1, 2000 and which is attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve the settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy expressed in *Cardonick v. Board of Education of the Borough of Brooklawn*, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. Petitioner has determined that respondent is an unfit superintendent, but recognizes nonetheless that their charges must be established on the record by a preponderance of the competent and credible evidence. A settlement agreement in this matter will cause the least disruption to petitioner's employees, who will not be called away from their regular duties to testify; it will avoid the uncertainty of litigation and a potentially lengthy and expensive process and possible appeals which would undoubtedly extend beyond the termination date in respondent's employment contract with petitioner, July 1, 2000.

Furthermore, if the tenure charges were to be upheld following a hearing on the merits, pursuant to *N.J.S.A.* 18A:66-36 respondent would forfeit his rights to deferred retirement benefits. Although the Legislature has provided for absolute forfeiture of pension rights for those

members removed for cause before they are eligible to actually receive retirement benefits, a voluntary resignation prior to removal for cause will permit respondent to avoid the effect of the mandatory forfeiture provisions on his deferred retirement benefits. *Widdis v. Retirement System*, 238 *N.J. Super.* 70 (App. Div. 1990). Preservation of pension rights is a legitimate concern for the Commissioner when considering proceedings involving tenure charges. *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967).

In accordance with *N.J.A.C.* 6:11-3.5, petitioner is required to notify the State Board of Examiners of the alleged conduct in cases where teaching staff members accused of unbecoming conduct resign or retire from their positions before tenure proceedings have been concluded. Pursuant to that regulation if the State Board of Examiners should determine to issue an order to show cause, it will be the responsibility of the district to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying the allegations. Under all of the circumstances, the proposed stipulation of settlement appears to be an appropriate resolution of the matter.

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

I hereby **file** this initial decision with the Commissioner of the Department of Education for consideration.

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

March 27, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

March 29, 2000
DATE

D. N. Gintaraitis/fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

2000 MAR -1 A 11:08

File No. 2249-0002

Parker, McCay & Criscuolo, P.A.
Three Greentree Centre, Suite 401
Route 73 and Greentree Road
P.O. Box 974
Marlton, New Jersey 08053
(856) 596-8900
Attorneys for Board of Education of the Township of Chesterfield, Burlington County

IN THE MATTER OF THE TENURE HEARING OF MARK MULLEN, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 332-11/99 OAL Docket No. EDUTH-10177-99S Civil Action **STIPULATION OF SETTLEMENT**

WHEREAS, the Chesterfield Township Board of Education ("Board of Education") certified and filed Tenure Charges with the Commissioner of Education, against the Chief School Administrator, Mark Mullen ("Mullen"), on or about November 1, 1999; and

WHEREAS, Mullen filed an Answer to the Tenure Charges on or about November 19, 1999, in which he denied the allegations thereof; and

WHEREAS, the Commissioner of Education transmitted the Tenure Charges to the Office of Administrative on or about November 23, 1999; and

WHEREAS, the parties, through their respective counsel, participated in settlement discussions and negotiations on February 17, 2000; and

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

WHEREAS, hearings are scheduled to occur in April 2000; and,

WHEREAS, the Board has had a full opportunity to investigate this matter, and based upon that investigation, has determined that this Stipulation of Settlement is fair and just, and causes the least disruption to the School District in that witnesses will not be taken away from their normal responsibilities, that the settlement avoids the uncertainty of litigation and a lengthy and expensive hearing process and possible appeals and that Mullen has raised defenses which may be meritorious and that there is good cause which warrants this Stipulation of Settlement; and

WHEREAS, the Board of Education has determined that it is in the best interest of the Chesterfield Township School District, and the public at large to resolve the dispute existing between the Board of Education and Mullen; and

WHEREAS, the parties have determined it to be in their respective best interests to resolve the above referenced matter and come to an agreement with respect to the issues presented in this matter; and

WHEREAS, the Board of Education believes that the prosecution of the tenure charges will divert substantial amounts of money, time and key staff resources from the true mission of the Chesterfield Township School District, the parties have agreed to resolve this matter under and subject to the terms as outlined in this Settlement Agreement.

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

1. Upon the execution and approval of this Stipulation of Settlement, the Board of Education hereby withdraws the Tenure Charges with prejudice, and Mullen agrees to the dismissal of same along with the Answer filed on his behalf.

2. By executing this Stipulation of Settlement Mullen hereby resigns his position with the Board of Education to be effective February 23, 2000; said resignation is conditioned upon the Board of Education's fulfillment of the terms hereof and upon the Commissioner of Education's approval hereof. Mullen shall submit, in writing, his resignation to the Board of Education on or before February 23, 2000.

3. The Board of Education shall pay Mullen's salary retroactively from November 1, 1999 through December 31, 1999, and an additional lump sum payment of Eleven Thousand Dollars ($11,000.00) in gross salary for the period January 1, 2000 through the date of Mullen's resignation. The Board of Education shall make all necessary payroll deductions and/or withholdings from the foregoing amounts for federal and state taxes and for pension contributions.

4. The Board of Education shall reimburse Mullen in the amount of Nine Hundred and Sixteen Dollars and Two Cents ($916.02) for COBRA payments made by him from November 1, 1999 through the effective date of Mullen's resignation, upon presentation of proof of payment and the billing statement.

5. In accordance with Executive Order No. 11, in response to requests for information, the Board of Education shall indicate the dates of Mullen's employment and the fact that he resigned in good standing from the Chesterfield Township School District. Nothing herein shall prevent Mullen from obtaining letters of reference from former and/or current members of the Board of Education.

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

6. The Board of Education and Mullen agree to release each other from any and all claims which they have now, or may have in the future against each other relating to Mullen's employment with the Board. Nothing in this paragraph shall waive any rights

Mullen may have to COBRA Benefits in accordance with Federal Law, and/or any rights he may have to assert a claim arising under the Teachers Pension and Annuity Fund Act.

7. The parties understand that this Stipulation of Settlement is contingent upon the approval of Administrative Law Judge M. Kathleen Duncan and the Commissioner of Education. It is understood and agreed that in the event such approval is not granted then all provisions hereof shall be null and void and of no further effect and the parties shall retain all legal rights they had prior to their execution of this agreement.

8. The parties warrant that they have entered into this Stipulation of Settlement voluntarily, without any duress or undue influence and that by entering into this agreement, each party waives their right to a hearing and disposition on the merits of the Tenure Charges.

9. This Stipulation of Settlement may be executed in two or more counterparts, each of which when executed and delivered shall be deemed an original, and all of which when taken together shall constitute but one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this agreement.

WHEREAS, the Board of Education and Mullen have reviewed this Settlement Agreement and have consulted with their respective attorneys; and

WHEREAS, Mullen has approved the terms and conditions of the Settlement Agreement; and

WHEREAS, the Settlement Agreement has been approved by the vote of the members of the Board of Education of the Chesterfield Township School District at its meeting of February 23, 2000, and has been made a part of the Minutes of that meeting.

IN WITNESS WHEREOF the parties hereto have set their hands and seals on this 18th day of February, 2000.

CHESTERFIELD TOWNSHIP BOARD OF EDUCATION

Attest:

By: Mary Brennan Mazzoni
MARY BRENNAN-MAZZONI,
BOARD PRESIDENT

Louise Zoilkowski
LOUISE ZOILKOWSKI,
BOARD SECRETARY

Witness:

Mark Mullen
MARK MULLEN

F.P. Cavallo
FRANK P. CAVALLO, JR., ESQ.
ATTORNEY FOR CHESTERFIELD TOWNSHIP BOARD OF EDUCATION

Andrew Babiak
ANDREW BABIAK, ESQ
ATTORNEY FOR MARK MULLEN

RESOLUTION OF THE CHESTERFIELD TOWNSHIP BOARD OF EDUCATION APPROVING SETTLEMENT REGARDING TENURE CHARGES INVOLVING MARK MULLEN

BE IT RESOLVED by the Chesterfield Township Board of Education as follows:

1. The Board hereby approves of the settlement of tenure charges involving Mark Mullen in accordance with the terms of a proposed Settlement Agreement which has been reviewed by the Board.

2. The Board authorizes submission of the proposed Settlement Agreement to the Commissioner of Education for review and approval, the terms of which shall remain confidential until such time as approved by the Commissioner.

3. The Board President, Board Secretary and Solicitor are directed to take such action as may be necessary to further the actions and intentions of the Board in this matter.

I hereby certify that on February 23, 2000, the Chesterfield Board of Education adopted the above resolution by a vote of 5-0.

Louise Zolikowski

Louise Zolikowski
Business Admin/Board Secretary

LAW OFFICE
PARKER, McCAY & CRISCUOLO, P.A.

OAL DKT. NO. EDU 10177-99
AGENCY DKT. NO. 332-11/99

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK MULLEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF CHESTERFIELD, BURLINGTON	:	DECISION
COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 15 2000

Date of Mailing: MAY 15 2000

149-00

ERNA CHIRICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6659-98
AGENCY DKT. NO. 344-7/98

ERNA CHIRICO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner

Alan J. Schnirman, Esq., for respondent

Record Closed: March 1, 2000 Decided: March 27, 2000

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 10, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

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

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

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

March 27, 2000
DATE

M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

March 29, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
MONTGOMERY KNOLL
9 TAMARACK CIRCLE
SKILLMAN, NEW JERSEY 08558
(609)921-1502
Attorney for Petitioner

2000 MAR -1 P 4:21

ERNA CHIRICO Petitioner, vs. MILLTOWN SCHOOL DISTRICT MIDDLESEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION FOR NEW JERSEY OAL DOCKET NO. ~~499-10/96 S~~ EDU ST 06659-98 AGENCY REF. NO. ~~10756-96S~~ 344-7/98 SETTLEMENT AGREEMENT

Erna Chirico (hereinafter "Petitioner"),7 Michael Avenue, Milltown, New Jersey 08850 and the Board of Education of the City of Trenton (hereinafter "Board"), stipulate and agree that, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. In return for compliance with the Agreement, the petitioner agrees to the dismissal, with prejudice, of the above-captioned litigation. The petitioner releases and waives any and all claims to back salary and/or back benefits, except as provided in this Agreement.

2. In return for compliance with this Agreement, the Board agrees as follows:

   (A) The petitioner is hereby re-employed with the Board, effective November 1, 1999, in the position of general aide.

   (B) The petitioner will be employed in this position assuming satisfactory work performance from November 1, 1999 and for as long as it takes the petitioner to accrue 25 years of service with the Public Employee Retirement System (P.E.R.S.), to be thereafter employed at the sole discretion of the Board.

(C) The position of general aide is a ten (10) month position presently paying $9.50 per hour. The petitioner will receive that rate presently and thereafter be entitled to any increases in salary, for the balance of her years of service, to which other hourly employees similarly situated are entitled.

(D) The petitioner will be employed for a minimum of 30 hours per week during the course of her employment and will be entitled to related pension contribution to P.E.R.S. as well as "Husband and Wife" health benefit plan.

(E) The petitioner will be entitled to the reimbursement of eighty-five (85) sick days and will be entitled to accrue ten (10) sick days per year (one per month) commencing November 1, 1999 and continuing during the remaining course of her employment. As to the ten (10) sick days per year granted in accordance with this Agreement, it is understood by and between the parties and the Milltown Education Association that this aspect of the Agreement is specific to this case and to the settlement of this case and does not set a precedent nor does it constitute a past practice.

(F) Within thirty (30) calendar days of the execution of this Agreement, the Board will pay to petitioner the sum of Three Thousand Five Hundred ($3,5000.00) Dollars.

3. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized to sign this Agreement and bind the Board to its terms.

4. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. This Agreement shall be subject to the laws of the State of New Jersey.

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by the parties. However, if it is determined in the future that there has been miscalculation of damages set forth in paragraph 2 above, the parties agree to correct any errors regardless of which party gained the benefit(s) thereof.

7. This Agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education and shall be of no force or effect unless such approval is received. In the event that such approval is not given, the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates specified.

FOR PETITIONER:

Erna Chirico

Erna Chirico

WITNESS:

Michael T. Barrett, Esquire

Dated: 10/28/99

FOR THE RESPONDENT, MILLTOWN SCHOOL DISTRICT:;

Walter E. Boright
Superintendent of Schools

WITNESS:

Alan J. Schnirman, Esquire

Dated: 3/1/00

OAL DKT. NO. EDU 6659-98
AGENCY DKT. NO. 344-7/98

ERNA CHIRICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 15 2000

Date of Mailing: MAY 15 2000

150-00

C.F., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

May 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1869-00
AGENCY DKT. NO. 79-3/00

C. F., on Behalf of Her Minor Child S.F.,
Petitioner,
v.
KENNILWORTH BOARD OF EDUCATION, UNION COUNTY,
Respondent

C. F., petitioner, *pro se*

Thomas O. Johnston, Esq., for respondent
(Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: March 20, 2000 Decided: March 29, 2000

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 12, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

A emergent relief hearing was held on March 20, 2000, wherein the parties agreed to settle this matter and completed a Stipulation of Settlement which is attached hereto.

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

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

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

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

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

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

3/29/2000
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

3/31/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

Re: C. F. on behalf of S. F. v. Kenilworth Board of Education
Agency Docket No. 79-3/00
OAL Docket No EDU 869-00

Petitioner agrees that her son, S. F. (Scott Ferguson) will ~~receive~~ serve an in-school suspension on Wednesday March 22, 2000, and an out-of-school suspension on Thursday March 23, 2000 and on such day will not be permitted entry into the David Brearley Middle/High School in Kenilworth, nor will he be permitted to participate in any school related activity on ~~said~~ such day.

Petitioner further agrees to attend a Re-Entry conference with appropriate School administrators on Friday, March 24, 2000, at 7:30 A.M.

This stipulation of settlement will constitute full satisfaction for a, and all claims Petitioner may have against the Kenilworth Board of Education, related to this matter.

Thomas O. Johnston
Attorney for
Board of Education
of Borough of Kenilworth

Dated 3/10/2010

Dated 3/20/20
3/20/2010

Petitioner
Cynthia L. Ferguson

Jeffrey V. Ferguson
JEFFREY V. FERGUSON

OAL DKT. NO. EDU 1869-00
AGENCY DKT. NO. 79-3/00

C.F., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 15 2000

Date of Mailing: MAY 15 2000

* It is noted for the record that this matter was transmitted to the OAL on March 6, 2000, not September 12, 1997, as stated in the Initial Decision.

RUSSELL RIEGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9628-99
AGENCY DKT. NO. 243-8/99

IN THE MATTER OF
RUSSELL RIEGER
AND THE NEW MILFORD
BOARD OF EDUCATION

Harold N. Springstead, Esq., for petitioner
(Springstead & Maurice, Esqs., attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty & Hara, Esqs., attorneys)

Record Closed: February 8, 2000 Decided: April 4, 2000

BEFORE **IRENE JONES**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on September 3, 1999 for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were scheduled for June 14 and 16, 1999 but were adjourned because the parties had reached a settlement. A Stipulation of Settlement and

Release was signed by the parties on January 5, 2000 and filed in this office on February 8, 2000. A copy is attached hereto.

I have reviewed the Stipulation of Settlement and Release and I **FIND**:

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

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

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

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

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

4/4/2000
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

4/7/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is made this 10th day of January, 2000, by and between the NEW MILFORD BOARD OF EDUCATION, with offices at 145 Madison Avenue, New Milford, New Jersey 07646 ("the Board")

AND

MR. RUSSELL RIEGER ("Rieger"), residing at 46 Mary Street, Lodi, New Jersey 07644.

WITNESSETH:

WHEREAS, at its May 24, 1999 meeting, the Board voted to withhold Rieger's salary increments for the 1999-2000 school year, based on alleged deficiencies in performance in the 1998-1999 school year, and

WHEREAS, on or about August 4, 1999, Rieger filed a verified petition appealing said increment withholding with the Commissioner of Education [Agency Docket No. 2438/99]; and

WHEREAS, on or about September 14, 1999, said petition was transmitted by the Commissioner of Education to the Office of Administrative Law for disposition under [OAL Docket No. EDU OR 09628-99N]; and

WHEREAS, on or about September 8, 1999, the New Milford Education Association filed a grievance on Rieger's behalf, protesting the withholding of his salary increment for the 1999-2000 school year; and

WHEREAS, Rieger has been a teacher in the New Milford School District for over 29 years, serving in the capacity of teacher with tenure;

WHEREAS, the parties wish to fully resolve these disputes by mutual agreement; and

WHEREAS, Rieger has indicated his desire to resign from all employment with the Board effective June 30, 2000, upon certain terms and conditions to be stipulated in this Agreement; and

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. In return for full compliance with this Agreement, Rieger agrees to sign an irrevocable letter of resignation from all employment with the Board, to be effective June 30, 2000. The Board shall, by separate resolution, publicly accept this resignation at its next regularly scheduled Board meeting. The form of said resignation is attached hereto. Once said resignation is publicly accepted by the Board, it is binding and irrevocable and is not subject to modification or recision.

2. Rieger's salary increment for the 1999-2000 school year shall be restored, retroactive to September 1, 1999, for the entirety of the 1999-2000 school year, in the amount of $1,828, thus bringing his salary for the 1999-2000 school year to $69,730 (step 19). In addition, Rieger' longevity pay shall be adjusted to reflect that he is serving his thirtieth year with the District,

thus increasing his entitlement from 4% of his salary at step 18, to 6% of his salary at step 19. As adjusted, Rieger is entitled hereunder to receive a differential of $1,468 in longevity pay. These combined benefits (increment and longevity differential) shall be paid to Rieger in the total amount of $3,296, less all applicable deductions, including check offs for taxes, F.I.C.A., and T.P.A.F. contributions. He shall receive one prorated lump sum payment to cover the period from September 1, 1999 until the time his salary is adjusted in accordance with this Agreement. The remainder shall be included in his regular paychecks in the appropriate prorated amount.

3. Upon his resignation, Rieger shall be entitled to all benefits available to him under the current collective negotiations agreement between the New Milford Education Association and the Board. The Board shall at that time remove any and all reference to the subject increment withholding from Rieger's personnel file, including any notices informing Rieger that such action is being considered, has been proposed or is being implemented.

4. The compensation and benefits specified in paragraph 2 of this Agreement are to be provided in consideration for Rieger:

a. withdrawing his petition of appeal with the Commissioner of Education, [Agency Docket No. 2438/99; OAL Docket No. EDU OR 09628-99N] with prejudice;

b. withdrawing the September 8, 1999 grievance of the increment withholding, with prejudice;

c. executing both a General Release in favor of the Board releasing the Board from all claims, liabilities or expenses to which it may be subject, arising from the rights or claims of Rieger; and

d. tendering his resignation effective June 30, 2000 and relinquishing his status as a tenured employee in the form accompanying this Agreement. However, nothing in this Agreement, or the General Release given by Rieger shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

5. Notwithstanding the foregoing, nothing in this Agreement, or the General Release give by Rieger shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

6. Rieger acknowledges that he has consulted with an attorney or a representative of his own choosing prior to signing this Agreement, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

7. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

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

9. In the event that the Board is prevented from, or unable to fulfill the terms of this Agreement, for any reason, Rieger's resignation shall be rendered null and void and of no force or effect, regardless of whether it has been accepted by Board resolution. In that event, Rieger's tenure and employment rights shall return to the status existing prior to the execution of this Agreement.

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

Witness:

Frank Ceurvels
Board Secretary/Business Administrator

Dated:

NEW MILFORD BOARD OF EDUCATION

Gary Ramella
Board President

Witness:

Dated: 1/5/2011

Russell Reiger

RELEASE

This Release, dated , , is given

BY the Releasor(s) Mr. Russell Rieger, residing at 46 Mary Street, Lodi, New Jersey 07644, referred to as "I",

TO THE NEW MILFORD BOARD OF EDUCATION, and its officers, employers, administrators, agents, servants and all other persons firms or corporations who or which are or might be liable in the premises from any and all claims which I have or might have against them referred to as "You". If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

> More particularly any and all claims arising out of the employment relationship between Mr. Russell Rieger and the New Milford Board of Education, including, but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claims(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement, which allege a violation of the Older Workers' Benefits Protection Act, 29 U.S.C. 621, et seq., or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.
>
> This Release does not apply to any rights which Mr. Russell Rieger may have under the terms of the Memorandum of Agreement between Mr. Russell Rieger and the New Milford Board of Education, dated January 17, 2000, or to deny his rights to receive a pension from the Teachers' Pension and Annuity Fund, or any workers' compensation claim that Mr. Russell Rieger has or may have against the New Milford Board of Education. Mr. Russell Rieger shall also be accorded all statutory protection related to indemnity of school district officers and employees as set forth in N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1.

2. Payment. I have been paid a total of $ 1.00 and other good and valuable consideration as more specifically set forth under the terms of the Memorandum of Agreement between Mr. Russell Rieger and the New Milford Board of Education, dated January 17, 2000, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Russell M Rieger
Mr. Russell Rieger

(Seal)
NOTARY PUBLIC

STATE OF NEW JERSEY)
SS:
COUNTY OF BERGEN)

BE IT REMEMBERED that on this 5th day of Jan , 2000 , before me personally appeared Mr. Russell Rieger, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

NOTARY PUBLIC

Prepared by:
Fogarty & Hara, Esqs.

Stephen R. Fogarty, Esq.

OAL DKT. NO. EDU 9628-99
AGENCY DKT. NO. 243-8/99

RUSSELL RIEGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000

Date of Mailing: MAY 19 2000

* Terms 1 and 4d indicate that the form for petitioner's resignation is attached to/accompanies the Agreement. However, the Commissioner notes that no such form is part of the record forwarded by the OAL.

M.V., on behalf of minor child, C.V.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 749-00

AGENCY DKT. NO. 286-9/99

M.V. ON BEHALF OF MINOR

CHILD, C.V.,

Petitioner,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF HAMILTON,

Respondent.

M.V., petitioner, *pro se*

Dennis M. DeSantis, Esq., on behalf of respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell

Record Closed: April 5, 2000 Decided: April 6, 2000

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of respondent's determination that C.V. is not domiciled in the district and thus is not entitled to a free public education, *N.J.S.A.* 18A:38-1. A petition was filed with the Commissioner, and this matter was transmitted to the Office of Administrative Law on February 22, 2000 for a hearing pursuant to *N.J.S.A.* 52:14F-1 to –13. A telephone prehearing conference was scheduled for March 23, 2000 and petitioner was provided notice by regular mail

at the address provided. On the scheduled date petitioner could not be reached. A letter was sent to petitioner on March 24, 2000, annexed, advising that she missed the telephone call and that she had ten days to respond if she wished to litigate the question raised in her petition. No response has been received.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

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

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

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

4/6/00
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/7/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 12 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/caa

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
Quakerbridge Plaza - Bldg. 9
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6519
(609) 588-6536 (FAX)

SOLOMON A. METZGER
ADMINISTRATIVE LAW JUDGE

March 24, 2000

Martha Vickers
41 Soloff Drive
Trenton, NJ 08610

Re: M.V. on behalf of Minor Child, C.V. v.
Board of Education of the Township of Hamilton
OAL DKT. NO. EDU 749-00
AGENCY DKT. NO. 286-9/99

Dear Ms. Vickers:

A telephone prehearing conference in the above matter was to take place on March 23, 2000, at 4:00 p.m. My office initiated a call to your home and there was no answer. If you remain interested in pursuing this case, you must provide a written explanation for your unavailability on March 23, 2000. If a response is not received within ten days, I will conclude that you no longer wish to litigate the questions raised by your petition, and the matter will be dismissed and returned to the Department of Education.

Very truly yours,

Solomon A. Metzger
Administrative Law Judge

/caa

c: Dennis DeSantis, Esq.

New Jersey Is An Equal Opportunity Employer

OAL DKT. NO. EDU 749-00
AGENCY DKT. NO. 286-9/99

M.V., on behalf of minor child, C.V.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner adopts the Order of Dismissal recommended by the Administrative Law Judge (ALJ) due to petitioner's failure to pursue the issue raised in her petition as set forth by the ALJ in the Initial Decision.

Accordingly, the matter is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000

Date of Mailing: MAY 19 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

157-00

FRANCA BEUMEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6434-99

AGENCY DKT. NO. 133-5/99

FRANCA BEUMEE,

Petitioner,

v.

PRINCETON REGINAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Gidian Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Brigette N. Shrank, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 29, 2000 Decided: April 5, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 10, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

April 5, 2000
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

4/7/00
DATE

Debbie Antanaitis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

SETTLEMENT AGREEMENT AND GENERAL RELEASE OF ALL CLAIMS

2000 JAN -6 A 11: 14

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Settlement Agreement") is made and entered into by and between PRINCETON REGIONAL SCHOOLS (the "BOARD"), with Board Offices at 25 Valley Road, Princeton, New Jersey 08540 and FRANCA BEUMEE ("MS. BEUMEE"), residing at 26 Henry Ave, Princeton New Jersey 08540 ,with reference to the following facts:

WITNESSETH:

WHEREAS, MS. BEUMEE has caused to be filed a petition before the Commissioner of Education entitled Franca Beumee v. Princeton Regional School District, Mercer County, OAL Docket No. EDUOR 06434-99S, Agency Ref. No.: 133-5/99 (hereinafter referred to as the "Action"), in which she seeks reimbursement of deductions made to her wages and/or reduction of gross pay by the BOARD based upon her erroneous placement on the salary guide.

WHEREAS, MS. BEUMEE and the BOARD now desire to settle fully and finally all differences between them, including, but in no way limited to, those differences arising from the aforementioned Action.

NOW THEREFORE, in consideration of the recitals above and the mutual promises and obligations herein contained, it is agreed as follows:

1. The BOARD shall pay to MS. BEUMEE the sum of ONE THOUSAND SEVEN HUNDRED FIFTY-FIVE DOLLARS ($1,755.00) in the form of a check payable to "WILLS, O'NEIL & MELLK ATTORNEY TRUST FUND and FRANCA BEUMEE" for full and

complete satisfaction of any and all claims MS. BEUMEE now has or may have against the BOARD.

The parties agree that PRINCETON shall make payment to MS. BEUMEE after the completion of all of the following: (a) the execution of this Settlement Agreement by Ms. BEUMEE; (b) approval and execution of this Agreement by the BOARD; and (c) approval of this Settlement by the Administrative Law Judge and Commissioner of Education.

2. MS. BEUMEE, for and in consideration of the payments made by the BOARD as set forth herein and for other good and valuable consideration, hereby releases and forever discharges, and by this instrument does release and forever discharge, the BOARD and each of its respective present and former directors, officers, employees, trustees, agents, attorneys, insurers, parent corporations, subsidiaries, divisions, related, affiliated, and successor companies and entities, shareholders, representatives, predecessors, successors and assigns, and each and all of them ("RELEASEES"), from any claim for the payment of MS. BEUMEE'S claim for ONE THOUSAND SEVEN HUNDRED FIFTY-FIVE DOLLARS ($1,755.00) herein agreed to, and any other type of remuneration of any kind or nature whatsoever, for claims to which MS. BEUMEE had, now has, or hereafter may have against the BOARD in any way related to, emanating from or otherwise in respect to her claim for deductions to wages based upon her placement on the salary guide and attorneys fees arising therefrom, or allegations that could have been alleged in the Action. In return for the consideration set forth in this Agreement, MS. BEUMEE releases the BOARD from any and all claims under all state and federal rules and regulations and contract or tort law which MS. BEUMEE may have against the BOARD, whether known or unknown, unforeseen, unanticipated, unsuspected or latent, that she, his heirs,

executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever except to the extent that any such claim concerns an allegation that the BOARD has failed to comply with any obligations created by this Settlement Agreement.

3. MS. BEUMEE agrees to dismiss with prejudice in its entirety the Action seeking reimbursement for deductions and/or erroneous placement on the salary guide against all defendants named therein. MS. BEUMEE understands that the BOARD is paying her $1,755.00 to fully satisfy her claim for deductions and/or erroneous placement on the salary guide. MS. BEUMEE understands that she is responsible for her attorneys fees associated with this action and settlement. MS. BEUMEE further understands that the BOARD's obligation to pay any consideration pursuant to this Settlement Agreement is expressly conditioned upon the Entry of an Order dismissing the Action with prejudice in its entirety approved by the Commissioner of Education.

4. The Board will submit one lump sum payment to MS. BEUMEE and deduct the appropriate state and federal taxes from the agreed upon $1,755.00 settlement. MS. BEUMEE agrees and understands that she will fully assume all tax obligations, if any, on any sums paid under this Settlement Agreement and that she shall be exclusively liable for the payment of all federal, state and local taxes which may be determined to be due as a result of any consideration or payment received by her pursuant to this Settlement Agreement. MS. BEUMEE further agrees and hereby represents that she shall pay such taxes, if any, at the time and in the amount required of her. In addition, MS. BEUMEE agrees to fully indemnify and hold harmless the BOARD from payment of any and all taxes, interest or penalties that may be required of it by

any government agency at any time as a result of any payment or consideration paid by the BOARD pursuant to this Settlement Agreement. MS. BEUMEE further acknowledges that neither the BOARD nor any representatives or attorneys of the BOARD have made any promise, representation or warranty, express or implied, regarding the tax consequences of any consideration paid pursuant to the Settlement Agreement, and that she has been advised to consult a tax attorney or accountant regarding the tax consequences of having received the settlement sum set forth above.

5. MS. BEUMEE represents and covenants that, other than the Action, which she will cause to be dismissed with prejudice, she has not filed, initiated, or caused to be filed or initiated, any claim, charge, suit, complaint, grievance, action, or cause of action against the BOARD. MS. BEUMEE further represents, promises, and agrees that she will not file, refile, initiate, or cause to be filed, refiled or initiated any claim, charge, suit, complaint, grievance, action, or cause of action based upon, arising out of, or relating to any claim, demand, or cause of action released herein.

6. MS. BEUMEE covenants that she has made no assignment and will make no assignment of the claims, demands or causes of action released herein and agrees that she will not institute legal proceedings based upon, arising out of, or relating to any claim, demand or cause of action released herein.

7. MS. BEUMEE acknowledges that: (a) the consideration provided pursuant to this Settlement Agreement is in lieu of any consideration that she would otherwise be entitled to receive and the receipt of the consideration set forth in this agreement by MS. BEUMEE is full and complete satisfaction of any and all claims MS. BEUMEE had, has, or may have against the

BOARD; (b) she has been and is hereby advised in writing to consult with an attorney prior to signing this Settlement Agreement; and (c) she has been provided a full and reasonable opportunity to study and consider this Settlement Agreement with legal counsel of her choice before signing it.

8. MS. BEUMEE and the BOARD expressly understand and agree that the payments to and benefits received by MS. BEUMEE pursuant to this Agreement shall be in lieu of any and all other amounts to which MS. BEUMEE might be entitled from the BOARD as of the date of her execution of this Agreement and, without limiting the generality of the foregoing, MS. BEUMEE hereby expressly waives any right or claim that she may have or assert to attorneys fees.

9. MS. BEUMEE understands that the foregoing payments and consideration are received in settlement and for compromise of disputed claims and that neither this Settlement Agreement nor the aforesaid promises are to be construed as an admission on the part of any of the BOARD of any wrongdoing or liability, nor to be admissible as evidence in any proceeding other than for enforcement of the provisions of this Settlement Agreement. The BOARD does not admit, and specifically denies, any liability, wrongdoing or violation of any law, statute, regulation, agreement or policy. The BOARD is entering into this Agreement solely for the purpose of (a) amicably resolving any and all matters in controversy, disputes, causes of action, claims, contentions and differences of any kind whatsoever between MS. BEUMEE and the BOARD and (b) avoiding the attorneys' fees and other expenses that will result from litigation.

10. MS. BEUMEE understands that this Settlement Agreement represents the entire agreement and understanding between the parties and supersedes any prior agreement,

understanding or negotiations respecting such subject. No change to or modification of this Settlement Agreement shall be valid or binding unless it is in writing and signed by MS. BEUMEE and a duly authorized officer of the BOARD.

11. This Settlement Agreement shall be governed and construed under the laws of the State of New Jersey.

12. No waiver of any breach of any term or provision of this Settlement Agreement shall be construed to be, nor shall be, a waiver of any other breach of this Settlement Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

13. This Settlement Agreement shall inure to the benefit of and be binding upon the heirs, representatives, successors and assignees of each of the parties to it. Each of the RELEASEES who is not a signatory to this Settlement Agreement is hereby agreed to be a third party beneficiary of this Settlement Agreement and shall be entitled to all rights, benefits and protections of this Settlement Agreement and shall further be entitled to enforce this Settlement Agreement and each of its terms.

IN WITNESS WHEREOF, this Settlement Agreement is executed by the parties hereto as of the date indicated by the signature.

Dated: 11/12/99, 1999

FRANCA BEUMEE

Dated: 11/12/99, 1999

GIDIAN R. MELLK, ESQ.
ATTORNEY FOR FRANCA BEUMEE

Dated: 11/29/99, 1999

FOR PRINCETON REGIONAL SCHOOLS

Dated 3/27/00

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Brigette N. Shark, Esq.
Attorney for Princeton Regional Schools.

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OAL DKT. NO. EDU 6434-99
AGENCY DKT. NO. 133-5/99

FRANCA BEUMEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 18 2000

Date of Mailing: MAY 18 2000

IN THE MATTER OF THE TENURE HEARING JAMES JOHNSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 1119-00
AGENCY DKT. NO. 354-12/99

IN THE MATTER OF THE TENURE HEARING OF JAMES JOHNSON, STATE-OPERATED SCHOOL DISTRICT HUDSON COUNTY.

Ken Iwama, Assistant General Counsel, for petitioner
(Charlotte Kitler, General Counsel, attorney)

Sanford R. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: April 4, 2000 Decided: April 5, 2000

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

Statement of Facts

This matter involves tenure charges of unbecoming conduct or other just cause certified by the State-Operated School District of the City of Jersey City ("District") against James Johnson under the Tenure Employee's Hearing Law, *N.J.S.A.* 18A:6-10 to –18.1. James Johnson was a tenured teaching staff member employed by the District. By certification adopted on January 29, 1999, the state district superintendent found evidence of probable cause to certify tenure charges, which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the charges allege that Mr.

Johnson was guilty of excessive absenteeism and chronic tardiness over the course of six years.

On December 1, 1999, the District filed its written tenure charges with the Commissioner of Education ("Commissioner"). Despite repeated inquiry by the Commissioner, respondent failed to submit an answer to the tenure charges against him. Consequently, on December 23, 1999, the Commissioner deemed the charges to be admitted and issued summary decision dismissing Mr. Johnson from his tenured position. Thereafter, on January 4, 2000, respondent's attorney filed a notice of motion for reconsideration, together with Mr. Johnson's supporting affidavit and a letter from his physician. On January 7, 2000, the Commissioner vacated his summary decision order and forwarded the matter to the Office of Administrative Law ("OAL") for hearing on the underlying tenure charges.

At a conference telephone conversation on February 4, 2000, the OAL fixed March 3, 2000 as the date for completion of all discovery. When respondent failed to answer initial interrogatories, the District moved on March 20, 2000 for extension of the time for discovery. In denying that request, the OAL noted that, "at the hearing the Board may object to the admissibility of any evidence that was not produced in response to petitioner's interrogatories."

Meanwhile, on or about March 8, 2000, Mr. Johnson wrote a letter to the District offering to resign from his position effective immediately.[1] By letter dated March 29, 2000, the District sought "to withdraw the tenure charges filed against James Johnson in light of his retirement[.]" The District urges that it "should not be compelled to waste its time and resources to prepare for and then litigate a matter which is moot." Moreover, the District contends "that enough time and resources have already been wasted with Mr. Johnson, who has demonstrated little or no interest in participating in his own case."

[1] During a conference telephone conversation held on April 4, 2000, Board counsel advised that the state district superintendent has accepted Mr. Johnson's resignation and, therefore, that respondent is no longer employed by the District.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that they tenure charges have become moot and that no useful purpose would be served by conducting a tenure hearing.

N.J.S.A. 18A:6-10 authorizes a local school district to file charges seeking to dismiss a tenured employee "for inefficiency, incapacity, unbecoming conduct, or other just cause." When a board of education brings the charges, the Commissioner possesses jurisdiction to hear and decide the entire controversy. *In re Fulcomer*, 93 *N.J. Super.* 404, 410 (App. Div. 1967). Once the school district has filed tenure charges, it cannot unilaterally withdraw them without the Commissioner's approval. *In re Fulcomer*, at 412.

Nonetheless, the Commissioner may consent to withdrawal of tenure charges under appropriate circumstances. Recently, the State Board declared that the Commissioner may accept a withdrawal if the school board has decided to impose minor discipline rather than to pursue formal tenure charges. *In re Tenure Hearing of Elaine Frost*, EDU 11545-96, Final Decision, State Board (July 6, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. Similarly, a withdrawal should be allowed in this case, where the District has already achieved the relief it is seeking and the pleadings do no suggest any substantial misconduct such as physical or mental abuse of a child.

Voluntary withdrawal of the tenure charges does not preclude the State Board of Examiners from taking further action, if appropriate, against respondent's teaching certificates. *N.J.A.C.* 6:11-3.5 requires the District's chief school administrator to report charges of unbecoming conduct to the State Board of Examiners "either before tenure proceedings have been brought or prior to the conclusion of such proceedings."

Order

It is **ORDERED** that the District's request to withdraw its tenure charges is hereby granted.

And further **ORDERED** that such withdrawal shall not be construed as constituting factual findings on the validity of the tenure charges.

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

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

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

April 5, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/7/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 1119-00
AGENCY DKT. NO. 354-12/99

IN THE MATTER OF THE TENURE HEARING JAMES JOHNSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon careful and independent review of the record, the Commissioner determines to adopt the Initial Decision of the Administrative Law Judge (ALJ) approving the District's withdrawal of the instant tenure matter. Under these circumstances, where respondent unilaterally resigned his position as a Crisis Intervention Teacher on March 8, 2000, having, therefore, abandoned his tenure acquired with the District, and given the nature of the charges against respondent, the Commissioner will not compel the District to prosecute charges against respondent.

The Commissioner is mindful that the within tenure charges for excessive absenteeism and unbecoming conduct were brought against respondent for his having been absent a total of 311 days from the start of the 1993-94 school year through the end of the 1998-99 school year, for his failure to report to work from March 1999 until the end of the 1998-99 school year, despite clear directives from the District's administration to do so, and for his failure to report to work for the 1999-2000 school year. Respondent denied both charges.

Accordingly, having made no findings with regard to the facts in this matter, the Commissioner adopts the recommendation of the ALJ that this matter be withdrawn. The Commissioner underscores that such withdrawal is subject to the District's compliance with *N.J.A.C.* 6:11-3.5, which requires, upon the resignation of a teaching staff member accused of unbecoming conduct prior to the conclusion of the tenure proceedings, that the chief school administrator, or State District Superintendent in this case, report the alleged conduct to the State Board of Examiners, to which a copy of this decision is being forwarded.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2006

Date of Mailing: MAY 19 2006

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

J.F.N., Jr., and J.N. on behalf of minor child, C.N., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioning parents alleged that the Board's assignment of an unsafe, distant bus stop for their daughter was arbitrary, capricious and unreasonable. There was no question that petitioners' child lived more than two and a half miles from school and was entitled to free transportation. The issue was the suitability of a bus stop at a closed landfill. Petitioners contended that walking to the stop presented a threat to their daughter's safety – the narrowness of the roadway, blind curves, absence of streetlights, lack of sidewalks or shoulders, and the wooded sparsely populated nature of the area known as a feeding place for bears.

The ALJ noted that school districts have broad discretion with respect to selection of bus routes and placement of bus stops, and that the Commissioner will not second-guess such exercise of discretion unless it is arbitrary, capricious and unreasonable. Here, the Board repeatedly denied petitioners' request, without explanation, for an extension of the Board's bus route to accommodate a different bus stop. The record demonstrated that the road was dangerous and the landfill was near the woods frequented by bears, seasonal hunters and strangers driving all-terrain vehicles and motorcycles. Having found that the landfill area was an unsuitable location for a bus stop because of the high risk to the safety of students assigned to it, and noting that other routes could bring a District van close to petitioners' property, the ALJ concluded that the location of the school bus stop at the landfill area was arbitrary, capricious and unreasonable. The ALJ ordered that the Board immediately discontinue using the abandoned landfill site as a bus stop, and that the Board select one of the proposed alternatives for extending van service to petitioners' home.

The Commissioner affirmed the ALJ's conclusion that, under the particular circumstances of this matter, petitioners have demonstrated that the Board's refusal to accommodate their request to locate an alternative bus or van stop for C.N. was arbitrary and capricious.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3936-98
AGENCY DKT. NO. 70-4/98

JAMES F. NIELSEN, JR. and
JEAN NIELSEN, his wife,
Petitioners,
v.
BOARD OF EDUCATION OF THE
MORRIS HILLS REGIONAL
SCHOOL DISTRICT,
Respondent.

Allan J. Iskra, Esq. for petitioners
(Shoenwald & Iskra, attorneys)

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

Record Closed: December 21, 1999 Decided: April 4, 2000

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

Statement of the Case

This is a complaint about the location of a stop for a bus transporting students to and from high school. Both sides concur that petitioner lives more than two and-a-half miles from school and, consequently, is entitled to free transportation. Basically, the issue is whether the regional school district acted arbitrarily, capriciously and unreasonably when it designated a particular location for a bus stop used by petitioners'

daughter. Petitioners allege that the bus stop placed at a closed landfill is dangerous and unsafe. They request that the bus be rerouted to pick up and drop off their daughter at the end of their driveway. The district maintains that it carefully considered all alternatives and that the route suggested by the parents would jeopardize the safety of all occupants of the school bus by requiring that vehicle to travel a portion of an unpaved and substandard roadway. For the reasons that follow, the designated bus stop poses an unacceptable safety risk and the district must make other arrangements for meeting its legal obligation to transport petitioners' daughter.

Procedural History

On March 18, 1998, petitioners James and Jean Neilson filed a petition with the Commissioner of Education ("Commissioner") seeking reassignment of the bus stop for their child. Respondent Board of Education of the Morris Hills Regional District ("Board" or "Morris Hills") filed its answer on April 16, 1998. Subsequently, on May 11, 1998 the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

The OAL held extensive hearings ending on March 8, 1999. Both parties filed briefs on April 20, 1999. Thereafter, at the request of the parties, the OAL reopened the hearing to supplement the record with additional testimony. Ultimately, the record closed on December 21, 1999.

Findings of Fact

(1) General Background

Many of the background facts are undisputed. James and Jean Nielsen are the parents of two minor children. The family lives together in Rockaway Township, one of the constituent districts of the Morris Hills Regional School District. At the time of the hearing, the oldest child, Claire, then fifteen-years old, was a sophomore at Morris Knolls High School, located in neighboring Rockaway Borough and operated by the Board. Her younger brother James III, ten-years old and in fifth grade, went to a school

operated by the local elementary school district.[1] When Claire Nielsen attended elementary and middle school, the Rockaway Township School District provided van service from her driveway to school and back. Likewise, the elementary district continues to provide van service for her younger brother, along the same roadway that the regional district contends is unsafe.

The Nielsen residence is located at 130 Jacobs Road, approximately one-half mile south of the entranceway to the closed Rockaway Township landfill and an abandoned railroad lot. This landfill entrance is utilized by the Board's bus as a turnaround point and also as the drop-off stop for Claire Nielsen. Generally, the surrounding area is rural and heavily wooded. To get from the landfill to her home, Claire must walk north along Jacobs Road. There are no sidewalks or streetlights on this portion of Jacobs Road.

Originally, the Board had assigned Claire Nielsen to a bus stop at the corner of Elizabeth Lane and Timberbrook Road, located a considerable distance from her house. In August 1997, her father wrote the Board requesting that the bus route already scheduled to proceed north on Jacobs Road to the landfill turnabout "be extended .6 mile further to go past our house." By letter dated September 11, 1997, the Building, Grounds and Transportation Committee ("Committee") of the Board denied the Nielsens' request.[2] The letter fails to provide any reasons for the Committee's decision. Testimony indicates that the Committee relied on the advice of Business Administrator/Board Secretary Manuel Deus, who had visited the site and recommended against bussing. Instead, the Committee proposed to pick up the Nielsens' daughter at the landfill "where the bus turns around."

After receipt of this denial, Mr. Nielsen again wrote to the Board on October 20, 1997 seeking reconsideration of his request for an extension of the existing bus route. In this letter, he stated that, "Since the start of the school year we have delivered our daughter via car to a bus stop [at 59 Jacobs Road] that is about (1.75) miles from our

[1]Although Claire is now old enough to drive and is nearly in her senior year, the dispute will not become moot since James III will soon be of high school age.
[2] Only four of the full Board's eight members sit on this standing committee.

home." He pointed out that, "After our daughter boards the bus, we witness the bus pass our residence driveway daily." While the Board acknowledged that a school bus carrying Claire Nielsen continued past her house during September and October 1997, it insists that the route was unauthorized and that the practice was discontinued as soon as the Board became aware of its existence.

Minutes for a meeting on November 3, 1997 reflect that the Committee reviewed Mr. Nielsen's request and that Board President Jeffrey Biggs "offered to go out and look at the bus stop with Mr. Deus." On November 18, 1997 Mr. Deus sent a letter to Mr. Nielsen that the Committee was "still unable to honor your request." Again, no reasons were given.

An attorney representing Mr. and Mrs. Nielsen wrote to the Board on January 12, 1998 objecting to requiring a teenage girl to walk half a mile alone "in the pre-dawn darkness on an unlit and deserted road" and asking that the matter "be placed on the agenda for discussion at the next Board meeting." In a closed session on January 19, 1998, Board members "further discussed the matter" and directed Mr. Deus to respond that they "had not changed their position." Accordingly, Mr. Deus notified the attorney on February 18, 1998 that the Board "feels it is inappropriate to move the bus stop to the requested location."

(2) Suitability of the Bus Stop at the Closed Landfill

Municipal officials support the Nielsens' claim that the bus stop at the landfill presents a threat to their daughter's safety. Officer Stephen Machuga, a traffic safety officer employed by the Rockaway Township police department, testified for petitioners as an expert witness. He has served as a police officer for ten years and has completed several courses in automobile-accident investigation and traffic engineering. Familiar with Jacobs Road, he described the terrain between the Nielsen residence and the existing bus stop at 59 Jacobs Road as "narrow and windy," with blind curves, overgrown vegetation and houses set back from the road. The landfill had formerly been a depository for solid waste, which was "put in a hole and filled over with dirt." A

large population of bears inhabits the Jacobs Road region. Bears are particularly attracted to the landfill, where the municipal animal control officer dumps the carcasses of road kill.

Although the landfill turnaround is closer than 59 Jacobs Road to the Nielsen residence, the walking route is not any safer. Heading north from the landfill, the road becomes unpaved, graveled and narrow. Since Jacobs Road does not have shoulders, pedestrians must walk on the roadway itself. In the early morning dawn or late afternoon, drivers "would have a hard time seeing pedestrians." During hunting season, deer and duck hunters frequent the area, and the police department "gets reports of shots being fired all the time." Off-terrain vehicles and motorcycles cut in and out of the wooded paths that intersect with Jacobs Road. Mayor John Inglesino of Rockaway Township contacted the Board on behalf of the Nielsens expressing concerns about the isolated locale of the bus stop. He noted that "[t]he absence of homes and vehicular traffic in the area, in addition to the presence of seasonal hunters, combine to pose a threat to [Claire Nielsen's] safety."

Both parents testified about their fear for their daughter's life. Mr. Nielsen explained that the area was "desolate," and he worries that a young woman could be abducted on her way to the landfill. When the school bus picks up his daughter at 6:30 a.m., it is still dark outside during most of the school year. Hidden trails going off to an adjacent watershed area crisscross Jacobs Road at several places. Strangers drive all-terrain vehicles or motorcycles along these intersecting paths. Although the speed limit near his house is 35 miles per hour, he has complained to the police about motorcycles traveling at much faster speeds. Whenever he has posted no hunting signs on his property, hunters have torn them down. Due to such unsatisfactory conditions, he and his wife will not let their daughter walk to and from the bus stop. Usually, his wife drives Claire to the collection point at 59 Jacobs Road in the morning and picks her up at the landfill after school.

Jean Nielsen is unwilling to drop Claire off at the landfill in the morning because the area is "dark and creepy." Waiting for her daughter in the afternoon, she

occasionally sees men emerging from the woods reflected in her car's rearview window. Often she is unaware of their presence until they are near her car. On two or three occasions, Mrs. Nielsen has observed the school bus get stuck as it attempts to turn around in the landfill. Once, the bus pulled into the landfill at an unusual angle and "grazed" the front of her stationary vehicle.

Mrs. Nielsen also testified about the great inconvenience that existing arrangements have caused to her family life. Because her husband makes frequent business trips, Mrs. Nielsen bears the burden of delivering her daughter to the bus stop. She works for a patent attorney at home and must interrupt work to perform this chore. Sometimes she must wake up her sleeping son early and take him along to her daughter's bus stop to avoid leaving him home alone. If the bus is late at the end of the day, she must return home to pick up her son and go back to the landfill to wait for her daughter.

Morris Hills does not genuinely dispute that the landfill is not a proper location for a bus stop. To the extent that its own witnesses confirm the narrowness of the roadway, the blind curves, the absence of streetlights, the lack of sidewalks or shoulders and the wooded, sparsely-populated nature of the area, their testimony only underscores the unreasonableness of requiring a child to walk that route in the early morning or late afternoon. Indeed, Board President Jeffrey Biggs conceded on cross-examination that he would be concerned about letting his own children wait at a bus stop known as a feeding place for bears.

Much of the Board's proofs involve the perceived dangerousness of permitting a school vehicle to travel the same route that it expects Claire Nielsen to walk by herself. Jeffrey Biggs, who, in addition to being president of the Board, is a professional engineer specializing in municipal planning, took a personal interest in the bus-stop controversy. He visited the scene four different times and prepared a detailed report, complete with charts and glossy photographs. Mr. Bigg's main objection to letting a school vehicle continue past the landfill to the Nielsen driveway is the existence of the unpaved and graveled portion of Jacobs Road. Versions differ slightly as to the actual

distance of this section. Mrs. Nielsen estimated that the paved portion of Jacobs Road continues north of the landfill until it stops roughly 380 feet from the entrance to her driveway. Using a wheel and odometer, Mr. Deus measured this unpaved portion as approximately 400 feet (the unpaved road then continues north beyond the Nielsen home for a *total* distance of about 2/10 of a mile.) To put things in perspective, the unpaved portion over which a vehicle must travel to reach the Nielsen residence would be only slightly greater than the length of a football field.

Unable to obtain any Township standards for road construction, Mr. Biggs referred to other recognized standards such as the Residential Site Improvement Standards ("RSIS") set forth in the New Jersey Administrative Code, *N.J.A.C.* 5:21-1.1 to –8.1.[3] Utilizing the "hierarchy-of-roads" definitions contained in the RSIS, he decided to apply the standards for a "rural residential lane," which has less stringent criteria than other possible designations.[4] Essentially, Mr. Biggs compared conditions on Jacobs Road to RSIS standards in terms of pavement, road width, grade and sidewalk/shoulder requirements.

With respect to pavement, the standards require some sort of paving of varying degrees of thickness.[5] Mr. Biggs emphasized that the 400 feet or so of graveled or loose-stone roadway leading to the Nielsen residence, which creates a "washboard effect" and has caused traction and drainage difficulties. He agreed with Officer

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[3] While it is valid to look for relevant standards, it should be pointed out that the RSIS does not apply to the roadway abutting the Nielsen property. Operative in June 1997, the RSIS governs site improvements required to be carried out in connection with new applications for residential subdivision, site plan approval or variance before any planning board or zoning board of adjustment. *N.J.A.C.* 5:21-1.5(a). The Nielsens received zoning board approval to build on an "unimproved road" in 1983, so their development constitutes a prior nonconforming use.

[4] Mr. Biggs acknowledged that he needed a count of "average daily traffic" in order to classify a road under the RSIS hierarchy. See Table 4.2 at *N.J.A.C.* 5:21-4.1. He also admitted that he neglected to perform such a study.

[5] A close look at the RSIS guidelines renders it doubtful whether the pavement standards apply to Jacobs Road. *N.J.A.C.* 5:21-1.6 makes clear that the standards are not intended to address certain areas in Northern Jersey covered by limestone or other carbonate rocks, "which pose unusual and complex problems in relation to development activities." Rockaway Township is expressly identified as a "limestone area." Appendix at *N.J.A.C.* 5:21-1.11.

Machuga that the roadway on which Claire Nielson must walk is "curvilinear" rather than straight, which presents sight-distance problems.

Pursuant to the RSIS, a rural residential lane must have a minimum width of 18 feet. According to Mr. Biggs and Mr. Deus, the paved portion of Jacobs Road tapers down to a width of 16 feet at a point north of the landfill near where the paving ends. Moreover, the yellow centerline striping does not extend to the graveled roadway. Mr. Biggs expressed his opinion that the roadway must be widened and stripping added in order for the route to meet minimum standards.

RSIS specifies that the maximum grade for a rural residential lane is 12%. Curiously, Mr. Biggs did not measure the grade of Jacobs Road between the landfill and the Nielsen residence. He did, however, measure the grade at a top of a hill much further north of the Nielsen property, where a guardrail runs along one side of the road and a rocky ledge protrudes on the other side. There, he measured a "vertical drop" of 16.3 feet.

Lastly, Mr. Biggs indicated that Jacobs Road fails to comply with the RSIS requirement of a four-foot wide sidewalk on one side of any street within 2,500 feet of a school-bus stop. On cross-examination, however, he conceded that sidewalls were designed for the protection of pedestrians and not for the benefit of vehicular traffic.[6]

Uncontradicted testimony discloses that a van operated by the Board routinely pulls in and out of the driveway of another student's home. The shortest route for providing door-to-door service to Claire Nielsen would be for a van to continue north on past the landfill to the Nielsen residence, turn around in her driveway and retrace its route south toward Timberbrook Road. Most of the Board witnesses had never personally driven in or out of the Nielsen driveway, but still offered their views on the practicality of such maneuver. Manuel Deus commented that the Nielsen driveway is not level with the road, so that the rear or front of a van pulling into the driveway would

[6]No one is suggesting that a fifty-four-passenger school bus should attempt to turn around in the Nielsen driveway. In comparison, the seating capacity of the Morris Hills' van is nineteen passengers.

point downward.[7] Similarly, Jeffrey Biggs described the driveway as flat for ten to twenty feet and then sloping downward at approximately a 10% grade. Miriam Diltz, the district's transportation coordinator, backed a midsize car into the Nielsen driveway during a site visit in September 1997. As she was exiting the driveway, she could not see for a distance of at least three hundred feet looking south.[8] Nonetheless, she does not remember encountering any difficulty in making the turn. Mrs. Nielsen, who uses her driveway several times per day, estimates that the visibility south from the top of the driveway is "between 250 and 275 feet."

Significantly, the route traveled by the district's van #4 already takes it close to the Nielsen property and it would require no more than fifteen extra minutes to pick up the Nielsen child. Van #4 is running at half capacity, so there is plenty of room for one more passenger. Currently, Van #4 makes its first pick-up at 6:26 a.m. and arrives at Morris Knolls High School by 7:15 am. in time to discharge its passengers for the opening of school. Ms. Dilts' opposition to using van #4 for transporting Claire Nielsen is not for safety reasons, but because the added time might increase the total time of the ride beyond one hour.[9] Only Claire Nielsen would be likely to suffer the consequences of a longer ride, since Ms. Dilts contemplates that she would be picked up first and dropped off last.

If the school van does not turn around in the Nielsen driveway, the alternative would be to proceed north on Jacobs Road until it intersects with Green Pond Road. Jacobs Road remains unpaved for an additional 700 feet or so. Continuing past the Nielsen residence, Jacobs Road climbs up a steep incline until the crest of a hill, where the pavement resumes and the roadway descends sharply downward. Photographs depict that, heading north, the roadway approaches a point with a rock ledge on one side and a guardrail on the other.

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[7] "Uphill stops are discouraged due to the hazard of uncontrolled backing if engine or bake failure should occur." *Policies and Procedures Manual for Pupil Transportation* (Oct. 1986) at 35.

[8] "[W]herever possible, a stopped bus [should] be visible in both directions for at least 300 feet." *Ibid.*

[9] Apparently the one-hour limitation on the length of a bus ride is an "unwritten rule" of the district, adopted for the comfort and convenience of students.

Near a telephone pole at this approximate location, Mr. Biggs measured the road width in December 1998 and ascertained it to be 12 feet wide. During the course of the hearing, however, he changed testimony regarding road width. In February 1999 he remeasured the road at the same location and found it to be 14½ feet wide. Conditions had changed over the intervening period that may explain the difference. Mr. Biggs indicated that the Township had regraded the road and may have "widened it somewhat." Conflicting evidence was presented on whether two large vehicles approaching from opposite directions on Jacobs Road north of the Nielsen house would be able to pass each other. About the best that can be said is that the vehicles could pass, but that one of the vehicles might have to slow down or pull over to the side of the road.

Subsequent to the original hearing, Rockaway Township made road improvements that alleviate some but not all of the Board's safety concerns. Rockaway Township performed this work as a dust-abatement project in response to complaints by residents that the roadway was too dusty. Edward Hollenbeck, the Township's supervisor of public works, testified that over the summer of 1998 his department paved the dirt portion of Jacobs Road, including the 380 to 400-foot portion, with "millings." Mr. Hollenbeck explained that "millings" are a product created when an asphalt road is ground down to be resurfaced. Once the millings were spread on the roadway, his workers used heavy rolling equipment to compact the granules. Then the hot summer sun congealed the particles into a hard black surface that resembles asphalt. The Township also put a single yellow median line in the roadway approaching the Nielsen driveway from the landfill, signifying that passing another vehicle traveling in the same direction is prohibited.

Mr. Hollenbeck candidly admitted that millings are not as durable as asphalt and that their use represents "a compromise" to save money. In his words, "the surface is better than it was and that's all we expected." Reluctantly, Mr. Deus agreed that traction is better than it had been on the dirt surface. He insisted, however, that the ruts on roadway are "a little worse," contradicting earlier testimony by Mr. Biggs that

improvements to Jacobs Road had "eliminated some of the ruts" and made for a smoother ride. Like any paved surface, potholes may be formed when water gets into cracks and freezing weather causes the liquid to expand. Nonetheless, Mr. Hollenbeck acknowledged that his department is responsible for maintenance of Jacobs Road and would repair any potholes that develop.

I FIND that the landfill area is an unsuitable location for a bus stop because of high risk to the safety of students assigned to it. Proofs establish that blind curves, lack of sidewalks or shoulders, no lighting, and isolation from neighbors characterize the walking route. As a result, Claire Nielsen must walk on the dark unlit traffic lane in order to reach her destination. Surrounding thick woods conceal joy riders, who dart in and out of Jacobs Road. Hunters frequent the area and the sound of gunshots is a common occurrence. Responsible Township officials verified that the danger is real and that a young woman should not be required to take this route to her bus stop. Worse yet, the bus stop is at an abandoned landfill known as a feeding ground for bears. Due to the nature of the area, a child waiting for a bus would have little warning if someone were suddenly to jump out of the woods and grab her.

Given that the location of the designated bus stop is unacceptable, the selection as to the best bus route rests within the sound discretion of the Board. From the evidence presented, it appears relatively safe for a school van to travel the short distance beyond the landfill, pick up Claire Nielsen at her house, and turn around in her driveway, especially now that the Township has upgraded and striped the formerly dirt section of Jacobs Road. Since its van already turns around in another student's driveway, the district cannot claim to have a uniform policy against turning around in private driveways. For many years, the elementary school district van has successfully utilized the longer route north past the Nielsen house to Green Pond Road, which takes it up a steep incline and through a narrow pass. Even Morris Hill's own bus driver considered the longer route safe enough for a full-size school bus to use, until the Board directed him to discontinue that route and turn around at the landfill.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Morris Hill's location of a school bus stop at the landfill area was arbitrary, capricious and unreasonable.

N.J.S.A. 18A:39-1 provides that whenever there are "secondary school pupils who live more than 2½ miles from their public school of attendance, the district shall provide transportation to and from school for these pupils." Claire Nielsen lives more than two and-a-half miles from Morris Knolls High School. Thus, the issue is not *whether* Claire Nielsen is entitled to bussing, but rather *how* she is to be bussed.

Undeniably, school districts have broad discretion with respect to selection of bus routes and placement of bus stops. The Commissioner will not second-guess such exercise of discretion unless it is arbitrary, capricious or unreasonable. See *Lemma v. Branchburg Bd. of Educ.*, EDU 8953-97, Initial Decision (July 22, 1998), *adopted*, Comm'r (Aug. 28, 1998) http://lawlibrary.rutgers/edu.oal/search.html (upholding local district's refusal to change bus stop); *Mandaglio v. Mendham Twp. Bd. of Educ.*, 1990 *S.L.D.* 1380, 1384 (Comm'r 1990) (upholding uniformly-applied school policy prohibiting schools buses from turning around on dead-end streets); *J. O'D. v. Peapack-Gladstone Bd. of Educ.,* 1989 *S.L.D.* 1303, 1313 (Comm'r March 15, 1989) (upholding appropriateness of local district's bus stop and rejecting proposed alternate route as "patently dangerous.")

Of course, responsibility for removal of traffic safety hazards belongs to the municipal governing authorities rather than to school boards. *Schrenk v. Ridgewood Bd. of Educ.*, 1961 *S.L.D.* 185, 187 (Comm'r April 15, 1961). *See also, Yedwab v. Fairlawn Bd. of Educ.*, OAL Dkt. 7765-80 (June 22, 1981), *adopted* (Comm'r Aug. 4, 1981). A local school district has no obligation to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, *etc.* to meet the requirements of safe travel for school children. *Nichols v. Wayne Twp. Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 701 (Comm'r Sept. 3, 1993), *adopted* 94 *N.J.A.R.*2d 277 (St. Bd. Feb. 2, 1994), *aff'd* 95 *N.J.A.R.*2d (EDU) 157, No. A-3526-93T5 (N.J. App. Div. March

3, 1995), certif. den. 142 *N.J.* 449 (1995). Recognizing its responsibility, Rockaway Township has made some improvements to the unpaved surface of Jacobs Road and has expressed its willingness to maintain the roadway by repairing potholes.

It does not follow, however, that the Board has no duty to select safe locations for its bus stops. "The bus stop should be at a location where pupils can wait in safety." *Policies and Procedures Manual for Pupil Transportation* (Oct. 1986) at 35. Certainly student safety is a factor to be considered in assessing whether the Board acted reasonably. *Wayne Twp. Bd. of Educ. v. Kraft,* 139 *N.J.* 597, 604 (1995). Whether a walkway or a bus stop is safe depends on the surrounding facts. *Kraft*, at 602. *Compare Board of Educ. v. Bailey*, 1984 *S.L.D.* 1165 (St. Bd. 1984) (finding it unsafe for children to walk on an isolated path through a county park) with *Mangieri v. Board of Educ.*, 1991 *S.L.D.* 69 (St. Bd. 1991) (finding it safe for children to use a walkway across railroad tracks). In *Nicols*, for example, the Appellate Division agreed that it is unsafe for a school child to be required to walk on the wrong side of the road or to ignore marked crosswalks. "School routes are not some theoretical abstraction, but must be capable of being walked by real children." *Nicols*, slip op. at 6.

Recently, the State Board of Education held that a school board's refusal to extend minibus service to a child's home "was arbitrary and capricious under the circumstances." *Shrewsbury v. Holland Twp. Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 795 (Comm'r June 21, 1996), *rev'd* 97 *N.J.A.R.*2d (EDU) 416 (St. Bd. April 2, 1997). Noting that bends in the road and a drop in grade made it dangerous for a child to walk between home and the bus stop, the State Board accepted the ALJ's finding that the same route "does not appear to be particularly perilous for a minibus." *Shrewsbury*, at 417. While the State Board took cognizance of the parents' offer to construct a turnaround on their own property, the outcome does not turn on any single fact. Rather, the State Board examined the entire circumstances in determining that the school board's refusal to provide minibus service was unreasonable.

Like the *Shrewsbury* case, the record here demonstrates that it is dangerous for Claire Nielsen to walk on a curved country road without sidewalks or shoulders. Not

much foresight is needed to know that a bus stop should not be placed at a lonely clearing in the woods where bears come to eat. Although none of the alternatives are ideal, the use of a van which either turns around in her driveway or continues north past her house does not seem "particularly perilous." A van carrying elementary school children routinely takes the longer and purportedly more dangerous route. Under the totality of circumstances, the Board's refusal to accommodate Claire Nielsen by extending van service to her driveway is arbitrary, capricious and unreasonable.

Order

It is **ORDERED** that Morris Hills immediately discontinue using the abandoned landfill site as a bus stop.

And it is further **ORDERED** that Morris Hills select one of the proposed alternatives for extending van service to the Nielsen home.

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

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

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

April 4, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/7/00
DATE

Debbie Antanitis/lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. James F. Nielsen, Jr.
2. Ingrid Secusi
3. Office Stephen Machuga, Rockaway Township Police Department
4. Jean Nielsen
5. Manuel E. Deus, business administrator/board secretary of the Morris Hills Regional School District
6. Jeffrey A. Biggs, president of the Board of Education of the Morris Hills Regional School District
7. Miriam Dilts, transportation coordinator of the Morris Hills Regional School District
8. Edward Hollenbeck, superintendent of public works, Rockaway Township

List of Exhibits

No.	Description
J-1	Copy of letter to Manuel Deus from James F. Nielsen, Jr., dated August 25, 1997
J-2	Copy of letter to James F. Nielsen, Jr. from Manuel E. Deus, dated September 11, 1997
J-3	Copy of letter to Manuel Deus from James F. Nielsen, Jr., dated October 20, 1997
J-4	Copy of letter to James F. Nielsen, Jr. from Manuel E. Deus, dated November 18, 1997

J-5 Copy of letter to Manuel Deus from John P. Inglesino, dated December 19, 1997

J-6 Copy of letter to the Hon. John P. Inglesino from Jeffrey A. Biggs, dated January 27, 1998

J-7 Copy of letter to Manuel Deus from David K. Marx, Jr., Esq., dated January 12, 1998

J-8 Copy of letter to David K. Marx, Jr., Esq. from Manuel E. Deus, dated February 18, 1998

J-9 Copy of excerpt from the Bus Driver's Handbook of the Morris Hills Regional District for the 1997-98 school year

J-10 Copy of excerpt from the Bus Driver's Handbook of the Morris Hills Regional District for the 1998-99 school year

J-11 Copy of map of Rockaway Township showing location of the Nielsen home, undated

J-12 Street map of Rockaway Township marked with various options, revised September 1998

J-13 Street map of Rockaway Township marked with various options, revised September 1998

P-1 Photograph looking north on Jacobs Road in direction of the Nielsen home showing start of Gravel Road, dated June 18, 1998

P-2 Photograph of Jacob Road looking south from the same point as P-1, dated June 18, 1998

P-3 Photograph looking north toward the Nielsen home from the end of pavement, dated June 18, 1998

P-4 Photograph looking north on Jacobs Road showing mailbox at top of Nielsen driveway, dated June 18, 1998

P-5 Photograph showing Rockaway Township van, dated June 18, 1998

P-6 Photograph showing paved road looking north toward the Nielsen home, dated June 18, 1998

P-7 Photograph showing path into water shed, dated June 18, 1998

P-8 Photograph showing turn-around area and entrance to abandoned landfill, dated June 18, 1998

P-9 Photograph looking north from 100 Jacobs Road in the direction of the landfill entrance, dated June 18, 1998

P-10 Videotape of Jacobs Road prepared by petitioners in July 1998

P-11 Resume of Office Machuga, undated

P-12 Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999

P-13 Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999

P-14	Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999
P-15	Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999
P-16	Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999
P-17	Photograph of Ford Bronco and Ford Explorer passing each other on Jacobs Road, dated January 30, 1999
P-18	Videotape of vehicles passing each other, prepared by petitioners on January 30, 1999
P-19	Videotape of Jacobs Road, prepared by petitioners in February 1999
P-20	Videotape of Jacobs Road, prepared by petitioners on December 8, 1999
R-1	Street map of Rockaway Township, revised September 1998
R-2	Assessment map of Rockaway Township, revised January 1996
R-3	Videotape of Jacobs Road, prepared by the regional school district on November 22, 1998
R-A6 to 16	Photographs of Jacobs Road going north from the landfill toward the Nielsen house

R-A17 Photographs from Jacobs Road looking toward the Nielsen driveway

R-A17 to 19 Photographs traveling north past the Nielsen house toward the first set of guardrails

R-A20 to 22 Photographs looking south from the crest of the hill toward the Nielsen's house

R-A23 to 25 Photographs looking north on Jacobs Road showing section where the unpaved road narrows and rises

R-5B5 to 6 Photographs of Jacobs Road heading north showing the second set of guardrails

R-5B7 Photograph of Jacobs Road looking south toward the second set of guardrails

R-5B8 to 9 Photograph of Jacobs Road looking north toward third set of guardrails

R-5B10 Photograph of Jacobs Road looking over the guardrails to the embankment and the water below

R-5B11 Photograph of Jacobs Road looking south at the third set of guardrails

R-5B12 Photograph of Jacobs Road going north toward the crest of a hill

R-5B13 Photograph of Jacobs Road heading north showing guardrails and the valley below

R-B14 to 16 Photographs of Jacobs Road returning south down the hill toward the Nielsen's home

R-5B17 Photograph of Jacobs Road showing the landfill area

R-5B18 Photograph of Jacobs Road looking north toward the Nielsen house

R-5B-19 Photograph showing the wooded area

R-5B-20to25 Photographs showing Jacobs Road going north after the third set of guardrails from the crest of the hill to Green Pond Road

R-6C6 to 7 Photographs of Jacobs Road showing turn-around at the landfill lot

R-C8 Photograph of the landfill showing newly paved driveway and construction of a house

R-C9 to 11 Photographs of Jacobs Road looking south toward the landfill turn-around

R-C12 Photograph of Jacobs Road facing north toward the first Nielsen mailbox

R-C13 to 15 Photographs of Jacobs Road showing curve in the road after the first Nielsen mailbox

R-7 Copy of excerpt of the minutes of a meeting of the buildings, grounds and transportation committee of the Board of Education of Morris Hills Regional District, dated September 8, 1997

R-8 Copy of excerpt of the minutes of a meeting of the buildings, grounds and transportation committee of the Board of Education of Morris Hills Regional District, dated November 3, 1997

R-9 Copy of excerpt of the minutes of a meeting of the buildings, grounds and transportation committee of the Board of Education of Morris Hills Regional District, dated January 5, 1998

R-10 Copy of the minutes of a closed session of the Board of Education of the Morris Hills Regional District, dated January 19, 1998

R-11 Copy of a route listing report of the Board of Education of Rockaway Township, dated August 17, 1998

R-12 Curriculum vitae of Jeffrey A. Biggs, undated

R-13 Copy of set of letters to municipal officials of Rockaway Township from Jeffrey A. Biggs, dated December 18, 1997

R-14 Copy of report by Biggs Associates, dated January 15, 1999

R-15 Photographs showing width of Jacobs Road at a location near the guardrail north of the Nielsen home, dated February 22, 1999

R-16 Photograph showing width of Jacobs Road, dated February 15, 1999

R-17 Photograph of Jacobs Road showing guardrails, dated February 22, 1999

R-18 Booklet entitled "Policies and Procedures Manual for Pupil Transportation," published by the New Jersey Department of Education, dated October 1986

R-20 9 to 21 Photographs of Jacobs Road showing the end of the asphalt pavement and the beginning of the milling pavement

R-20 13 to 17 Photographs of Jacobs Road traveling south from Green Pond Road

R-21 Videotape of Jacobs Road, prepared by the regional school district on October 15, 1999

R-21 to 5 Photographs of Jacobs Road traveling north from the landfill showing the "single lane ahead" sign

R-26 to 8 Photographs of Jacobs Road traveling north showing the edge of the roadway

OAL DKT. NO. EDU 3936-98
AGENCY DKT. NO. 70-4/98

J.F.N., Jr., and J.N. on behalf of minor child, C.N., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, RESPONDENTS.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioners' reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

On exception, the Board points to statements in the Initial Decision which, it finds, did not fully comport with the testimony, citing these as either erroneous findings by the ALJ or omissions from his summary of the testimony adduced at the hearing. Additionally, the Board clarifies that, contrary to the ALJ's statement on page 6 of the initial decision, it "*does* dispute any finding that the landfill is not an appropriate stop." (Board's exceptions at 2) (emphasis added) Moreover, the factors identified by the ALJ as contributing to the danger of the bus stop near the landfill, are, according to the Board, "factors within the express control of the Township." (*Id.* at 3) Still central to the Board's position is its contention that, due to safety concerns, it has not provided bus or van transportation over unpaved roads since an accident occurred on such a road more than ten years ago. As before the ALJ, the Board maintains that the case law supports its stance.

In reply, petitioners generally submit that the ALJ's findings are supported by the record herein, noting, *inter alia*, that respondent's own witness, Board President Jeffrey Biggs,

testified that he would not want his children waiting at the bus stop assigned to C.N. (Petitioners' Exceptions at 2) Petitioners further argue that, "[r]egardless of who is responsible for the 'bear problem,' Judge Springer correctly concluded that this is a dangerous situation and in weighing all of the evidence, he found that it is in the best interest of both the Respondent and the Petitioners for the bus stop to be relocated." (*Id.* at 3, 4) Petitioners assert that the ALJ's conclusions of law are proper and urge the Commissioner to affirm the Initial Decision.

Upon careful and independent review of the record in this matter, including all documentary, photographic and videotaped exhibits, the Commissioner concurs with the ALJ's conclusion that, under the particular circumstances of this matter, petitioners have demonstrated that the Board's refusal to accommodate their request to locate an alternative bus or van stop for C.N. was arbitrary and capricious.[1]

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Board is directed to select a suitable alternative route allowing for van service to C.N.'s driveway.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000

Date of Mailing: MAY 19 2000

[1] The Commissioner notes that, to the extent that the misstatements and omissions identified by the Board indeed exist, they are not material to his determination in this matter.

[2] In so concluding, the Commissioner notes that the ALJ's finding on page 11 of the Initial Decision with respect to the unsuitability of the landfill area for a bus stop should not be read as a general proscription, but as applied to petitioners herein.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

160-00E

D.H., AND K.H. ON BEHALF OF HIS MINOR DAUGHTER, S.H., PETITIONERS,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY, RESPONDENT.	:	

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2794-00

AGENCY DKT. NO. 133-4/00

DEANNA HOOVER AND K. H., ON BEHALF OF HIS MINOR DAUGHTER, S. H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,

Respondent.

Kenneth E. Smith, Esq., on behalf of the petitioners (Wade & Wood, attorneys)

Barry Chatzinoff, Esq., on behalf of the respondent (Weinberg, McCormick, Chatzinoff & Paul, attorneys)

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by the petitioners, with the Commissioner of Education (Commissioner) on April 24, 2000. The petitioners request that the Commissioner find that Deanna Hoover, as of the start of the 1999-2000 school year, had successfully completed the requirements for the eleventh grade and that she be allowed to graduate from the Edgewood Senior High School at the end of the 1999-2000 school year. Also, that the Commissioner find that S.H., as of the start of the 1999-2000 school year, had successfully

completed the requirements for the tenth grade and that she was properly placed in the eleventh grade for the 1999-2000 school year. In addition, the petitioners filed a request for emergency relief on behalf of both Deanna Hoover and S.H.

The matter was transmitted on April 27, 2000, to the Office of Administrative Law, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-t o –13, prior to the filing of any papers by the respondent, since the petitioners are requesting emergency relief.

The matter was scheduled for an oral argument as to the motion for emergency relief and for a hearing on May 11, 2000.

This order deals only with the motion for emergency relief.

Emergency relief is an extraordinary equitable remedy and the burden of proof is on the petitioners to show that (1) there is a threat of immediate and irreparable harm to the petitioners, (2) there is a probability that the petitioners will eventually succeed on the merits, and (3) that the inconvenience or loss to the Board will be nominal. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); *New Jersey Bar Association v. Northern New Jersey Mortgage Associates*, 22 *N.J.* 184 (1956); *N.J.A.C.* 1:1-12.6; *N.J.A.C.* 6:24-1.5.

Based on the petition and the record developed at the hearing, I **FIND** that the facts pertinent to this motion are not in dispute.

Deanna Hoover attended St. Joseph High School for three years and S.H. attended St. Joseph High School for two years. At the end of the 1998-99 school year, Keith Hoover, the father of Deanna Hoover and S.H., enrolled his daughters with the respondent. Because of a financial dispute as to tuition, St. Joseph High School refused to send the school records of Deanna Hoover and S.H. to the respondent. Both Deanna Hoover and S.H. past the Grade 11 High School Proficiency Test (P-9, P-8), and the respondent placed Deanna Hoover in the twelfth grade and S.H. in the eleventh grade at the Edgewood Regional Senior High School for the 1999-2000 school year. Without the school records from St. Joseph High School, Michelle Ferner, the principal of the Edgewood Regional Senior High School testified that she cannot certify that

Deanna Hoover has the necessary credits needed for graduation or that S.H. has the needed credits for advancement to the twelfth grade.

Kenneth E. Smith, Esq., on behalf of the petitioner, argued that Deanna Hoover and S.H. would suffer irreparable harm if the motion for emergency relief is not granted. Deanna Hoover wants to graduate with her class and the graduation ceremony is scheduled for June 14, 2000. Both Deanna Hoover and S.H. are anxious to have their educational status determined so that they can make future plans.

Mr. Smith argued that there is a strong likelihood that the petitioners will prevail in the matter. Mr. Smith stated that the facts in this matter are similar to those in *M.C. on behalf of L.C., a minor child v. Board of Education of the Freehold Regional High School District, Monmouth County*, EDU 8229-98, Initial Decision, (October 29, 1999) <http://lawlibrary.rutgers.edu/oal /search.html>, adopted, Comm'r. (February 20, 2000). This case dealt with the high school placement of L.C. who had been home schooled for a period of time. The Commissioner emphasized that the decision regarding the placement of L.C. should not have focused on the equivalency of L.C.'s home school instruction to the school's program but rather on L.C.'s level of proficiency as determined by appropriate testing. In this matter, the respondent placed Deanna Hoover and S.H. based on their scores in the eleventh grade proficiency test. At the hearing, Deanna Hoover testified that she had successfully completed the eleventh grade at St. Joseph High School and S.H. testified that she had successfully completed the tenth grade at St. Joseph High School. Additionally, Mr. Smith submitted the affidavit of Robert Cizozzi, who had been a teacher at St. Joseph High School, indicating that Mr. Cizozzi was one of Deanna Hoover's teachers during the 1998-99 school year and that she had successfully completed the eleventh grade at St. Joseph High School (P-10).

Mr. Smith argued that the granting of the motion will not cause any inconvenience or loss to the respondent.

Barry Chatzinoff stated that without the previous school records the respondent cannot determine if Deanna Hoover has sufficient credits to graduate and S.H. has sufficient credits to

advance to the twelfth grade consistent with the respondent's policy (J-1) and *N.J.A.C.* 6:3-4A.1(d)ii(3).

I am persuaded by Mr. Smith's argument that Deanna Hoover would suffer irreparable harm if she is not permitted to graduate with her class, that there is a likelihood that the petitioners will succeed in this matter and that there is no inconvenience or loss to the Board if Deanna Hoover is allowed to graduate with her class. I hereby **ORDER** that Deanna Hoover be permitted to graduate provided that she passes the required courses necessary for graduation. Also, I **CONCLUDE** that Mr. Smith has not shown an irreparable harm to S.H. if emergent relief as to her educational status is not granted. The court in the *Crowe* case stated that the relief granted should not be broader than necessary pending a final decision. The hearing in this matter was handled on an expedited basis and I am confident that a final decision will be rendered in sufficient time to allow S.H. to make plans for the next school year. Deanne Hoover's position is different since the final decision in the matter may not be issued prior to the graduation ceremony. Therefore as to S.H., I **DENY** the motion for emergent relief.

At the hearing, both parties waived the right to file exceptions.

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

May 15, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

/cad

OAL DKT. NO. EDU 2794-00
AGENCY DKT. NO. 133-4/00

D.H., AND K.H. ON BEHALF OF HIS MINOR DAUGHTER, S.H., PETITIONERS,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY, RESPONDENT.	:	

The record of this emergent matter, including the Order issued by the Administrative Law Judge (ALJ) and an audio cassette tape of the hearing conducted at the Office of Administrative Law on May 11, 2000, have been reviewed. Upon such review, the Commissioner determines to affirm the Order of the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000

Date of Mailing: MAY 19 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

161-00E

NICHOLAS DENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF AND MODIFYING TERMS OF PUPIL SUSPENSION
OAL DKT. NO. EDU 2851-00
AGENCY DKT. NO. 144-5/00

NICHOLAS DENTINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD,

Respondent.

Thomas J. Hagner, Esq., for petitioner (Kenney & Kearney, attorneys)

Susan S. Hodges, Esq., for respondent (Capehart & Scatchard, attorneys)

BEFORE **BRUCE R. CAMPBELL**, ALJ:

An eighteen-year-old high school senior challenges a board of education's decision to suspend him for the balance of the school year for committing vandalism.

Nicholas Dentino filed a petition of appeal with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:24-1.2 through -1.5 alleging the Haddonfield Borough Board of Education arbitrarily and unreasonably suspended him from attendance on April 6, 2000 for

the balance of the school year. The petition contained a request for emergent relief in the form of expedited hearing because the suspension runs to the end of the petitioner's senior year and he will be unable to return unless the matter is resolved.

The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -15 and *N.J.S.A* 52:14F-1 through -13. After notice, hearing was held on Monday, May 15, 2000, at the Office of Administrative Law, Trenton.

THE ARGUMENTS

In essence, the petitioner alleges principals and superintendents have discretion in dealing with pupil violations of duly adopted school rules and policies, but the discretion is not unfettered and, in his case, overreached. On its face, a suspension of more than forty school days is too severe under the circumstances and in relation to other infractions listed in the Memorial High School Handbook (P-1). As of this hearing, Dentino had served approximately half of the suspension.

The petitioner also alleges he has received only two hours of home instruction since suspended. He asserts the principal has waived Dentino's physical education requirement. Presumably, this would remove an impediment to his graduation, provided he passes all subjects and has at least the minimum number of credits required for graduation. Dentino stresses that he has been accepted by two colleges for autumn attendance.

The petitioner also asserts the Board was split as to whether the subject penalty should be imposed (P-3) and a juvenile officer suggested that the Municipal Court impose no penalty in light of the severity of the school's punishment. Furthermore, the suspension of more than forty days is clearly excessive, Dentino did not act in retribution for a previous suspension, his actions were not premeditated but happened on the spur of the moment, the high school principal's contention that the vandalism destroyed any trust that existed between him and these pupils is far fetched and the Board fails to recognize that Dentino went to police and admitted his part in the

incident. In short, the school does not want to deal with Dentino and the other two involved pupils.

The Board counterargues that the other two young men involved received precisely the same penalty as Dentino did. Dentino, when questioned by police, denied any involvement in the incident. Only later did he go to the authorities and admit his participation.

The petitioner is receiving home instruction, will be given all final examinations and, if academically qualified, will receive his diploma although he will not be permitted to participate in graduation exercises.

The Board did grapple with its decision here. It looked at all facts and options. Among the facts are: Dentino violated a behavioral contract while on a class trip and was serving a suspension for that when he participated in the vandalism; it was not an impulsive act because he and the others went to a store and purchased eggs that they subsequently threw at the school; after the incident began, a tire iron was retrieved from the car the group traveled in and Dentino threw it at a school office window, breaking it and, in addition to all of this, pulled up some shrubs that were part of the school's landscaping. Dentino will miss some desirable privileges. He will not participate in either the prom or the graduation exercises. But he broke rules and knew he was breaking rules. He cannot claim surprise when punishment follows.

The Board acted carefully and appropriately. It did not merely uphold an administrator's decision. As the minutes show (P-3), the matter was duly deliberated. And it must be noted that, while the vote was not unanimous, it was 5-2 to support the suspension, hardly an even split.

DECISION AND ORDER

There is no contention of procedural defect here. The pupil had a hearing by the Board of Education in a timely manner. *Graham v. Board of Education of the Township of Ocean*, 1978 *S.L.D.* 810. There is no dispute as to culpability. The only matter in difference is penalty.

This incident, clearly the most egregious, was far from the first contact the petitioner had with the disciplinary system. Exhibit P-2 illustrates a dozen "interventions" with the assistant principal and principal related to behavior. Quite recently, Dentino was disciplined for misbehavior on the senior class trip. All participants in the senior trip signed contracts beforehand in which they agreed to comply with certain standards of behavior. Importantly, each pupil knew what constituted improper behavior. Dentino acted inappropriately – broke his contract – and received a two-day suspension. That is lamentable.

The vandalism is deplorable. It cannot be rationalized. School officials, Board members and the public were understandably shocked by the act. The Board properly considered his disciplinary record when considering penalty. *D.D. v. Lenape Regional High School Board of Education*, 1984 *S.L.D.* 1562. Exclusion from attendance at graduation exercises, because it is a privilege and not a right, has long been upheld in discipline cases. *See, e.g., B.G., B.B. and Deborah Van Pelt v. Board of Education of the Borough of Elmwood Park*, 1974 *S.L.D.* 611. The precedent as to other privileges such as proms is equally strong.

What must be addressed is the educational aspect of the matter. An exclusion in early April for the balance of the school year is as extreme a remedy as expulsion. And the Commissioner and State Board of Education have long held that even the most drastic of penalties, expulsion, should not strip the pupil of educational opportunity. *Scher v. Board of Education of West Orange*, 1968 *S.L.D.* 92. In fact, most long-term suspensions and expulsions do not constitute a permanent removal of a pupil from a school system. *See, e.g., J.W. v. Hammonton Board of Education*, 1975 *S.L.D.* 776. The Commissioner may restrict exclusion to a specific period. *G.C. v. Egg Harbor Board of Education*, Comm'r decision, May 1980 (unpublished).

In today's case, the petitioner has engaged in antisocial and possibly criminal behavior. As wrong-minded as his recent acts have been, he still is entitled to an education that will allow him to complete his high school requirements. Therefore, and in consideration of the whole record, it is **ORDERED** that the Board's withdrawal of Nicholas Dentino's prom and graduation privileges is hereby upheld as appropriate under the circumstances and clearly not an abuse of the Board's legislatively-invested powers. It is further **ORDERED** that home instruction of not less

than ten hours per week be provided immediately if not already in place. It is further **ORDERED** that high school staff administer final examinations to Nicholas Dentino at the same time and it is the same manner as to other pupils. It is my opinion that these arrangements will create no undue burden on either party and may afford school personnel some administrative convenience, while providing for examination of the petitioner is as nearly normal a manner as is possible under the present circumstances.

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

16 MAY 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

jh

EXHIBITS

Petitioner's

P-1 Excerpt, pages 58-65, Haddonfield Memorial High School Handbook, Vol. XXX, 1999-2000

P-2 Statement of High School Principal to Board of Education, April 13, 2000

P-3 Minutes, Executive Session of Haddonfield Board of Education, April 13, 2000, 2 pp.

Respondent's

None

OAL DKT. NO. EDU 2851-00
AGENCY DKT. NO. 144-5/00

NICHOLAS DENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on May 15, 2000, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner determines to affirm the recommended Order of the ALJ.[1] Accordingly, this matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000
Date of Mailing: MAY 19 2000

[1]The Commissioner reminds the parties that physical education may not be waived as it is a statutory requirement (*N.J.S.A.* 18A:35-5). However, the Board is not precluded from granting credit for curricular activities pursuant to *N.J.A.C.* 6A:8-5.1(a)lii(1).

[2]This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

162-00

A.S. ON BEHALF OF MINOR CHILD, M.S., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY, RESPONDENT.	:	DECISION ON MOTION

May 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING REQUEST FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 4066-00
AGENCY DKT. NO. 162-5/00

A.S. ON BEHALF OF MINOR
CHILD, M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF SOMERVILLE,
Respondent.

Kevin P. Kovacs, Esq., for petitioner (Purcell, Rise, Shannon, Mulch & O'Neill, attorneys)

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

BEFORE **BRUCE R. CAMPBELL**, ALJ:

A high school junior, through his parent, appeals a ten-day suspension from school and school-related activities because he allegedly threatened a teacher.

The matter was opened before the Commissioner of Education on May 17, 2000, with the filing of a verified petition of appeal. *N.J.S.A.* 18A:6-9. The petition included a request for emergent relief. *N.J.A.C.* 6:24-1.5 and *N.J.A.C.* 1:1-12.6. The matter was transmitted to the Office of Administrative Law, without Answer, on the same day. *N.J.S.A.* 52:14F-1 through -13. Oral argument on the question of emergent relief and/or stay of the Board's action was heard at 11 a.m. on Friday, May 19, 2000. The Board filed its Answer at that time.

THE ARGUMENTS

The petitioner argues that his action must be distinguished from cases involving violence and that there was no deliberation behind his remark, which he concedes was inappropriate. The context was a creative writing class. The time was 7:30 a.m. on a Friday morning. The teacher directed pupils to write about how they wanted to be famous and why. M.S. said, out loud, that he wanted to be famous for killing his teacher, Ms. R.

The petitioner also argues that the teacher did not feel threatened, that he went through the balance of the school day without the matter being raised again, that he attended his prom during the weekend and only on the following Monday, May 15, was called before the school disciplinarian. He was advised that he would be suspended from school and school-related activities for ten days, effective May 15.

It is also asserted that pupils were never advised of Board of Education policy on matters such as this. M.S. says he was not allowed to respond to the allegation against him, school officials demonstrated a knee jerk reaction to the matter, no mitigation was considered and, therefore, a ten-day suspension is excessive on its face.

At this point in the school year, a suspension is particularly harmful because junior year grades are an important factor in college acceptance decisions and because he is a member of the school's baseball team. The team will play one or more games before M.S.'s suspension is over and college scouts will attend those games.

The petitioner cites *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and says he will be irreparably harmed by this suspension, the legal right under his claim is not unsettled and he is likely to prevail on the merits. Thus, the temporary relief he seeks should be granted. If upon plenary hearing he should not prevail, he can serve the balance of the suspension in September.

The Board of Education argues the actual intent of M.S.'s remark is not germane. The words were the words. The suspension was not imposed until after the disciplinarian had an opportunity to look into the matter and, as copies of memoranda indicate, to speak with those involved. Ms. R. memorialized the event. Exhibit A. Principal O'Halleran provided a written summary of what happened to Board counsel. Exhibit B.

The suspension not being for more than ten days, the pupil received all process that was due. The timing of the suspension is of the petitioner's making, not the Board's. The petitioner is being treated as would a nonathlete.

M.S. knew or should have known that a threat of any sort could result in discipline. Each pupil receives and signs a receipt for the student handbook (see excerpt, Exhibit D) that clearly prohibits

> 10. Assault or Violence Directed Toward Any School Employee: No student shall assault, cause bodily harm to or threaten any school employee. Assault is interpreted as threatening language, signs or gestures. This rule applies during all school-sponsored activities before, during or after regular school hours, on campus or away, in route to or from school or on the school bus. Besides a violation of student behavior guidelines, such acts of violence or intent to cause bodily harm are in violation of state criminal laws.
>
> [Handbook at 14.]

There was a threat made. They looked into the incident (and would have been open to criticism and/or liability if they did not) and made a judgment. That judgment should be left undisturbed. A ten-day suspension is not excessive in these circumstances. Thus, it cannot be said the petitioner is likely to prevail.

DETERMINATION AND ORDER

First applying the test from *Crowe v. DeGioia*, above, it is clear that if harm exists here, it is to some extent irreparable. Preparation for an examination can be made up; participation in an athletic contest cannot. There is a critical distinction, however. Education is a right, not lightly set aside even in expulsion cases. Extracurricular activities are a privilege and may be withheld for good cause. If this petitioner prevails on the first prong of the test, it is by a paper-thin margin and then only as to academics.

The second criterion does not come into play. The legal rights to education and to extracurricular activities are quite clear, having been litigated many times and the outcomes being consistent; education is a right founded in the New Jersey Constitution and extracurricular activities are privileges that must be earned and can be lost for a number of legally acceptable reasons.

Most importantly, the petitioner cannot show a reasonable probability of prevailing on the merits. As the Commissioner has made abundantly clear:

> [I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 1939-49 *S.L.D.* 15, aff'd 135 *N.J.L.* 329)(*Sup. Ct.* 1947), 136 *N.J.L.* 521 (E.& A. 1948).

I cannot say on this record that the subject suspension is inappropriate at all, let alone inappropriate to a degree that would require the Commissioner or this judge to substitute his judgment for that of the local Board of Education. Nor can I find that the time between the threat and the suspension was excessive under the circumstances.

Accordingly, the request for emergent relief is **DENIED**. It is so **ORDERED**.

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

19 MAY 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

jh

EXHIBITS

Petitioner's:

None

Respondent's:

A. Handwritten memorandum of B.R. re: incident of May 12, 2000
B. Memoranda, O'Halloran to Rogers, May 16, 2000, 1p., and May 16, 2000, 2pp.
C. Board of Education Regulation R 5600.1, p.5, section 13
D. Excerpt from student handbook, p.14, section 10

OAL DKT. NO. EDU 4066-00
AGENCY DKT. NO. 162-5/00

A.S. ON BEHALF OF MINOR CHILD, M.S., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY, RESPONDENT.	:	DECISION ON MOTION

The Administrative Law Judge's (ALJ) Order, which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law (OAL) on May 19, 2000, has been reviewed. Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. This matter shall continue at the OAL for further proceedings as deemed necessary.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 19 2000

Date of Mailing: MAY 19 2000

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

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning Education Association alleged that the Board's use of a teacher through closed circuit TV, who did not hold New Jersey certification, was unlawful, as was subcontracting with a private vendor, Limited Star Distance Learning Consortium (STARNET), to provide distance learning credit courses in Latin at the Neptune Township Senior High School.

The ALJ found that the Latin instruction provided through the Board's distance learning program could not lawfully be delivered by a person not in possession of appropriate New Jersey certification. (*Guttenberg*) The ALJ ordered the Board to cease provision of Latin instruction via STARNET, effective July 1, 2000. The ALJ declined to order that the Board use its own employees to provide Latin instruction and did not order the Board to cease and terminate all subcontracting arrangements with STARNET if they are otherwise lawful.

The Commissioner affirmed the ALJ's conclusion holding that the State Board of Education decision in *Guttenberg* controls in this matter, thus precluding the Board from providing Latin instruction by an uncertified teacher through the distance learning program in dispute. The Commissioner found it unnecessary to reach further issues under the facts of this matter.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 392-99

AGENCY DKT. NO. 537-11/98

NEPTUNE TOWNSHIP

EDUCATION ASSOCIATION,

Petitioner,

v.

NEPTUNE TOWNSHIP

BOARD OF EDUCATION,

Respondent.

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

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Kathleen A. Naprstek, Esq., for participant New Jersey Education Association (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: February 7, 2000 Decided: March 23, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

On August 28, 1998, the Neptune Township Board of Education, with the approval of the Monmouth County Superintendent of Schools, entered a contract with Limited Star Distance Learning Consortium ("STARNET"), to provide distance learning credit courses in Latin I, II, and III, at the Neptune Township Senior High School.

On November 30, 1998, the Neptune Township Education Association ("Association"), filed a petition of appeal before the Commissioner of Education seeking a ruling from the Commissioner terminating the Board's contract with STARNET on the grounds that the contract was *ultra vires* and unlawful.

On January 8, 1999, the Board filed its answer, denying the allegations of the petition and raising several procedural defenses.

On January 27, 1999, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 through –15 and *N.J.S.A.* 52:14F-1 through –13.

On August 19, 1999, the parties agreed to a stipulation of facts. The Board reserved the right to supplement the stipulation, if necessary, by including omitted portions of abridged documents contained in or attached to the stipulation. It appears that no such supplementation was necessary.

On November 3, 1999, Kathleen A. Naprstek, Esq., of Zazzali, Zazzali, Fagella & Nowak, filed a motion to participate in the matter on behalf of the New Jersey Education Association. On November 23, 1999, the judge entered a Letter Order granting the motion and permitting the NJEA to participate by filing a brief and filing exceptions to the initial decision with the Commissioner of Education.

The petitioner Association and respondent Board had filed cross motions for summary judgment.

STIPULATIONS OF FACT

The parties submitted the following thirty-three stipulated facts.

1. Petitioner, Neptune Township Education Association, is the majority representative of all certified non-administrative staff employed by the

Respondent, Neptune Township Board of Education, including but not limited to teachers of foreign languages.

2. The Respondent is the Board of Education of the Township of Neptune which is responsible for the administration and operation of the schools in the Township of Neptune. The Board is required to comply with all of the provisions of Title 18A of the revised statutes and to not exceed its authority thereunder.

3. Pursuant to the thorough and efficient education provision of the New Jersey Constitution and the relevant Title 18A statutory provisions the Respondent Board provides instruction of various academic disciplines for academic credit, including but not limited to the teaching of Latin.

4. For the 1985-1986 school year the Board of Education employed Natalie Smith primarily to teach Latin at the secondary level at the Neptune Township High School. Ms. Smith, in pertinent part, possessed secondary endorsements in English and Latin on her teacher instructional certificate. Ms. Smith's assigned classes from the 1985-1986 school year through the 1997-1998 school year (along with the approximate number of students taught) were as follows:

1985-1986 - one class Latin (four English classes).

1986-1988 (2 years) - four classes Latin (one English class).

1988-1992 (4 years) - five classes of Latin including two sections each of Latin I and Latin II (approximately 23 students in each class).

One section of Latin III (approximately eleven students).

1992-1997 (5 years) - again five classes of Latin.

Two sections each of Latin I and Latin II (approximately 23 students in each class).

One combination Latin III/IV class (approximately 7 students).

1997-1998 - one section of Latin I (approximately 24 students).

One section of Latin II (approximately 18 students).

One section of Latin III (approximately 7 students).
Two English classes.

5. All of the Latin classes taught by Ms. Smith during the period between 1985-1986 through 1997-1998 were for five academic credits and were taught during the entire academic year (September through June).

6. For the 1998-1999 school year Natalie Smith was assigned five English classes and was not assigned any Latin instruction within the Neptune Township School District.

7. On or about September 1, 1998 Respondent Board of Education began to utilize the services of Star Net Corporation to provide, through the use of closed circuit television, "Latin instruction" to students in grades 9-12 for credit towards graduation. The "teacher" who presented the Latin instruction to Neptune Township High School students during the 1998-1999 school year did not hold a New Jersey standard teaching certificate. (See Exhibit "A" which consists of a February 9, 1999 letter from Patricia Riley, Instructional Coordinator for Star Net, to Michael Mixon, Vice Principal of the Neptune High School, which refers to the Curriculum Vitae of Dr. George H. Thompson, who provided the Latin instruction to Neptune Township students during the 1998-1999 school year). The only alleged teaching certification in the area of Latin presently maintained by Dr. Thompson is in the State of Texas.

8. Annexed hereto as Exhibit "B" is a copy of a July 23, 1998 letter from Dr. Michael T. Lake, Superintendent of Schools, to Michael Maddaluna, Monmouth County Superintendent of Schools. The letter relates, in part, to the Neptune Township School District's interest in "entering into a contract with Limited Star Distance Learning Consortium to provide the above credit courses (i.e. Latin I, II and III) for the 1998-1999 school year". It is significant that this letter stated, in part, that the Board "...[W]ill assign a certified teacher to monitor the pupils during the broadcast phase and E-mail cycle of the program".

9. In a letter dated August 4, 1998 from Michael Maddaluna, County Superintendent of Schools, to Dr. Lake (Exhibit "C") the County Superintendent approved the Board's request "...For a distance learning arrangement for three high school courses: Latin I, Latin II and Latin III" but added, in pertinent part, that "It would also be advisable for you to assign foreign language certified teachers to monitor the broadcast and E-mail phases of the program since personnel with a language background might be most able to actively participate in guiding students during study".

The one Latin certified teacher employed at the Neptune Township High School as of the 1998-1999 school year i.e. Natalie Smith, was as

previously noted reassigned from Latin instruction to an English position for the 1998-1999 school year. The two Department Chairpersons assigned to "monitor" Latin classes taught pursuant to distance learning were not certified in any foreign language. (Annexed hereto is Exhibit "C" which is an August 4, 1998 letter from Maddaluna to Michael Lake and Exhibit "D" which consists of a summary of the certificates/endorsements held by the assigned Department Chairpersons; i.e. Stephen Donley and Bertha Williams).

10. Annexed hereto as Exhibit "E" is a copy of the portion of the August 25, 1998 Board of Education meeting minutes approving Star Net, in pertinent part, as the distance learning provider for High School Latin I, II and III instruction within the Neptune Township School District.

11. Annexed hereto as Exhibit "F" is a Neptune Township High School 1998-1999 Course Description Guide which notes, in part, that the distance learning courses of Latin I and Latin II would be provided to Neptune Township school children. Significantly, this course description guide provided by the Board of Education makes reference to students being granted five credits each for Latin I and Latin II. During the 1998-1999 school year only 7 students were enrolled in the Latin I Distance Learning Class which began in August, 1998 and ended in January, 1999. The Latin II Distance Learning Class consisting of 9 students began in February, 1999 and ended in May, 1999. No Latin III was offered by the District except by the use of a correspondence course delivered to the student's home, which option was exercised by one student.

12. Annexed hereto as Exhibit "G" is a copy of a Latin I Distance Learning Roster for the 1998-1999 school year.

13. Annexed hereto as Exhibit "H" is a copy of a Latin II Distance Learning Roster.

14. Annexed hereto as Exhibit "I" please find Course Description Guides for the 1997-1998, 1996-1997, 1995-1996 and 1994-1995 school years. During this four year period of time a properly certificated teacher, Natalie Smith, provided Latin I, Latin II and Latin III/IV instruction to students within the District as part of a full year five credit course.

15. Annexed hereto as Exhibit "J" is a copy of the Neptune High School Foreign Language Curriculum. Annexed hereto as Exhibit "K" is a copy of a document supplied by the Board of Education to the Association entitled "Star Net 1997- 1998 Program and Course Guide which, in pertinent part, at pages 37 through 39 makes reference to the High School distance learning instruction provided in Latin I, Latin II and Latin III. (N.B. The Board only provided the Association with the pages that are annexed to this Stipulation of Facts). The following sections of the "Foreign Language

Curriculum" are specifically noted by the Neptune Township Education Association:

1. On page 6 of the Foreign Language Curriculum statement is made that the "Foreign Language curriculum at Neptune High School has been revised to correlate directly to the State of New Jersey Department of Education mandates regarding the Core Course Proficiencies". The information provided by Star Net regarding the Latin curriculum provided pursuant to distance learning (see pages 37-39 of Exhibit "K") does not establish that the distance learning instruction regarding either Latin I or Latin II met the New Jersey Core Course Proficiencies in Latin I and Latin II.

5. On page 7 of the "Foreign Language Curriculum" reference is made to the issue of "Teacher Attitudes". The requirements set forth within this Neptune High School Foreign Language Curriculum could not possibly be realized with the use of distance learning instruction and were not realized.

3. None of the Core Course Proficiencies set forth on page 9 of the "Foreign Language Curriculum" could be met through the utilization of distance learning since essentially all of the listed proficiencies required classroom discussion between students and a properly certificated Latin language teacher.

4. On page 10 of the "Foreign Language Curriculum" in a section titled "Program Objectives" a statement is made that students would "use modern technology to enhance the classroom activities..." an objective that cannot be satisfied when technology is not utilized as enhancement in foreign language instruction but as a replacement for classroom instruction.

5. On page 10 of the "Foreign Language Curriculum" titled "Program Objectives" a

statement is made that teachers in foreign languages would "correlate the curricula of all foreign language courses in our elementary and secondary schools with the New Jersey mandated Core Course Proficiencies". The limited Latin I and II instruction provided pursuant to distance learning within the Neptune School District during the 19981999 school year did not satisfy New Jersey mandated Core Course Proficiencies in Latin I or Latin II.

6. As part of the "Course Content" section of the "Foreign Language Curriculum" at pages 19 through 22 detailed Latin course content factors and objectives are delineated. Said "Course Content" objectives were not in any way satisfied through the distance learning provided to students in the Latin program within the Neptune School District during the 1998-1999 school year.

16. Within the Neptune High School Foreign Language Curriculum at page 12 reference is made to one year of Latin I instruction being provided, one year of Latin II instruction being provided and one year of Latin III instruction being provided. The Distance Learning Provider, Star Net, as previously noted, provided only one-half year of instruction in Latin I and only one-half year of instruction in Latin II while Latin III course materials through Star Net were provided through only "mail correspondence" to one student.

17. As part of the Foreign Language Curriculum at the Neptune High School (see Exhibit "J" again) a section of the Foreign Language Curriculum was devoted to the issue of "evaluating students' progress" regarding both modern and classical languages including Latin (page 24). The noted criteria as part of the evaluation process, which included a review of students' notebooks, class participation, reports, writing portfolio work and being involved in cultural projects were not effectuated pursuant to the distance learning of Latin within the Neptune Township School District during the 1998 1999 school year.

18. The "Time Allocation" standards of the Neptune High School's Foreign Language Curriculum (see page 23) regarding Latin instruction were not met through distance learning by Star Net during the 1998-1999 school year.

19. None of the Latin foreign language materials listed in the "Resource Materials" section of the Neptune High School Foreign Language Curriculum (at pages 26-28) were available for Latin students at the Neptune High School during the 1998-1999 school year. The resources/books provided through Star Net were not that of the approved curriculum within the District.

20. As an important part of the Neptune High School Foreign Language Curriculum (see again Exhibit "J") there were "scope and sequence" lists promulgated by the District to evaluate the instruction of students enrolled in language programs (see pages 32-35). The "sequencing" of the learning materials presented by the Latin Distance Learning Teacher, Dr. Thompson, was not consistent with the Board approved sequencing of Latin.

21. As part of the Star Net General Information packet (Exhibit "K") for the 1997-1998 school year references were made to the use of "teacher facilitators" at the school to be used in conjunction with distance learning which strongly supported the Association's contention that the facilitator r have the appropriate Latin subject matter endorsement. (See pages 3-12).

22. At page 12 of the Star Net Program and Course Guide references were made to Star Net's ability to accommodate individual school calendars and to assign grades based on "each school's unique time frame". It is significant that in all years prior to the present 1998-1999 school year the Latin I, Latin II and Latin III courses were all offered as full year five credit courses by in district New Jersey Latin certificated teaching staff members. During the 1998-1999 school year the Star Net calendar which provided Latin I and Latin II in half year instructional segments was utilized and no effort was made by the Board and Star Net to provide full year Latin I or Latin II instruction in contravention of the Board of Education's Foreign Language Curriculum and past practices within the District.

23. As part of the Star Net Program and Course Guide materials (Exhibit "K") at pages 37 through 39 reference was made to the Latin I, Latin II and Latin III instructional units providing one unit of credit, contrary to the five credits provided by the Neptune Township Board of Education in the past to students satisfactorily completing Latin I, Latin II and Latin III full year courses.

24. The determination of the Neptune Township Board of Education to credit students with five credits this year for completing the Latin I and Latin II **half year** courses provided through distance learning represents a falsification of the Latin students' records by crediting them with five credits for a one credit half year course.

25. Annexed hereto as Exhibit "L" is a copy of a letter dated February 22, 1999 from Dr. Lake to Janis Jensen of the New Jersey Department of Education regarding the topic of "Distance Learning - Spanish/Latin". The Association notes that this February 22, 1999 letter fails to note that the Neptune Township School District employed a certificated Latin teacher who was available to teach the Latin classes at issue during the 1998-1999 school year.

26. Annexed hereto as Exhibit "M" is a copy of a March 3, 1999 letter from Janis Jensen of the Department of Education to Dr. Lake which while stating that "Distance learning teachers are not required to have certification in the State of New Jersey" notes, in pertinent part, that "Research has shown that when the instructional process and goals of the program are properly monitored by a certified teacher, distance learning is compatible with second language learning, can accommodate a wide variety of student needs and interests and can increase student motivation to learn". The Association submits that the reference in this paragraph to "a certified teacher" represents the Department of Education's acknowledgement that any teacher facilitator involved in distance learning for foreign language must possess the appropriate subject matter foreign language endorsement.

27. Annexed hereto as Exhibit "N" is a copy of a January 26, 1999 memorandum from Ellen Schechter, Assistant Commissioner for the Division of Academic and Career Standards, which was forwarded, in pertinent part, to all Chief School Administrators throughout the State regarding the issue of "certification for world languages and visual and performing arts". None of the seven "staffing options" referenced in the January 26, 1999 memorandum referred to any "distance learning" option to be utilized in foreign language instruction within the State. Moreover, in the second paragraph of the January 26, 1999 memorandum the Assistant Commissioner stated as follows:

> Upon further assessment of the candidate pool with respect to the availability of appropriate staff in the areas of world languages and visual and performing arts, it has been determined that there is not an immediate need to use the emergency certification option. However, the Department will continue to monitor the situation and may approach the State Board of Education sometime in the future to request consideration for the expanding of the subject areas outline in *N.J.A.C.* 6:11-4.3 for the granting of emergency certification.

Implicit in this certification memorandum was the Department of Education's understanding that if appropriate New Jersey certified foreign language teachers were available within a local school district to provide

foreign language instruction this was the preferred option in the delivery of foreign language services within a local school district.

28. Annexed hereto as Exhibit "O" is a copy of a March 1, 1999 letter from Dr. Michael Lake to Ellen Schechter, Assistant Commissioner which questioned, in pertinent part, why the January 26, 1999 memorandum had not referred to "distance learning as a curriculum option". It is significant to note that when the County Superintendent Michael Maddaluna approved the use of distance learning within the Neptune School District he had never been apprised of the fact that there was an appropriately certificated Latin language teacher still employed within the Neptune Township School District who was available to provide the Latin instructional services to Neptune School District students during the 1998-1999 school year.

29. Annexed hereto as Exhibit "P" is a copy of a March 10, 1999 letter from Ellen Schechter to Dr. Michael Lake stating, in part, that it was an "oversight" that there was no reference made in her January 26, 1999 memorandum to the use of "distance learning" as "an excellent mechanism for providing world languages to students of all grades". The Association submits that it is significant that Ms. Schechter was never made aware that there was a teacher within the Neptune Township School District with a Latin endorsement on her instructional certificate who was available to teach the Latin courses at issue during the 1998-1999 school year and who had successfully taught Latin I, Latin II, Latin III and Latin IV courses for well over a decade within the District.

30. Annexed hereto as Exhibit "Q" is a copy of a document entitled "Educational Technology in New Jersey - Vision and Benchmarks by 2002", a document that was provided by the Board of Education during the discovery phase of this litigation. The following statements within this "Educational Technology" document relied upon by the Board of Education in entering into the distance learning contracting relationship with Star Net for the 1998-1999 school year strongly support the Association's factual and legal contentions in the instant matter:

    1. On pages 11 through 13 of this "Educational Technology" document references are made, in pertinent part, to the use of distance learning or media based programs only when there is a "lack of available qualified teachers...". On page 13 of this "Educational Technology" document the following statements are made:

        ...Historically, media based programs used as the sole vehicle for world languages instruction have had disappointing results and have not been an adequate substitute for

> classroom interaction with the world languages teacher. The key to a successful media program is the quality and intensity of follow-up by a language specialist. Media based programs supplement, but cannot replace, interactions that take place between the teacher and students. Note the following considerations:
>
> * Media based programs may not provide the meaningful interaction necessary for successful language learning.
>
> * Media based programs may not address the learning styles and needs of all students.
>
> * High quality media based programs that meet the criteria for effective standards based world languages instruction are difficult to find. In addition, specialized knowledge is needed to evaluate their potential benefit for both immediate use and long term effectiveness.

2. At the top of page 16 of this "Educational Technology" document the following statement is included:

> It is important to interject that new technologies cannot replace teacher-student or student-teacher interactions. Oxford (1998) cautions that technology can assist in creating a meaning focused, communicative language learning environment only if it becomes an integral part of the broader curriculum. Teachers must focus on learning objectives and then choose the type of technology and the tasks that meet the objectives. ...The role of the teacher as the facilitator in setting goals, providing guidelines and resources, and providing suggestions and support to the student is a key factor in successful computer assisted instruction.

3. On page 21 of the "Educational Technology" document reference is made to the importance that any technological assistance consider and accommodate a school district's

mission statement and philosophy, school board goals, goals of the world language programs, and staff/specialists qualifications. The Association submits that these goals and objectives have not been met by virtue of the Neptune Township Board of Education's implementation of distance learning instruction in Latin during the 1998-1999 school year. In pertinent part, a one credit half year course in both Latin I and Latin II is being utilized by the district in satisfying a five credit full year requirement outlined within the Board of Education's foreign language curriculum.

4. On page 22 of the "Educational Technology" document a statement is made regarding the need to evaluate what opportunities are offered to the students in teaching a subject to "interact face to face" with a teacher. In providing only distance learning instruction to Latin students within the Neptune Township School District the Board is denying these students "face to face" interaction with their foreign language teacher.

5. On page 25 of the "Educational Technology" document provided by the Board of Education one of the recommendations for administrators and program planners within the District is as follows:

> There is assurance that when the program is delivered by the classroom teacher, nonspecialist teacher/volunteer, or media-based programs, it is designed and coordinated with a world languages teacher/specialist or supervisor well-versed in standards-based methodology. (It is submitted by the Association in the instant matter that this recommendation certainly has not been implemented by the Neptune Township Board of Education inasmuch as the distance learning program is not designed and/or coordinated with an appropriately certificated foreign language teacher or supervisor well-versed in standards-based methodology).

6. On page 33 of the "Educational Technology" document references are made to a series of "assessment alternatives" that clearly establish that all of the noted assessment alternatives require direct involvement between students

and a certified classroom teacher; which involvement is missing in distance learning environments.

7. On pages 38 through 44 of the "Educational Technology" document reference is made to the issue of professional development of classroom teachers. It is made very clear that the use of technology is a resource to be used by a properly certificated classroom teacher and is not to be used to supplant certificated classroom teachers. (Emphasis supplied).

31. Annexed hereto as Exhibit "R" is a copy of a State Board of Education decision dated March 3, 1999 in the matter of Guttenberg Education Association vs. Board of Education of the Borough of Guttenberg, which concludes, in pertinent part, that employment as a foreign language teacher is of such a character that the qualifications for such service require appropriate State certification. (Citing N.J.A.C. 6:116.3(a)(9)). The Association cites this State Board of Education decision as conclusively establishing that the use of non-certificated teaching personnel providing limited foreign language services through distance learning for academic credit violates the aforementioned regulations that require that foreign language instruction be provided only by appropriate State certified subject area foreign language teachers.

32. Annexed hereto as Exhibit "S" is a copy of a Newark Star-Ledger article from March 19, 1999 establishing that Latin language instruction is becoming more popular throughout the State of New Jersey again. As the rest of the State moves forward in promoting Latin in our schools the Neptune Township Board of Education has moved backwards in diminishing the services and quality of instruction for Latin within the Neptune Township School District.

33. Both the students and parents of students involved in the Latin I and Latin II instructional programs offered by Star Net as part of the District's Latin distance learning experience during the 1998-1999 school year have expressed significant dissatisfaction with the "educational services" provided by Star Net. One Latin I student was advised that he had failed Latin I only because numerous assignments that had been turned in by the student to the Department Chairperson "monitoring the Latin I course" had apparently not been transmitted for grading purposes by the Department Chairperson to Dr. George Thompson who is providing said Latin instruction.

ADDITIONAL ASSERTIONS OF FACT

The Association relies on the joint stipulation of facts. The Board asserts, in addition, that the nature and contents of exhibits cited in the stipulation create additional, necessary facts.

On July 23, 1998, the Neptune Superintendent of Schools wrote to the Monmouth County Superintendent of Schools requesting approval of a distance learning program at the high school for the 1998-99 school year in the areas of Latin I, II and III, through a contract with STARNET. The Neptune Superintendent advised the County Superintendent that the Board "will assign a certified teacher to monitor the pupils during the broadcast phase and e-mail cycle of the program" and that the Board's "current Latin Curriculum and grading procedure will be interfaced with the Distance Learning Program." Exhibit B.

On August 4, 1998, the County Superintendent wrote to the Neptune Superintendent and approved the Board's request "for a distance learning arrangement for three high school courses: Latin I, Latin II and Latin III." Exhibit C. On August 28, 1998, the Board approved STARNET as the distance learning provider for Latin I, II and III. Exhibit E.

The STARNET Distance Learning Program provides student instruction via direct television broadcast and videotape programs. Exhibit K. STARNET provides collateral materials including calendars and lesson plans as well as text books, laboratory apparatus, resource materials, work books, language audio tapes and other instructional materials. Exhibit K. STARNET requires the district to assign a classroom facilitator for high school credit courses. Exhibit K. STARNET offers training for facilitators. Exhibit K. Facilitators "report certain classroom activities to the STARNET instructional staff. The Facilitator is also responsible for sending student tests, assignments and other projects to STARNET." Facilitators are required to "monitor student progress and report any difficulties to the student, parents and school administrators." Exhibit K.

The District assigned Department Chairpersons Stephen R. Donley and Bertha L. Williams as facilitators for the high school Latin I, II and III distance learning courses. Both Mr. Donley and Ms. Williams are full-time teaching staff members employed by the Board. Both are

holders of standard instructional certificates. The various endorsements to their instructional certificates are set forth in the statement of facts (Exhibit D). Neither Mr. Donley nor Ms. Williams are holders of a foreign language endorsement issued pursuant to *N.J.A.C.* 6:11-6.2(a)(9).

STARNET assigned George H. Thompson, Ph.D, as the instructor for the Board's Latin I, II and III courses. Dr. Thompson holds teaching certificates issued by the states of Texas and New Mexico. He does not hold a teaching certificate issued by the State of New Jersey. Thompson's curriculum vitae is in the stipulation of facts at Exhibit A.

On February 22, 1999, Neptune's Superintendent wrote to Ms. Janis Jensen, World Language Coordinator, Office of Standards and Professional Development, New Jersey Department of Education, requesting a review by the Department of the District's High School Distance Learning Latin Program. Specifically, the Superintendent sought review of "the contention of our Association that the distance learning teacher must be a New Jersey Certified Foreign Language Teacher and the Classroom Teacher monitoring the downlink classroom in Neptune must be a New Jersey certified Foreign Language Teacher." Exhibit L.

On March 3, 1999, Ms. Jensen wrote to the superintendent and advised that "Distance Learning Teachers are not required to have certification in the State of New Jersey." Ms. Jensen also said that "Distance Learning is recognized in the field as a viable alternative model for delivering world language instruction and is recommended as an option by the New Jersey World Languages Curriculum Framework." Exhibit M.

The Latin Distance Learning Program has been in operation in the Neptune Senior High School from September 1998 to the present.

THE ARGUMENTS

The Association

The Association asserts that the Board may not use non-certified teaching personnel to provide foreign language instruction for academic credit to its high school students. The Board began using STARNET on or about September 1, 1998. The "teacher" who presented the Latin instruction does not hold a New Jersey Standard Teaching Certificate. The Board at all times pertinent to this case employed a person properly certified in Latin.

N.J.S.A. 18A:26-2, *N.J.A.C.* 6:8-6.2 and *N.J.A.C.* 6:11-3.1 all require possession of the New Jersey State Teacher's Certificate in order to provide instruction for academic credit to school children in New Jersey. *N.J.A.C.* 6:11-6.3(a)(9) clearly requires that a Latin teacher possess the required foreign language endorsement on that teacher's teaching certificate. Since September 1998, Dr. George Thompson has provided Latin instruction to Neptune Township High School students for academic credit although it is uncontroverted that he does not hold any New Jersey teaching certificate.

Further, the two Department chairpersons were assigned to monitor the Latin classes taught by a television. However, neither of these persons has a foreign language endorsement.

On March 3, 1999, the State Board of Education decided *Guttenberg Education Association v. Board of Education of the Borough of Guttenberg*, St. Bd. decision (March 3, 1999) http://lawlibrary.rutgers.edu/oal/search.html, which held that employment as a foreign language teacher is of such a character that the qualifications for that service require appropriate State certification. *N.J.A.C.* 6:11-6.3(a)(9). The Association relies on this decision as conclusively establishing that the use of non-certificated teaching personnel providing limited foreign language services through distance learning for credit violates the regulations that require that such instruction be provided only by appropriate State-certified subject area foreign language teachers.

Referring to *Guttenberg*, the Association points out that the State Board reversed the decision of the Commissioner to grant the Guttenberg Board's application for an "equivalency" pursuant to *N.J.A.C.* 6:29-3.3(c) to "permit persons with a County Substitute Certificate and subject matter experience to provide world language instruction." The Guttenberg Board had advised the Commissioner that it had approved the use of instructors employed by Berlitz International to serve as "world language teachers" and that the Board requested an equivalency "because the Berlitz Teacher/Program is not certified . . ."

The Commissioner had granted Guttenberg's requested equivalency on January 9, 1998 for a period of three years. The Commissioner also indicated that the Guttenberg Board could submit a request for the continuation of the equivalency at the end of that period.

A notice of appeal challenging the equivalency was filed with the State Board on February 4, 1998. In rejecting the grant of the equivalency, the State Board cited the statutes and regulations that the Neptune Association relies on here.

The Association reasons that if a local board of education cannot provide foreign language instruction through the use of non-certificated instructional personnel who only possess county substitute certificates, then all the more a board such as the Neptune Township Board can not use the services of a non-certificated individual to provide Latin instruction for academic credit through a television teaching arrangement. It cannot be maintained that the *Guttenberg* arrangement with Berlitz International would have been validated the State Board if the Berlitz instruction is provided to pupils through a closed circuit television arrangement instead of through the services of an individual who would be physically present in the classrooms.

The Board appears to argue that this case is distinguishable from *Guttenberg* inasmuch as departmental supervisors were assigned to monitor the Latin instructional classes. The Association counters that argument by pointing out that it is uncontroverted that the department chairpersons assigned to monitor the Latin classes do not posses any foreign language certification. Their function in the classroom was simply to ensure the attention and good behavior of pupils in the classroom.

The Association also urges that there may be many instances in which distance learning can be used by properly certificated classroom teachers, meaning those with appropriate subject area endorsements, to enrich the instruction rendered by classroom teachers.

However, the Association strongly urges that, in light of the cited statutes and regulations and the *Guttenberg* State Board of Education decision, a board education cannot completely supplant academic construction by properly certified teaching staff members by way of entering into contracts to provide instruction for academic purposes through the use of closed circuit television. If the Board's arguments are sustained and the existing Latin distance learning venture is approved by the Commissioner, there will certainly be an increasing number of situations in which public school students in New Jersey will only receive instructional assistance, via a distance learning techniques, from non-certificated persons to the detriment of the entire educational process.

The Association also asserts that the facts and relevant exhibits establish that the Latin instruction provided through closed circuit television by a non-certificated individual, failed to meet even the required curriculum standards of the Board. Furthermore, the instruction does not provide a thorough and efficient education to the school children in the district who sought Latin instruction for academic credit.

At the August 25, 1998 Board of Education meeting, the Board approved STARNET as the distance learning provider for Latin I, II and III instruction within the district. Exhibit E.

The 1998-99 Course Description Guide (Exhibit F) notes that the distance learning courses of Latin I and Latin II would be provided to Neptune Township pupils. This course description guide provided by the Board refers to students being granted five credits each for Latin I and Latin II. During the 1998-99 school year, only seven students were enrolled in the Latin I distance learning class which began in August 1998 and ended in January 1999. The Latin II distance learning class, consisting of nine students, began in February 1999 and ended in May 1999. No Latin III was offered except by use of a correspondence course delivered to the student's home, which option was exercised by one student.

Exhibit I includes the Course Description Guides for the 1997-98, 1996-97, 1995-96 and 1994-95 school years. During this four-year span, a properly certificated teacher, Natalie Smith, provided Latin I, Latin II and Latin III/IV instruction to students within the district, each as a full year, five credit course.

Exhibit J is a copy of the Neptune High School Foreign Language Curriculum. Exhibit K is a copy of the documents supplied by the Board to the Association entitled "STARNET 1997-98 Program and Course Guide" which, at pages 37-39 makes reference to the High School Distance Learning Instruction provided in Latin I, Latin II and Latin III. A comparison of the two documents reveals that the Board's Foreign Language Curriculum asserts that "Foreign Language Curriculum at Neptune High School has been revised to correlate directly to the State of New Jersey, Department of Education mandates regarding the Core Course Proficiencies." The information provided by STARNET regarding the Latin curriculum to be supplied pursuant to the distance learning arrangement does not establish that the distance learning instruction regarding either Latin I or Latin II met the New Jersey Core Course Proficiencies for Latin I and Latin II.

The Board's Foreign Language Curriculum refers to teacher attitudes. The requirements set forth in this curriculum cannot be realized through the distance learning instruction mechanism.

None of the Core Course Proficiencies set forth in the Board's Foreign Language Curriculum could be met through the distance learning technique because essentially all of the listed proficiencies require classroom discussion between students and a properly certificated Latin teacher.

The Board's Foreign Language Curriculum, in a section titled "Program Objectives," states that students would "use modern technology to enhance the classroom activities . . . ." An objective can not be satisfied when technology is not used as an enhancement, but as a replacement for classroom instruction.

The Board's Foreign Language Curriculum, in the section titled "Program Objectives" states that teachers of foreign languages will "correlate the curricula of all foreign language courses in our elementary and secondary schools with the New Jersey Mandated Core Course Proficiencies." Association urges that the limited Latin I and II instruction provided under the distance learning mechanism did not satisfy mandated Core Course Proficiencies in either Latin I or Latin II.

As part of the Course Content section of the Board's Foreign Language Curriculum, detailed Latin course content factors and objectives are spelled out. These objectives were not in any way satisfied through the distance learning mechanism provided to students in the Latin program in the Neptune School District during the 1998-99 school year.

The Foreign Language Curriculum makes several references to one year of Latin I instruction being provided, one year of Latin II instruction being provided and one year of Latin III instruction being provided. STARNET provided only one half year of instruction in Latin I and one half year instruction of Latin II, while Latin III course materials were provided only by "mail correspondence" to one student.

The Foreign Language Curriculum devotes a section to evaluating progress in modern and classical languages, including Latin. The noted criteria including a review of students' notebooks, class participation, reports, writing portfolio work and being involved in cultural projects, were not done under the distance learning scheme in the 1998-99 school year.

The Time Allocation standards expressed in the Foreign Language Curriculum were not met through the distance learning mechanism in the 1998-99 school year.

None of the Latin foreign language materials listed in the "Resource Materials" section of the Foreign Language Curriculum were available for Latin students at the Neptune High School in the 1998-99 school year. The resources and books provided through STARNET were not those of the approved curriculum. Nor did the scope and sequence of the learning materials presented by STARNET match the Board-approved scope and sequence lists.

The STARNET general information package (Exhibit K) for 1997-98 referred to the use of "teacher facilitators" at the school in conjunction with distant learning. The Association asserts this supports its contention that the facilitator would have to posses the appropriate Latin subject endorsement.

The STARNET Program and Course Guide refers to STARNET's ability to accommodate individual school calendars and to assign grades based on "each school's unique time frame." In all years prior to introduction of distance learning, Latin I, Latin II and Latin III courses were all offered as full year-five credit courses by in-district New Jersey certified Latin teachers. During the 1998-99 school year, the STARNET calendar provided Latin I and Latin II in half-year instructional segments and no effort was made by the Board or STARNET to provide full year Latin I or Latin II instruction. This contravenes the Board's Foreign Language Curriculum and its past practice.

The STARNET program and course guide materials refer to the Latin I, Latin II and Latin III instructional units providing one unit of credit, contrary to the five credits provided by the Neptune Township Board in the past to students who satisfactorily completed Latin I, Latin II or Latin III full-year courses.

The Board's determination to credit students with five credits this year for completing Latin I and Latin II half year courses provided through distance learning represents a falsification of the Latin students' records by crediting them with five credits for a one credit, half year course.

Exhibit Q is a document entitled "Educational Technology in New Jersey – Vision and Benchmark by 2002," supplied by the Board to the Association in discovery. The following statements within the documents, relied upon by the Board in entering into the distance learning relationship with STARNET, support the Association's factual and legal contentions:

1. On pages 11 through 13 of this "educational Technology" document references are made, in pertinent part, to the use of distance learning or media based programs only when there is a "lack of available qualified

teachers. . .". On page 13 of this "Educational Technology" document the following statements are made:

> . . . Historically, media based programs used as the sole vehicle for world languages instruction have had disappointing results and have not been an adequate substitute for classroom interaction with the world languages teacher. The key to a successful media program is the quality and intensity of follow-up by a language specialist. Media based programs supplement, but cannot replace, interactions that take place between the teacher and students. Note the following considerations:
>
> * Media based programs may not provide the meaningful interaction necessary for successful language learning.
>
> * Media based programs may not address the learning styles and needs of all students.
>
> * High quality media based programs that meet the criteria for effective standards-based world languages instruction are difficult to find. In addition, specialized knowledge is needed to evaluate their potential benefit for both immediate use and long term effectiveness.

2. At the top of page 16 of this "Educational Technology" document the following statement is included:

> It is important to interject that new technologies cannot replace teacher-student or student-teacher interactions. Oxford (1998) cautions that technology can assist in creating a meaning-focused, communicative language learning environment only if it becomes an integral part of the broader curriculum. Teachers must focus on learning objectives and then choose the type of technology and the tasks that meet the objectives. . . . The role of the teacher as the facilitator in setting goals,

> providing guidelines and resources, and providing suggestions and support to the student is a key factor in successful computer-assisted instruction.

3. On page 21 of the "Educational Technology" document reference is made to the importance that any technological assistance consider and accommodate a school district's mission statement and philosophy, school board goals, goals of the world language programs, and staff/specialists qualifications. The Association submits that these goals and objectives have not been met by virtue of the Neptune Township Board of Education's implementation of distance learning instruction in Latin during the 1998-1999 school year. In pertinent part, a one credit half year course in both Latin I and Latin II is being utilized by the district in attempting to satisfy a five credit full year requirement outlined within the Board of Education's foreign language curriculum.

4. On page 22 of the "Educational Technology" document a statement is made regarding the need to evaluate what opportunities are offered to the students in teaching a subject to "interact face to face" with a teacher. In providing only distance learning instruction to Latin students within the Neptune Township School District the Bard is denying these students "face to face" interaction with their foreign language teacher.

5. On page 25 of the "Educational Technology" document provided by the Board of Education one of the recommendations for administrators and program planners within the District is as follows:

> There is assurance that when the program is delivered by the classroom teacher, nonspecialist teacher/volunteer, or media-based programs, it is designed and coordinated with a world languages teacher/specialist or supervisor well-versed in standards-based methodology. (It is submitted by the Association in the instant matter that this recommendation certainly has not been implemented by the Neptune Township Board of Education inasmuch as the distance learning program is not designed and/or coordinated with an appropriately certificated foreign language teacher or supervisor well-versed in standards-based methodology).

6. On page 33 of the "Educational Technology" document references are made to a series of "assessment alternatives" that clearly establish that all of the noted assessment alternatives require direct involvement between students and a certified classroom teacher; which involvement is missing in distance learning environments.

7. On pages 38 through 44 of the "Educational Technology" document reference is made to the issue of professional development of classroom teachers. It is made very clear that the use of technology is a resource to be used by a properly certificated classroom teacher and is not to be used to supplant certificated classroom teachers.

The Association points out that newspapers and other publications have remarked about the growth of Latin language instruction in New Jersey. Both the students and the parents of students involved in the Latin I and Latin II instructional programs via STARNET expressed dissatisfaction with the "educational services" provided. One Latin I student was advised that he had failed Latin I only because numerous assignments that had been turned in by the student to the Department chairperson had apparently not been transmitted for grading purposes by the chairperson to Dr. George Thompson, who is providing the controverted Latin instruction.

In summary, the Association asserts its arguments clearly establish that the instruction provided through distance learning by an uncertificated teacher fails to accommodate or even acknowledge the curriculum objectives established by Neptune Township High School and the Neptune Township Board of Education. Moreover, the Latin instruction, such as it is, is substandard and antithetical to the objectives of a thorough and efficient education.

The Board

The Board argues that the Association alleges its contract with STARNET is *ultra vires* and unlawful. The thrust of the Association claim is that the Thorough and Efficient Education provisions of the New Jersey Constitution, together with various provisions of Title 18A of the New Jersey Statutes and Title 6 of the New Jersey Administrative Code require the Board to provide foreign language instruction only through the use of certified teachers employed by the Board. The Association would like a ruling not only declaring the Board's contract with STARNET void, but also compelling the Board "to provide foreign language instruction through the use of the Board's own employees" and prohibiting the Board from procuring Latin instruction services from private contractors, vendors, corporations, persons or other entities.

These allegations and claims for relief are based on the provisions of education law that govern employment contracts between district boards of education and certified staff. *N.J.S.A.* 18A:26-2 speaks of teaching staff members "employed in the public schools by any board of education." *N.J.S.A.* 18A:1-1 defines teaching staff member as "a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment. . . ." And there are other references to holder of position, employing board of education and employment. But education laws do not limit district boards of education to providing pupil instruction only by means of classroom teachers employed by the Board.

In *Impey v. Bd. of Ed. of the Borough of Shrewsbury*, 142 *N.J.* 388, 390 (1995), the New Jersey Supreme Court recognized that boards have considerable latitude in providing essential educational services. The Court held that the provisions of *N.J.S.A.* 18A:46-1 through -46, Classes and Facilities for Handicapped Children, and the regulations of the Commissioner and State Board of Education, specifically *N.J.A.C.* 6:28-7.4(a), "authorize a local board of education to enter into a contract with an educational services commission to obtain speech correction services for its eligible pupils." 142 *N.J.* at 396.

Further, *N.J.S.A.* 18A:26-2 authorizes boards to enter into contracts with properly licensed commercial drivers' schools for the purpose of providing behind-the-wheel instruction as part of a regular driver education course. These contracts are governed by the provisions of the Public School Contracts Law, *N.J.S.A.* 18A:18A-1 through -59. The Public School Contracts Law excludes contracts of employment from its provisions. "Contract" for the purpose of this chapter means contracts or agreements for the performance of work or the furnishing or hiring of services, materials, or supplies as distinguished from contracts of employment. *N.J.S.A.* 18A:18A-2(c).

The Board's contract with STARNET to provide distance learning Latin courses is a contract for "the furnishing or hiring of services" within the meaning of the Public School Contracts Law. Thus, it is distinguished from contracts of employment. As such, the provisions of *N.J.S.A.* 18A:26-2, *N.J.S.A.* 18A:27-2 and *N.J.A.C.* 6:11-3.1 do not apply.

The Board's authority to contract with STARNET to provide Latin instruction components is inferable from the provisions of the Comprehensive Educational Improvement and Financing Act of 1996 and the rules adopted by the State Board of Education and the Commissioner to carry out the Act. At *N.J.S.A.* 18A:7F-2(b), the Act provides:

> 5. The Legislature, therefore, provides and establishes:
>
> a. A definition of a thorough and efficient system of public education which is uniformly applicable to all districts in the State and specifies what must be learned with reference to academic standards that must be achieved by all students.
>
> b. The types of programs and services that will accomplish these goals in a manner that is thorough and efficient.
>
> c. A level of financial support sufficient to provide those programs and services.
>
> d. A funding mechanism to ensure that support.
>
> e. A system which ensures that the expenditure of public funds will be undertaken both with prudence and sound management and with accountability that includes mechanisms for enforcement in the event a district fails to meet the substantive standards established as set forth herein.

The Act also establishes procedures, implemented by the State Board, for defining the substantive content of a thorough education in the form of what are described as rigorous Core Curriculum Content Standards. These are to be uniformly required of each district in the State. On May 1, 1996, the State Board adopted seven academic and five workplace readiness areas as Core Curriculum Content Standards. The Act also establishes mechanisms for setting and maintaining standards for the efficient delivery of programs and services to accomplish the goal. *N.J.A.C.* 6:19-1.1.

The Act also requires the Commissioner to develop and establish efficiency standards that define the types of programs, services, activities and materials necessary to achieve a thorough and efficient education. The efficiency standards must be reviewed every two years and revised as appropriate. The Commissioner established standards that are set forth in the biennial report on the cost of providing a thorough and efficient education. *N.J.S.A.* 18A:7F-4(c)(3) requires the biennial report to address the cost of providing the distance learning network component of a thorough and efficient education.

The Act requires the State Board to define the content of a thorough and efficient education in the form of Core Curriculum Content Standards. The standards adopted by the State Board include world languages.

The Neptune Board's foreign language curriculum must comply with the Core Curriculum Content Standards. The Board's authority to contract with STARNET for distance learning services to provide the Latin I, II and III components is inferable from the provisions of the Act. This conclusion is also supported by legislation and regulations adopted after the filing of the present petition. In 1999, the Legislature enacted L. 1999, c.110, which designated Neptune Township as an "Abbott district." Under this designation, the Board is subject to the rules of the State Board and the Commissioner effective September 10, 1999, and which were adopted to insure the provisions of a thorough and efficient system of education as defined by the Core Curriculum Standards to pupils attending public schools in the Abbott districts. *N.J.A.C.* 6:19A-1.1.

Under these rules, the Board must submit to the Department of Education a plan for implementation of a research-based whole school reform model or a whole school alternative program design or a comprehensive strategy that uses research-based supplemental programs that address the Core Content Standards no later than May 2000. *N.J.A.C.* 6:19A-4.1(d) requires:

> 5. Educational technology: Educational technology shall be infused in all aspects of curriculum and instruction, throughout the entire WSR [whole school reform] model, to support achievement of the Core Curriculum Content Standards pursuant to *N.J.A.C.* 6:19A-1.4(f) and -2.2(b).

> 6. Educational technology includes acquisition and maintenance of necessary equipment and infrastructure, provision of appropriate professional development activities and designation of appropriate staff to implement plans and activities.

The Board insists that its distance learning Latin program is an essential element of its WSR model.

The Board also argues that the certification provisions of *N.J.A.C.* 6:11-3.1 *et seq.* do not apply to distance learning programs adopted to achieve Core Curriculum Content Standards. The Association's reliance on *Guttenberg*, above, is misplaced. The issue of the legality of providing foreign language instruction by subcontracting with a private vendor for instructional services was not addressed in the decision. Second, unlike the contractual arrangement with Berlitz International that was the subject of the Guttenberg Board's application for an equivalency, the Neptune Board's distance learning Latin program is specifically authorized by statute, *N.J.S.A.* 18A:7F-4, as an efficient program by which to achieve the Core Curriculum Content Standards.

The Department of Education recognizes distance learning as a viable alternative model for delivering language instruction. Exhibit M. The Board's distance learning Latin program conforms to the distance learning model for world languages contained in the World Languages Curriculum Framework Second Draft, Exhibit Q.

The inherent nature of a distance learning program, that is, enabling students to take courses offered in other schools or universities, to collaborate on projects with remote peers or mentors, and to access a wide array of electronic services for achievement of the Core Curriculum Content Standards infers that the certification provisions of *N.J.A.C.* 6:11-3.1 and other sections do not apply to distance learning programs adopted by district boards of education pursuant to the Comprehensive Education Improvement and Financing Act of 1996. Our courts recognize that administrative agencies must have flexibility to respond to changing conditions and technologies. In *Radiological Society of New Jersey v. N.J. State Dept. of Health*, 208 *N.J. Super.* 548, 559-560 (App. Div. 1986), the court decided an appeal from a determination requiring that providers obtain a certificate of need as a prerequisite to reimbursement for coaxial

scanning and magnetic resonance services furnished to hospital patients. The Appellate Division held that the contested determination was "inferable from the enabling statutory authority." The court went on to state in its conclusion that it was guided by the administrative agency's need for flexibility:

> Nevertheless, we also recognize that administrative agencies must possess the ability to be flexible and responsive to changing conditions. *Texter v. Human Services Dept., supra*, 88 *N.J.* at 385 (1982). This flexibility "includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy. *Ibid.* Toward that end, "courts and commentators have encouraged hybrid agency proceedings as a way of producing more reasoned agency decision, especially in complex and controversial policy areas." *Ibid.* While this discretion is not unlimited, we must defer to the choice made as long as the selection is responsive to the purpose and function of the agency. *Id.* at 385-386. We perceive no justifiable basis to disturb the agency's determination here. *N.J. School Boards Ass'n v. State Health Benefits Comm'n*, 183 *N.J. Super.* 215 (App. Div. 1981; *Equitable Life Mort. v. New Jersey Div. of Taxation*, 151 *N.J. Super.* 232 (App. Div. 1977).

The Department of Education's determination that distance learning teachers are not required to have certification in the State of New Jersey (Exhibit M) is responsive to the purpose and function of the Department's statutory mandate under *N.J.S.A.* 18A:7F-4 to establish procedures for setting and maintaining standards for efficient delivery of programs and services that will accomplish the goals established by Core Curriculum Content Standards. The Department's determination was appropriate to carrying out legislative policy.

The Board also argues that the Association's claim is time-barred by *N.J.A.C.* 6:24-1.2(c). The petition challenges the Board's contract with STARNET to provide distance learning credit courses in Latin I, II and III. The Board approved the contract and courses on August 28, 1999. Exhibit E. The petition challenging the Board's action was filed on November 30, 1999, beyond the 90-day limit established by *N.J.A.C.* 6:24-1.2(c).

The Participant

The New Jersey Education Association filed a letter brief on January 7, 2000. The state association argues largely as does the local association. The NJEA asserts that, although the Board may argue this case involves issues of the implementation of world language instruction and the increased use of educational technology, the real issue is whether a board is permitted to provide foreign language instruction to its students for graduation credit through the use of non-certified personnel. The issue has been determined by the State Board of Education in *Guttenberg Education Association v. Board of Education. of the Borough of Guttenberg*, St. Bd. decision (March 3, 1999) http://lawlibrary.rutgers.edu/oal/search.html, in which it concluded that "employment as a foreign language teacher is of such character that the qualifications for such service require appropriate certification" (slip op. at 6). In *Guttenberg*, the Board entered into a contract with Berlitz International, Inc., a private contractor, for provision of world language teaching. Because the Berlitz teachers did not hold the appropriate teaching certificates that would entitle them to teach foreign language classes in the New Jersey public schools, the Board applied to the Commissioner for an equivalency waiver from the requirements of *N.J.A.C.* 6:29-3.3(c). Specifically, the Guttenberg Board sought permission to use county-certified substitute teachers to replace academic classroom teachers in foreign language instruction. While the equivalency application was pending, the Board employed a county-certified substitute teacher who did not hold the requisite standard teaching certificate to teach Spanish on a regular basis. This individual did not replace a teacher on leave, but filled a vacant position.

After the Commissioner granted the equivalency waiver for a three-year period, an appeal was filed with the State Board contesting the legality of permitting individuals having only county substitute certificates to deliver world language instruction. The parties submitted a proposed settlement of the appeal that indicated that the Board had determined not to "use the equivalency" that it had been granted and would refrain from employing an individual with a county substitute certificate to teach any foreign language. Nevertheless, the State Board of Education determined it was necessary to resolve the underlying certification issue. In invalidating the equivalency waiver, the State Board declared:

> [W]e have concluded that the responsibility of the State Board of Education for the general supervision of public education, *N.J.S.A.* 18A:4-10, and for the enforcement of the education laws of this state, *N.J.S.A.* 18A:4-15, preclude us from permitting the Commissioner to exercise the authority we have delegated him by the adoption of *N.J.A.C.* :3A-1.1 *et seq.* to set aside certification requirements that would otherwise apply. In that the equivalency granted by the Commissioner in this case would have such an effect, we conclude that it is invalid (slip op. at 4).

The State Board noted that the Guttenberg Board had been granted an equivalency waiver to *N.J.A.C.* 6:29-3.3(c), which permits the holder of a county substitute certificate to serve as an athletic coach in the school district in which that individual is employed, provided the chief school administrator can demonstrate that there is no "qualified and certified" applicant for the position. An argument was made on appeal that the Commissioner was justified in granting Guttenberg's equivalency waiver as it enabled the district to meet its need to develop a world language program. Nevertheless, the State Board recognized both the error made in issuing a waiver of the certification requirements for a foreign language teacher under the regulation governing coaches, for whom there are no certification requirements, as well as the error of issuing a waiver of the certification requirements established by the State Board of Examiners for service as a foreign language teacher. The State Board stressed in its decision "employment as a foreign language teacher is of such character that the qualifications for such service require appropriate certification." Even the district's need to develop a world language program did not justify setting aside the certification requirements.

As did the Guttenberg Board, the Neptune Township Board is trying to thwart the certification requirements established for a foreign language teacher. In using STARNET's services, the Board is permitting its students to be taught Latin by an individual who does not hold the requisite foreign language certification. This is further exacerbated by the fact that the Latin lessons that are being transmitted to the Neptune students via closed circuit television are being "monitored" by individuals who do not hold the necessary foreign language certification to teach Latin. What makes the Board's actions particularly egregious is the fact that the Board has a teacher in its employ who possesses the appropriate certification to teach Latin, the same teacher who provided Latin instruction in the district for more than ten years.

The State Board of Education recognized in *Guttenberg*:

> [C]ertification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. *N.J.S.A.* 18A:1-1; *N.J.S.A.* 18A:26-2. As such, and under the current statutory framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education. . . . Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules unnecessarily risks such a compromise. (Slip op. at 7).

DETERMINATION AND ORDER

Today's case is on all fours with the State Board of Education decision in *Guttenberg* in major respects. In *Guttenberg*, however, a circumstance existed that is not present here. The Guttenberg Board had been unable to employ a properly certificated foreign language teacher. Notwithstanding the Board's claim that there were emergent circumstances and that the use of non-certificated foreign language teacher was justified by emergency, the State Board decided that the Guttenberg Board could not legally employ the services of a person within the district who did not possess the appropriate New Jersey instructional certificate and the appropriate foreign language endorsement.

In Neptune Township, by contrast, there is a properly certified teacher of Latin. The Board decided not to employ Ms. Smith as a Latin teacher during the 1998-99 school year and the present school year. It decided to use the services of a private corporation. The corporation, STARNET, would provide through distance learning an instructor who did not possess a New Jersey State certificate. If it was not proper in an emergency situation to use a non-certificated teacher to provide foreign language instruction, then all the more, a local board of education cannot properly replace an appropriately certificated language teacher with a program via television.

The *Guttenberg* decision controls. Distance learning and other techniques, if employed to supplement academic instruction provided by certified teachers, are appropriate. The State Board of Education has declared that these mechanisms may not supplant a properly certified teacher.

It may be useful to momentarily put aside the statutes and regulations and look at what caused the petition of appeal to be filed. Pupils who want to study Latin at Neptune High School meet at a designated time and watch television programs containing Latin instruction presented by a person not the holder of a New Jersey teacher certificate, let alone a foreign language endorsement on a New Jersey teacher certificate. The pupils in the room are supervised or monitored by Department chairpersons who do not hold foreign language endorsements on their teaching certificates. It is not known if either or both of these persons ever studied Latin. Obviously, the television instructor cannot be asked questions. There is no interactivity.

On the question of credits awarded for the Latin courses under the former arrangement and the new arrangement, I am not provided enough information to find that the term "credit" has the same meaning in both contexts. Nor is the important issue of time devoted to instruction sufficiently developed to allow findings. It may be that what STARNET calls one credit is what the Department of Education used to call one unit. It may also be that instructional time is equal or substantially equal under the two regimens. In light of the ultimate holding herein, it may not be necessary to decide these questions.

From an insurance liability point of view, the presence of certificated persons in the room suffices. In educational terms, it does not. *N.J.A.C.* 6:11-6.1 makes clear that "each teaching endorsement is required for the corresponding teaching assignment." It is not denied that the television teacher is not appropriately certified. Thus, if an appropriately certified teacher were conducting the course and using the television programs as a supplement, there would be no problem. However, the television instruction is being used to supplant rather than supplement the program of Latin instruction. This is different from the situation in *Impey*, above. There, the Court held that a local board of education could enter into a contract with an educational services commission to obtain speech correction services for its eligible pupils. 142 *N.J.* at 396. It is obvious that *Impey* deals with speech correction services, not instruction. Further, the persons

employed by the educational services commission to provide speech correction services held appropriate New Jersey certificates.

Nor can I agree with the respondent's reading of the Public School Contracts Law. While it is true that the law excludes contracts of employment, and does permit contracts for the performance of work or hiring of services, the law must be read as a whole. At *N.J.S.A.* 18A:18A-2(c), the following: "Contracts" for the purpose of this chapter means contracts or agreements for the performance of work or the furnishing or hiring of services, materials, or supplies as distinguished from contracts of employment. At *N.J.S.A.* 18A:18A-2(h), "Professional services" means services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services also means services rendered in the performance of work that is original and creative in character in a recognized field of artistic endeavor. The plain words in these definitions do not support the Board's arguments.

Teachers supply professional services. They are persons authorized by law to practice a recognized profession which is regulated by law. The performance of that profession requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study. More than that, however, every teaching staff member in New Jersey public schools must possess a valid certificate issued by the State Board of Examiners.

Plain reasoning dictates that the requirements are not met in the distance learning arrangement at Neptune High School for Latin instruction. The Board's authority to contract with STARNET is not properly inferable from the provisions of the Comprehensive Educational Improvement and Financing Act. It must be noted that the Board appears to have acted in good faith and to have acted in great part upon information provided by the Department of Education.

This reliance does not excuse the failures of the program. The Association would like the Board ordered to provide foreign language instruction through use of the Board's own

employees. The Association also asks that the Board be ordered to cease and terminate all subcontracting arrangements with STARNET. Further, the Board should be prohibited from procuring Latin instruction services from private contractors, vendors, corporations, persons who are entities. This is perhaps too much. Certification requirements establish the threshold for teaching staff members employed in the public schools. Under the current statutory framework, the certification process is critical to assurance of the provision of a thorough and efficient education. A new delivery system, a new technique or an innovative approach, while all should be encouraged, cannot properly push aside certification requirements.

Exhibit N is a January 26, 1999 memorandum to chief school administrators from the Assistant Commissioner of Education for Academic and Career Standards addressing certification for world languages. Under "Staffing Options," seven possibilities are suggested. The first five state or imply that staff must be appropriately certified. Options six and seven are instructive:

> Option 6: Employment of paraprofessionals who possess the necessary skills to assist with the delivery of language instruction may be considered provided that they are under the supervision of a certificated staff member in the classroom.
>
> Option 7: Districts may use resource persons in conjunction with a certificated staff member in the classroom to assist in implementing a program similar to the program process outlined in *N.J.A.C.* 6:29-4.2(g) for family life education. College students, pre-service teachers, parents, or other interested and qualified members of the community with the necessary language skills may be considered. This person shall be under the supervision of the certificate (*sic*) staff member in the classroom.

The documents very clearly speaks for itself.

Even reliance on the World Languages Coordinator's letter of March 3, 1999 to the Neptune Superintendent is unavailing because the Coordinator states "Research has shown that when the instructional process and goals of the program are <u>properly monitored by a certified teacher</u>, distance learning is compatible with second language learning, ..." [Emphasis by this

writer.] Exhibit M. It would make little sense to read this as implying that any certified teacher could do the job. Only an appropriately certified language teacher can reasonably be expected to address properly the many things and questions that inevitably arise in the classroom.

The present petition is not untimely. The Board acted to enter a contract with STARNET on August 26, 1998. Exhibit E. The petition was filed with the Commissioner of Education on November 25, 1998, ninety-one days after the Board adopted the resolution approving an arrangement with STARNET. The president of the Association avers that she, the Association and Natalie Smith did not know on August 26 that the Board did not intend to employ a teacher holding a Latin endorsement on a valid teaching certificate. This was not known until the week beginning September 7, 1998. And it took until November 9, 1998 to determine that the television instructor lacked appropriate certification. Inasmuch as *N.J.S.A.* 18A:27-2 forbids employment of a person to teach unless the person is the holder of an appropriate certificate, the ninety days contemplated in *N.J.A.C.* 6:24-1.3(c) began to run on the first day the distance learning arrangement was used and began to run on each day thereafter the arrangement was used.

Even if the violation of *N.J.S.A.* 18A:27-2 is not deemed a continuing violation, the subject of the case is of such gravity as to justify relaxation of the 90-day rule. The Board says information regarding the STARNET contact was available to the public (including the Association) on August 26. The Appellate Division, the State Board of Education and the Commissioner have each rejected such narrow construction of the rule. In *Meyer v. Board of Education of Wayne*, 1986 *S.L.D.* 3094, the State Board observed, *inter alia*, at 3098, "in the absence of actual knowledge, the cause of action accrues only upon notice sufficient to alert the teaching staff member who has been adversely affected . . . ." In *Myer*, a reduction in force was at question.

More recently, the Appellate Division spoke similarly in *Kaprow v. Berkeley Tp. Bd. of Educ.*, 225 *N.J. Super.* 76, 89 (App. Div. 1992):

> We disagree with Kaprow's contention that the Local Board's lawyer's letter of June 14, 1988 constituted the order,

> ruling or action taken by the Local Board on his claim. The final order, ruling or other action by the Local Board occurred when it appointed nontenured persons to positions to which Kaprow claims tenure rights. Ciliento was appointed Assistant Superintendent of Administrative Services in 1986 and Ms. McGuckin was appointed District Supervisor of Elementary Education in 1987. However, because of the Local Board's unexplained failure to create a preferred eligibility list at the time Kaprow was riffed pursuant to *N.J.S.A.* 18A:28-12, and failure to notify him of these openings pursuant to the local board's attorney's letter dated September 22, 1981, Kaprow had no notice of the openings nor of the Board's final order, ruling or other action filing those openings. But, on February 23, 1998, Kaprow was clearly advised by the Local Board's secretary of these appointments, to which he promptly responded by asserting his claims. Thus, we agree with the State Board that it was at that time that the controversy or dispute came into being and Kaprow was obliged, pursuant to *N.J.A.C.* 6:24-1.2(c), to file his petition no later than 90 days from the receipt of the letter from the Local Board's secretary dated February 23, 1998. Yet, he did not file the petition until August 1, more than five months after receipt of the February 23 letter and two and half months after the deadline he himself had established for the Local Board to respond to his follow-up letter of April 25, 1988. Thus, his claims were time barred as found by the State Board. [Emphasis added.]

Accordingly, I **ORDER** the Neptune Township Board of Education to cease provision of Latin instruction via STARNET effective July 1, 2000. Because there may be other lawful methods for providing this instruction, I do not **ORDER** that the Board use its own employees to provide Latin instruction. There would be some relationship, of course, between the Board and any person or persons providing Latin instruction. That relationship is secondary, however, to appropriate certification.

The Association also wants an order directing the Board to cease and terminate all subcontracting arrangements with STARNET. This, too, overreaches. There may be lawful and appropriate arrangements between STARNET and the Board that do not violate either statute or code. For example, much of what has been provided via STARNET in the last two school years might appropriately supplement Latin instruction provided by a properly certified teacher.

Nor am I willing to order that the Board be prohibited from procuring Latin instruction services from private contractors, vendors, corporations, persons or entities. Again, it is not the character of the provider that controls. Rather, it is the possession of appropriate certification. The prohibition the association seeks would be overly broad.

In consideration of the foregoing, the petition of appeal of the Neptune Township Education Association is **GRANTED**. The appropriate remedies are found in the orders, above.

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

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

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

MAR 2 3 2000
DATE

Bruce L. Campbell
BRUCE CAMPBELL, ALJ

Receipt Acknowledged:

3/24/00
DATE

Deborah Gottesman
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 2 8 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

LIST OF EXHIBITS

Joint:

J-A Letter, Riley to Mixon, February 9, 1999

J-B Letter, Lake to Maddaluna, July 23, 1998

J-C Letter, Maddaluna to Lake, August 4, 1998

J-D Summary of certificates held by Donley and Williams

J-E Excerpt, Board of Education meeting minutes, August 26, 1998

J-F Course Description Guide, 1998-99 (excerpt)

J-G Latin I roster

J-H Latin II roster, February – May 1999

J-I Course Description Guide, 1997-98 and 1994-95 (excerpts)

J-J Neptune High School Foreign Language Curriculum, 39 pp.

J-K General Information (17 pp.), Student Instruction 1997-98 (6 pp.), STARNET

J-L Letter, Lake to Jensen, February 22, 1999

J-M Letter, Jensen to Lake, March 3, 1999

J-N Memorandum, Schechter to Chief School Administrators re: Certification for World Languages, January 26, 1999, 4 pp.

J-O Letter, Lake to Schechter, March 1, 1999

J-P Letter, Schechter to Lake, March 10, 1999

J-Q Educational Technology in New Jersey
Vision and Benchmarks by 2002, N.J. Department of Education, World Languages Framework, undated, 49 pp.

J-R Guttenberg Education Association v. Klagholz and Guttenberg Board of Education, State Board decision, March 3, 1999, 8 pp.

J-S Article re: Latin course resurgence in New Jersey schools, Star-Ledger, March 19, 1999, 2 pp.

OAL DKT. NO. EDU 392-99
AGENCY DKT. NO. 537-11/98

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, RESPONDENT.	:	DECISION

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

Upon such review, the Commissioner concurs with the ALJ that the petition of appeal should not be dismissed as untimely. The Commissioner further concurs that the holding of the State Board of Education in *Guttenberg*, *supra*, controls in this matter, so that the Latin instruction provided through respondent's distance learning program could not lawfully be delivered by a person not in possession of appropriate New Jersey certification.

Accordingly, the Commissioner affirms the order of the OAL directing respondent to cease its current means of providing Latin instruction through STARNET. Like the ALJ, the Commissioner does not find it necessary under the facts presented in this matter to reach further issues.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 22 2000
Date of Mailing: MAY 22 2000

[1] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

V.A AND Q.A., on behalf of minor child, J.L.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 26, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9802-98
Agency Dkt. No. 428-9/98

V.A. AND Q.A. ON BEHALF OF MINOR CHILD, J.L.J.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE MAPLEWOOD, ESSEX COUNTY

Respondent.

V.A. and Q.A. o/b/o minor child, **J.L.M.**, *pro se*

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

Record Closed: March 31, 2000 Decided: April 6, 2000

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on October 29, 1998 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a Stipulaton of Settlement which is attached and fully incorporated herein.

I have reviewed the record and the agreement and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

April 6, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

April 11, 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and Maplewood Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

MAR 31 9 26 AM '00

V.A. and Q.A., ON BEHALF OF THE MINOR CHILD, J.L.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 428-9/98
OAL DKT NO. EDUOS 09802-98N

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioners Victor Allen and Quinster Allen and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. As a result of the foregoing. Petitioners Victor Allen and Quinster Allen withdraw their Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

3/14/2000
VICTOR ALLEN Date

3/20/00
SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION Date

Quinster Allen 3-14-2000
QUINSTER ALLEN Date

Document #: 401078/JLB

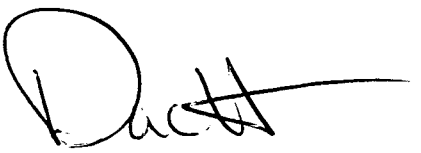
OAL DKT. NO. EDU 9802-98
AGENCY DKT. NO. 428-9/98

V.A AND Q.A., on behalf of minor child, J.L.J., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY, RESPONDENT.	:	DECISION

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: MAY 26 2000

Date of Mailing: MAY 26 2000

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Burlington Board contested the determination of the Department that the Board was responsible for tuition costs and expenses for R.E., a special education student placed in a residential facility.

The ALJ determined that R.E.'s mother, also R.E., lived in respondent's District at the time of placement. The Board admitted that R.E. lived in the District from February 1996 until June 1996, but contended that R.E. was never a legal resident since she lived with a friend temporarily. The ALJ determined that the district of residence for the purposes of *N.J.S.A.* 18A:6-9, *N.J.A.C.* 6:5-1.1 through 5-1.10, and *N.J.A.C.* 6:24 was Burlington, on the date of the child's placement in a residential facility. Petition was dismissed.

The Commissioner adopted findings and determination in Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6011-97

AGENCY DKT. NO. 160-5/97

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,

Petitioner,

v.

NEW JERSEY DEPARMTNET OF EDUCATION, OFFICE OF FINANCE,

Respondent.

Thomas J. Scattergood, Esq., for petitioner

Robert Bates, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: February 9, 2000 Decided: April 13, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

In this matter, the Board of Education of the City of Burlington, Burlington County (petitioner) contests the determination of the Department of Education, Bureau of School Finance (respondent). The issue involved the placement of a special education student by the Division of Youth and Family Services in a residential facility. The respondent had determined that the district of residence of the parent of this special education student at the time of her placement was the City of Burlington, and that, accordingly, petitioner is responsible for the tuition costs of

providing the student with a free, appropriate public education. *N.J.S.A.* 18A:7B-12, *N.J.A.C.* 6:20-5.3 and *N.J.A.C.* 6:20-5.4.

Respondent determined that R.E. was a resident of 522 B. Road, Burlington, N.J., at the time of the placement of her daughter. The daughter of R.E. (whose initials are also R.E.) was placed in Willowglen Academy, a group home, under a voluntary residential placement agreement on February 6, 1997. At the time of the placement, R.E. gave DYFS the address of 522 B. Road. For her and her daughter's residence.

Petitioner's position was that 522 B. Road is a single family house owned by RJT Enterprises of Burlington, and that this house was leased to J. and D. W., by assignment of the original lease, from R.L., the original leaseholder P-5. D.W. lives there now with her 3 minor children.

Petitioner admitted that R.E. lived in Burlington City from February, 1996 until June, 1996. Petitioner said that R.E. now resides at 222 U. Street, Beverly, N.J., and has done so since about May, 1997. *R.E. was in Burlington City, on April 18, 1997.*

Petitioner's witness, John A. McBride, said that the Burlington City housing ordinance (P-1) required a certain amount of space in a residence for the number of people in residence, and that 522 B. Road could not legally hold R. E., her daughter, and the legal tenants, J. and D. W. (neé D.S.), and D.W.'s three children. The landlord said that he had no knowledge that R.E. and her daughter lived at 522 B. Road, and D.W. said that R.E. does not live there now.

Joanne Fadol, of the Division of Youth and Family Services (DYFS), said that the information that R.E. lived at 522 B., Bordentown, from July, 1996 through July, 1997 came from the client, R.E., herself. She said no one from her agency performed a home visit or otherwise went to the reported address to verify that R.E. lived there.

Burlington City says that R.E. was never a legal resident of 522 B. Road, but there is no requirement in the law that she be legally a tenant, or that her presence in the house she occupied be in accordance with a municipal ordinance, or that she be known to the landlord.

Evidence was presented that R.E. lived in Burlington City on February 21, 1996. Her residence on the critical date of February 6, 1997, is known only from the statement she gave to DYFS in arranging her daughter's placement.

The petition of Burlington City itself states that "the tenant was a friend of R.E. and permitted her stay temporarily at these premises in February, 1997 for a couple of weeks while she was in transit searching for an apartment and a permanent address."

I believe that petitioner's statement is true. R.E. lived with a friend temporarily. While she and her child were living with that friend, her child was placed in residential care. The district of residence for the purposes of *N.J.S.A.* 18A:6-9, *N.J.A.C.* 6:5-1.1 through 5-1.10, and *N.J.A.C.* 6:24, was Burlington, on the date of the child's placement in a residential facility. *Board of Ed. of Maurice River v. Board of Ed. of Wildwood*, 93 *N.J.A.R.* 2d (EDU) 895, interpreting *N.J.A.C.* 6:3-8.3(b)(6), recodified as *N.J.A.C.* 6:5-1.8.

The appeal of Burlington City is **DENIED.**

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

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

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

April 13, 2000
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

April 17, 2000
DATE

W. M. Cantanucci Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 18 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For Petitioner:

John A. McBride, Attendance Officer, Burlington City

For Respondent:

Joanne Fadol, Supervising Family Service Specialist II

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Ordinance, Minimum Housing Standards, 18 pages
P-2 photograph
P-3 Residential Property Record Card, 3 pages
P-4 Deed, 2 pages
P-5 Lease Agreement, 2 pages
P-6 Application for Certificate of Occupancy
P-7 Amendment to the Lease
P-8 documents, 2 pages
P-9 Letter, Haines to Gola, March 25, 1997
P-10 Letter, Wyns to Gola, March 18, 1997
P-11 Willowglen Academy to City of Burlington, August 31, 1999
P-12 Certificate of Occupancy

For Respondent:

R-1 District of Residence Determination, 5 pages

OAL DKT. NO. EDU 6011-97
AGENCY DKT. NO. 160-5/97

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the Initial Decision of the ALJ. Accordingly, the within petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 01 2000

Date of Mailing: JUN 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

169-00
CONSOLIDATED
WITH 91-00

IN THE MATTER OF BRUCE WHITE, :

EWING TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, MERCER COUNTY. : DECISION

:

SYNOPSIS

Citing *In the Matter of Frank Pannucci*, the School Ethics Commission concluded that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when, as a Board member, he negotiated and voted on a contract with a local bargaining unit where his wife was a member of the same statewide general union. The Commission recommended that the Commissioner impose a penalty of removal from the Board.

During the pendency of the administrative proceedings, the State Board of Education reversed the Commission's decision in *Pannucci*. The Commissioner found that, given the change in law that had occurred during the ongoing proceedings in this matter, he could not adequately assess the Commission's recommended penalty without having the benefit of that body's review of its decision in light of the State Board's ruling in *Pannucci*. The Commissioner, therefore, returned the matter to the Commission so that it could determine what effect, if any, the State Board's reversal of prior decisional law might have on its finding of violation and recommended penalty.

In its decision on return, the Commission considered the effect of the *Pannucci* decision on its finding of a violation and the penalty recommendation. The Commission reaffirmed that respondent violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act and added that the facts also established a violation of *N.J.S.A.* 18A:12-24(a) and (b) and reaffirmed its recommendation that the Commissioner impose a penalty of removal from the Board.

The Commissioner reiterated that the findings and conclusions of the Commission as to what occurred or whether it was a violation of the School Ethics Act are outside the scope of the Commissioner's review and must be accepted by him in reviewing the Commission's recommended penalty. The Commissioner determined that the violations of *N.J.S.A.* 18A:12-24(b) and (c) found by the Commission were insufficient to warrant the extreme result of respondent's removal from elected office. The Commissioner determined that the appropriate penalty to be imposed upon respondent as a school official found to have violated *N.J.S.A.* 18A:12-24(a), (b) and (c) of the School Ethics Act, under the circumstances set forth by the Commission, was suspension from the Ewing Board of Education for a period of 45 days.

170-00

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN YATAURO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF LACEY, OCEAN COUNTY.	:	

June 2, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10092-99S (EDU 00793-99S Remanded; EDU 08619-97 Remanded)

AGENCY DKT. NO. 347-9/97

LACEY TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

BRIAN YATAURO,

Respondent.

Arthur Stein, Esq., for petitioner (Arthur Stein and Associates, attorneys)

Steven R. Cohen, Esq., and **Keith Waldman**, Esq., for respondent (Selikoff and Cohen, attorneys) and **Henry F. Collins, III**, Esq., (Collins and Berman, attorneys)

Record Closed: April 17, 2000 Decided: April 19, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from an October 13, 1999, remand by the Commissioner of Education ("Commissioner") of *Lacey Twsp. Bd. of Ed. v. Brian Yatauro*, EDU 00793-99S (EDU 08619-97 remanded), Initial Decision, (July 12, 1999), <http://lawlibrary.rutgers.edu/oal/search.html>. In particular, the Commissioner remanded the matter to the Office of Administrative Law ("OAL") "[S]olely for expansion of the record to resolve the exact amount of setoff, if any, the Board may deduct from these monies owed for compensation respondent received from substituted

employment." The matter was transmitted to the OAL on November 18, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

April 19 2000
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

4/20/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 24 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

RECEIVED
APR 17 10 47 AM '00
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ARTHUR STEIN & ASSOCIATES, P.C.
1041 West Lacey Road
P.O. Box 1070
Forked River, NJ 08731-6070
(609) 693-6200
Attorneys for
Lacey Township Board of Education
8983AS

LACEY TOWNSHIP BOARD OF EDUCATION, Petitioner, vs. BRIAN YATAURO, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OCEAN COUNTY OAL DOCKET NO. EDU 08619-97S AGENCY REF. NO. 347-9/97 STIPULATION OF FACTS ON REMAND FROM THE NEW JERSEY COMMISSIONER OF EDUCATION TO THE OFFICE OF ADMINISTRATIVE LAW

The Petitioner, Lacey Township Board of Education, and the Respondent, Brian Yatauro, hereby agree and stipulate to the following:

1. This matter has been remanded to the Office of Administrative Law for the expansion of the record to resolve the exact amount of set-off, if any, the Lacey Township Board of Education may deduct from monies owed to the Respondent for the period of January 14, 1998, through February 28, 1999, by way of compensation Respondent received from substituted employment.

2. Respondent's claim for compensation to be paid by Petitioner was $47,930.43.

3. Respondent provided evidence of gross earnings by Respondent in the gross amount of $37,519.46 covering the period of January 14, 1998, through December 31, 1998.

4. Respondent provided evidence of gross earnings by Respondent for the period of January 1, 1999, through February 28, 1999, in the gross amount of $7,350.00.

5. The Petitioner and the Respondent agree that the Board is entitled to mitigation for the gross earnings as follows:

> For the period of January 14, 1998, through December 31, 1998, the sum of $24,600.00.
>
> For the period of January 1, 1999, through February 28, 1999, the sum of $6,400.00.

The Petitioner and the Respondent agree that the total amount of mitigation due the Petitioner is $31,000.00.

6. The Petitioner and the Respondent agree that after reduction of mitigation in the amount of $31,000.00 from the total gross pay received for the period in question of $47,930.43, the amount to be paid to Respondent by Petitioner pursuant to the Order of the Commissioner of Education is $16,930.43.

7. The Petitioner and Respondent request an entry of an Initial Decision and an Order by the Administrative Law Judge directing payment by the Petitioner to the Respondent in the gross amount of $16,930.43, which sum shall be reduced by standard deductions and which reduced amount is to be due a

payable by the Petitioner to the Respondent no later than 60 days from the date of the Commissioner's decision.

PETITIONER:
LACEY TOWNSHIP BOARD OF EDUCATION

By _____
Arthur Stein,
Attorney for Petitioner

RESPONDENT:
BRIAN YATAURO

By _____
Henry F. Collins, III
Attorney for Respondent

AS:ar
8983stipfact

OAL DKT. NOS. EDU 793-99 AND EDU 10092-99 (ON REMAND)
AGENCY DKT. NO. 347-9/97

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN YATAURO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF LACEY, OCEAN COUNTY.	:	

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

COMMISSIONER OF EDUCATION

Date of Decision: JUN 02 2000

Date of Mailing: JUN 02 2000

C.C., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4036-00

AGENCY DKT. NO. 161-5/00

C. C. ON BEHALF OF HER MINOR SON, R.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON,

Respondent.

C. C., petitioner, *pro se*

Frank P. Cavallo, Jr., Esq., on behalf of the respondent (Parker McCay & Criscuolo, P.A., attorneys)

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed with the Commissioner of Education (Commissioner) on May 16, 2000. The petitioner raises a number of issues and asks for emergent relief to stay the proposed detention of R.S., which C.C., his mother, alleges was improperly imposed.

The matter was transmitted on May 16, 2000, to the Office of Administrative Law, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-t o –13, prior to the filing of any papers by the respondent, since the petitioner is requesting emergency relief.

The oral argument as to the motion for emergency relief took place on June 1, 2000.

This order deals only with the motion for emergency relief.

Emergency relief is an extraordinary equitable remedy and the burden of proof is on the petitioner to show that (1) there is a threat of immediate and irreparable harm to the petitioner, (2) there is a probability that the petitioner will eventually succeed on the merits, and (3) the legal rights are settled; and (4) that the inconvenience or loss to the Board will be nominal. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); *New Jersey Bar Association v. Northern New Jersey Mortgage Associates*, 22 *N.J.* 184 (1956); *N.J.A.C.* 1:1-12.6; *N.J.A.C.* 6:24-1.5.

Based on the petition and the oral arguments, I **FIND** that the facts pertinent to this motion are not in dispute.

On or about April 5, 2000, a teacher reported that R.S. was copying homework answers from another student's book in the school's hallway between classes. The teacher sent a note to C.C. stating that R.S. had cheated and that he was going to receive an incomplete for the assignment and would be kept after school the following Thursday so that he could complete the homework. It was estimated that this after-school detention would be for about 20 minutes.

C.C. spoke to her son and R.S. denied that he was cheating. R.S. told his mother that he had not completed his homework and that he was doing it in the hall. C.C. also spoke to the other student involved who also denied that R.S. was copying his homework answers.

C.C. spoke to the teacher and then to the superintendent and was told that R.S. would have to serve the detention which had been increased to 45 minutes. C.C. refused to allow her son to serve the detention. C.C. then spoke to the President of the Board of Education who arranged for a hearing as to the detention matter on May 2, 2000. The Board affirmed the detention and the petition in issue was therefore filed with the Commissioner.

C.C. argued that the teacher's observation was faulty, that her son was not cheating and that he should not serve any period of detention. C.C. stated that there have been several

incidents at school involving her son which have resulted in a bad relationship between her and school's personnel. These incidents have affected R.S. and her son has seen a doctor for stress-related problems. C.C. thinks that R.S. is afraid of his teacher.

C.C. argued that it would be harmful to her son to be required to serve the detention prior to a hearing to determine whether or not he cheated as to his homework assignment. Also, C.C. was confident that at the hearing it would be shown that her son did not cheat as to the homework.

Frank P. Cavallo, Jr., Esq., on behalf of the respondent, argued that there is a strong likelihood that the petitioner will not prevail in the matter. Mr. Cavallo stated that pursuant to *N.J.S.A.* 18A:37-1 students are required to comply with school rules and he argued that the Board correctly affirmed the detention in the matter. Mr. Cavallo argued that the petitioner has not shown any irreparable harm will result if R.S. served the detention. Mr. Cavallo argued that the granting of the motion will cause a problem to the Board since the Board is concerned about the upholding of its right to discipline students and to be consistent with its discipline.

I have a concern regarding the increase in the length of the detention imposed on R.S. The Board's position is that the increase is consistent with the Board's rules. I question the increase which apparently was imposed because R.S.'s mother has refused to allow her son to serve the detention. However, I recognize that it has been clearly established that the Commissioner should not interfere with the management of schools by the local boards and to substitute his judgment for that of the local boards as to matters delegated to the local boards by statutes. *Boult and Harris v. Bd. of Ed. of Passaic*, 1939-49 S.L.D. 7, aff'd, *State Bd. of Ed.* 1939-49 S.L.D. 15, aff'd, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd, 136 N.J.L. 521 (E.&A., 1948).

I am persuaded by Mr. Cavallo's argument that R.S. would not suffer any irreparable harm and that there is a likelihood that the petitioner will not succeed in this matter. Since I have **CONCLUDED** that the petitioner has not shown irreparable harm or a likelihood of being successful in this matter, I **DENY** the motion for emergent relief.

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

June 2, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

/cad

OAL DKT. NO. EDU 4036-00
AGENCY DKT. NO. 161-5/00

C.C., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law on June 1, 2000, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Petitioner's exceptions were timely submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in rendering his determination herein.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. Petitioner's request for emergent relief is denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 08 2000

Date of Mailing: JUN 08 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

171-00

EDU #4036-00
C # 171-00E
SB # 34-00

C.C., on behalf of her minor son, R.C.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 8, 2000

For the Petitioner-Appellant, C.C., pro se

For the Respondent-Respondent, Parker, McCay & Criscuolo (Frank P. Cavallo, Jr., Esq., of Counsel)

Appellant, the parent of a student attending school in the Riverton school district, filed a petition of appeal and a request for emergent relief with the Commissioner of Education challenging the Riverton Board's determination to uphold the after-school detention imposed against her son for allegedly copying homework answers from another student. On June 8, 2000, the Commissioner of Education denied the appellant's request for emergent relief, finding that she had failed to satisfy the standard for such relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

On June 15, 2000, the appellant filed a notice of appeal with the State Board of Education from the Commissioner's denial of her request for emergent relief.

SEPT. 6, 2000

Pursuant to N.J.A.C. 6A:4-1.11(a), the appellant's brief in support of her appeal was due on July 5, 2000, 20 days after she filed her notice of appeal. The appellant, however, failed to file a brief by that date. By letter dated July 13, 2000, the Director of the State Board Appeals Office notified the appellant of her failure to file a brief and informed her that this matter was being referred to the Legal Committee of the State Board for consideration of her failure to perfect the appeal.

The appellant has still failed to file a brief in support of her appeal, nine weeks after the deadline for such filing and eight weeks after she was notified of such failure. Nor has she offered any explanation for her failure to file or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

September 6, 2000

Date of mailing SEP 08 2000

172-00

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AND AFL-CIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's adoption of a policy prohibiting the possession and use of portable paging or telecommunication devices by employees during school hours. Subsequent to the initiation of the petition, the parties agreed that the employees would place their cellular phones and pagers in a mutually agreed-upon location, *e.g.*, an administrative office, and could use those devices during their lunch periods. A hearing was held on the remaining issue regarding employee use of cellular phones during their preparation or professional periods.

Initially, the ALJ concluded that petitioners challenged the policy as applied and that the case was properly before the Commissioner of Education and the Office of Administrative Law. The ALJ concluded that there is no constitutional right to cellular telephones and pagers and that there is no constitutional right specifically affected by their prohibition. The ALJ also concluded that the Board's policy was not vague as charged, since the conduct prohibited was clear and all employees received a copy of the policy and the superintendent's memorandum noticing employees that violation of the policy might result in appropriate disciplinary action. Finally, the ALJ concluded 1) that the Board had reasonable rationale to adopt the policy, 2) that there was insufficient reason to nullify the policy because it permits the superintendent on a case-by-case basis to allow personnel to have a portable pager or to issue disciplinary action for violating the policy and 3) that petitioners failed to demonstrate that the Board acted arbitrarily, capriciously or unreasonably in adopting a policy which forbids the employees from possessing cellular telephones and pagers during preparation or professional periods. Petition was dismissed.

The Commissioner adopted findings and determination in Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9848-97
AGENCY DKT. NO. 289-8/97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AND AFL-CIO,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

Respondent.

Victor M. Mullica, Esq., for petitioners (Mullica and Mullica, attorneys)

Jack Gillman, Esq., for respondent (Hanly and Ryglicki, attorneys)

Record Closed: January 20, 2000 Decided: April 17, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, and AFL-CIO challenged the policy adopted by respondent Board of Education of the Township of North Bergen (Board) that prohibits the possession and use of portable paging or telecommunication devices by employees

during school hours. Petitioners assert that the policy is *ultra vires*, arbitrary and capricious and violates free speech.

On October 21, 1997, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The undersigned held several settlement conferences and on November 3, 1999, the parties placed on the record a partial settlement; they agreed that employees could use cellular phones during their lunch periods. A hearing was held on the remaining issue regarding employee use of cellular phones during their professional periods.

The parties filed post-hearing briefs and the record closed on January 20, 2000. Due to the voluminous case load of the administrative law judge (ALJ) an order of extension was granted for filing the Initial Decision to April 20, 2000. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.8.

UNDISPUTED FACTS

The relevant facts are undisputed:

On May 16, 1997, respondent school board adopted a policy, effective September 1, 1997, governing the possession and use of portable paging and telecommunication devices by its employees. The policy provides as follows[1]:

> PORTABLE PAGING OR TELECOMMUNICATION DEVICES (STAFF)
>
> A paging or telecommunications device is a device that emits an audible signal, vibrates, displays a message, or otherwise summons or delivers and sends a communication to the possessor. Receipt or transmission will constitute use.
>
> No Board employee shall use a portable paging or telecommunications device while on school property, during instructional or other assigned work time.
>
> No Board employee shall possess a portable paging or telecommunications device while on school property unless the device has been registered in the office of the Superintendent and approved in

[1] The policy *PORTABLE PAGING OR TELECOMMUNICATION DEVICES (STAFF)* is shown in the original form, without the changes agreed to by the parties and placed on the record on November 3, 1999.

> writing by the Superintendent. At the time of registration, the individual will acknowledge this policy on form prepared for this purpose.
>
> A person using or possessing a telecommunications device in violation of this policy will meet with the Superintendent to discuss the violation. The Superintendent will take any action deemed appropriate. A subsequent violation will be reported to the Superintendent and Board for appropriate disciplinary action.

Additionally, on May 19, 1997, the superintendent of schools issued the following memorandum:

> MEMORANDUM
>
> TO: ALL STAFF MEMBERS
> FROM: LEO C. GATTONI, JR., SUPERINTENDENT OF SCHOOLS
> DATE: MAY 19, 1997
> RE: PORTABLE PAGING OR TELECOMMUNICATION DEVICES (STAFF)
>
> Please be informed that the Board of Education has put into effect starting September 1, 1997, the attached policy #4152 entitled "Portable Paging or Telecommunication Devices." Also, be aware that disciplinary action may be taken for a violation of said policy.
>
> Please sign the attached sheet indicating that you have read the resolution and policy and that you understand the consequences if you violate this policy.

The parties have agreed that employees would place their cellular phones and pagers in a mutually agreed-upon location, *e.g.*, an administrative office, and could use those devices during their lunch periods.

I

SUMMARY DECISION

On May 11, 1998, petitioners moved for summary decision and contended that the policy is void, *ultra vires*, arbitrary and capricious, and unreasonable. Also, petitioners alleged that the policy is contrary to the best interests of the personnel of the North Bergen School System, and is an improper exercise of the Board's discretionary authority. Petitioners further argued that the policy unduly restricts, hinders, and interferes with free speech and other rights of staff members. Petitioners also contended that the policy is overbroad, vague, and an abuse of discretion because it lacked guidelines to implement the policy or to determine penalties. Additionally, petitioners contended that the superintendent's memorandum concerning the policy is "arbitrary, capricious, engendered by improper motives, illegal, and/or unreasonable." The Board filed a cross-motion to dismiss the petition.

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Ibid.* Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard employed by the federal courts. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

Essentially, the Board's action forbids its employees to use personal cellular telephones and pagers during instructional or other assigned work time. Also, the policy prohibits employees from possessing portable paging or telecommunication devices on school property unless they obtain permission from the superintendent. However, the parties have agreed that employees would place their cellular phones and pagers in a mutually agreed-upon location, *e.g.*, an administrative office, and could use those devices during their lunch periods. Thus, the remaining issue is whether the Board's policy forbidding the employees from using personal cellular telephones and pagers during their instructional and preparation periods is arbitrary, capricious or unreasonable.

On July 9, 1998, the undersigned issued an oral ruling on the parties' motions. For the reasons discussed herein I **CONCLUDED** that the policy adopted by the Board was not void on its face. Further, I **CONCLUDED** that the matter may be brought before the OAL to determine whether the Board's action to restrict the time, place and manner in which staff may use cellular telephones to communicate was arbitrary, capricious, unreasonable or vague. According, I **CONCLUDED** that there existed genuine issues of material fact and **DENIED** the parties' motions for summary decision.

II

ISSUE

The issue is whether the Board's policy that forbids the employees from possessing cellular telephones and pagers during instructional and preparation periods is arbitrary, capricious or unreasonable.[2]

FINDINGS OF FACT

Based upon a review of the relevant evidence I **FIND** the following **FACTS**:

1. North Bergen School District includes one high school and six elementary schools.

2. North Bergen High School includes approximately 2,400 students, 172 teachers, and 17 other employees.

3. North Bergen High School contains three to four telephones that are available for use at all times. One of the phones is located in the teachers' lounge for their exclusive use. The other three phones are located in the building's hallways. They are available for use by all persons in the building.

4. Franklin School, grades K-8, includes 612 students, 44 teachers and 24 other employees and has one public telephone.

5. McKinley School, grades K-8, includes 349 students, 29 teachers and 18 other employees. There are no public telephones in the building.

6. Kennedy School, grades K-8, includes 618 students, 42 teachers and 30 other employees and has one public telephone.

[2] Because the parties have stipulated that employees may use their cellular phones and pages their lunch periods, that question will not be discussed.

7. Fulton School, grades K-8, includes 1,072 students, 70 teachers and 15 other employees and has two public telephones.

8. Lincoln School, grades K-8, includes 713 students, 45 teachers and 46 other employees and has one public telephone.

9. Horace Mann, grades K-8, includes approximately 1,300 to 1,400 teachers and personnel and has three public telephones.

10. Employees have not requested that additional telephones be installed in the schools. They have requested, however, a replacement telephone for the McKinley School.

11. Prior to May 1997, there was no policy that prohibited the employees from using cellular telephones.

12. Currently, employees are permitted to use cellular phones and beepers before and after the school day and during their lunch periods. During the school day they must leave their phones in the school office. In the event of an emergency situation, employees may retrieve their phones from the office. In the event of a long-term personal or family emergency, applications can be made to the superintendent for permission to carry their phones on their person. Approval is made on a case-by-case basis.

13. Prior to the teachers having access to personal cellular phones, emergency telephone calls would be made to the main office and a staff member would contact the teacher at his or her classroom. The teacher would be relieved to respond to the emergency telephone call.

14. Teachers employed at the high school work from 8 a.m. to 3 p.m. with a forty-minute lunch period. Two police officers provide security to the staff and students. Teachers have ten professional or "prep" periods each week. Each "prep" period is forty minutes. Teachers may take their "prep" periods in the faculty lounge, the media

room or their classroom. They use that period to prepare lessons, grade papers, and obtain equipment for classes.

DISCUSSION AND CONCLUSIONS

Petitioners presented Phillip Steinberg and Monica Coyle, the former and current president of the Federal Teachers' Union, and Stephen Ludwig, a teacher employed by the District. Steinberg has taught at the high school for thirty-six years and he has served as the grievance representative for teachers and clerical employees. Steinberg received one complaint from the Board that two elementary school teachers used their cellular phones to have a personal conversation.

Steinberg, Coyle and Ludwig testified that there are too few public telephones available for employees. Further, a teacher cannot hold a private conversation because the phones are installed on the walls, not in telephone booths. Moreover, some of the phones are not readily accessible because they are located in remote areas of the buildings. Also, the witnesses believed that teachers should be allowed to carry phones for safety. For example, emergency situations may occur and the teacher may need to call 911, police or security.

Peter J. Fischbach is the superintendent of schools and has been employed by the school district for forty years. Fischbach testified that the Board adopted "Policy 4152, Portable Paging or Telecommunication Devices" in response to complaints that teachers and students were using cellular phones and beepers during class time. Some teachers left classrooms to make calls; others used the phones while they were in classrooms instructing pupils. Fischbach believed that the policy was consistent with the employment contracts that identify the time periods for teachers to instruct pupils. Thus, the Board believed that the devices, when in use, would interfere with the teachers' performance of their job duties. Also, the discharge of pagers and cellular phones during class time would compromise the health and safety of the students. Additionally, the Board believed that using cellular phones during professional periods would interfere with the teachers' duties and disrupt persons who were working within close proximity of the person making the personal telephone call. Fischbach also noted

that state law prohibits students from carrying beepers in public schools, unless there is a medical or an emergent reason. Thus, he believed that teachers should set an example for their students.

I have considered petitioners' allegation that the policy violates their constitutional rights. Petitioners' contend that the policy is unconstitutional, overbroad and vague. Thus, it must be declared null and void. Respondent argues that the policy is not vague on its face and passes constitutional muster.

The Commissioner has "fundamental and indispensable" jurisdiction over all disputes and controversies under the school laws. *Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 412-13 (App. Div. 1982). Moreover, it has been established that the Commissioner's jurisdiction extends to matters involving constitutional issues so long as the issues advanced to him are not novel in nature and have already been adjudicated by a court of competent jurisdiction. *Matter of Tenure Hearing of Sciarrillo, School Dist. of the City of Garfield*, 1977 *S.L.D.* 197, 202; *Schults v. Board of Educ. of Teaneck*, 86 *N.J. Super.* 29 (App. Div. 1964). Generally, in administrative proceedings, rules may be attacked as applied, but not facially. 37 *New Jersey Practice, Administrative Law and Practice* § 93 (Steven L. Lefelt) (1999). However, if an issue is especially fact sensitive and related to important matters of educational practice and policy, it may be necessary first to submit some facial constitutional challenges to the administrative agency. *Abbott v. Burke*, 100 *N.J.* 269 (1985), *appeal after remand*, 119 *N.J.* 287 (1990).

Here, the subject being regulated is when and how school employees may communicate with people outside the classroom. No protected speech is targeted and no particular association prohibited. Rather, petitioners challenged the Board's authority to restrict the time and manner of communication. Whether the policy compromises constitutional protections requires an examination of the particular conditions of the school environment both generally and at the specific schools involved. I **CONCLUDE** that the petitioners have challenged the policy as applied and that the case is properly before the Commissioner of Education and the OAL.

To survive constitutional scrutiny, a regulation must be content neutral, not directed at any particular message, idea, or form of speech, and must serve a significant government interest. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 *U.S.* 672, 706, 112 *S. Ct.* 2701, 2722, 120 *L. Ed.* 2d 541, 568 (1992). The policy addresses no specific speech content. Further, it does not directly contravene freedom of association. Rather, the Board has imposed restrictions on the time, place and manner in which staff may use cellular telephones to communicate.

I **CONCLUDE** that there is no constitutional right to cellular telephones and pagers. I further **CONCLUDE** that there is no constitutional right specifically affected by their prohibition. While staff may communicate with others, they may not have unrestrained access to personal telephones in the classroom. Although behavior is constrained, with a limitation of choices and liberty to act at any given moment, the constraint does not implicate constitutional guarantees.

Petitioners challenge the manner in which the Board is implementing its interest in controlling the schools. Petitioners argue, and I agree, that distractions are inherent in the lounge, where most teachers spend their "prep" periods. Further, the use of cell phones would provide convenience and privacy. Indeed, portable communication devices would allow communication, which might not otherwise be possible. Although the Board provides office and public telephones for employees, a quick call between classes might not be possible if the pay phone or office phone is too far away, or in use at the time needed. Moreover, a pager can more quickly indicate that a call is required and allow for more efficient communication, particularly when care of other family members or other exigent situations may be involved.

However, the arguments in favor of permitting teachers to carry phones and beepers during instructional periods and to use those devices during "prep" periods do not outweigh the Board's reasonable exercise of the power to administer the school. Teachers are being required to communicate at particular times by particular means. The authority to establish and maintain standards of teachers' conduct is conferred on boards of education by *N.J.S.A.* 18A:11-1. Indeed, the need to control the schools is a significant government interest. For example, in a matter impacting on teachers'

expression, the court found that creating an atmosphere of respect within a dignified environment conducive to discipline and learning was a reasonable basis for a policy specifying a narrow dress code for teachers. *Carlstadt Teachers Ass'n v. Board of Educ. of Borough of Carlstadt*, No. A-1469-80 (App. Div. March 26, 1982). The court analyzed the dress code and found that fifteen different combinations of wearing apparel were acceptable to the board, and that provided sufficient flexibility allowing for individual teacher tastes. *Id.* at 4-5.

Further, I reject petitioners' argument that the policy "is not fully comprehensive of its intent" and vague because it fails to specify its rationale or purpose, and that its intent is unclear. Moreover, petitioners' reliance on *Romeo v. Board of Education of Madison*, 1973 *S.L.D.* 102, is misplaced. In that matter the Commissioner stated that, "In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself." 1973 *S.L.D.* at 106. However, *Romeo* makes clear that the language should be given its ordinary and common significance. *Ibid.; see, e.g., Lane v. Holderman*, 23 *N.J.* 304 (1957) (meaning of a statute primarily ascertained by reading the language in its common significance); *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203 (1954) (particular words are to be made responsive to the reason and spirit of the enactment). Thus, *Romeo* does not imply that a policy statement must comprehensively describe its aim or intent within the four corners of the written document. However, the Board is required to show a reasonable purpose for the regulation.

Also, I reject petitioners' arguments that the policy is vague and overbroad. "To avoid the pitfall of vagueness, the terms of a zoning ordinance must enable a person of 'common intelligence, in light of ordinary experience' to understand whether contemplated conduct is lawful." *State v. Cameron*, 100 *N.J.* 586, 591 (1985), *quoting State v. Lashinsky*, 81 *N.J.* 1, 18 (1979). The standard to determine the vagueness of a law is not mechanical. Vagueness is determined within the contextual background of the particular law and with a firm understanding of its purpose. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 *U.S.* 489, 498, 102 *S. Ct.* 1186, 1193, 71 *L. Ed.* 2d 362, 371 (1982). "The degree of vagueness that the Constitution tolerates –

as well as the relative importance of fair notice and fair enforcement – depend in part on the nature of the enactment." *Cameron, supra*, 100 *N.J.* at 591.

Here, petitioners' vagueness charge requires only "that the rule fail to proscribe clearly the conduct against which it is being enforced in the matter before the court." 37 *New Jersey Practice, Administrative Law and Practice, supra*, § 94. "[I]n the area of occupational restrictions, any imprecision in drafting must be assessed with a recognition that the governing body of the occupation or profession is uniquely qualified to assess the meaning of the language." *Ibid., quoting Moiseyev v. New Jersey Racing Comm'n*, 239 *N.J. Super.* 1 (App. Div. 1989). The disputed policy proscribes teachers from possessing and using cellular telephones and portable pagers during instructional and "prep" periods. The devices may be used before and after school and during lunch periods. "That there may be a borderline area where application of the law is vague does not render the entire statute void for vagueness unless that borderline area is so broad that it covers practically the entire statute." *Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 124 (1983).

Here, no broadness is evidenced in the policy. The record reveals that all employees received a copy of the policy and the superintendent's memorandum. Both documents gave sufficient notice to employees that violation of the policy may result in appropriate disciplinary action. Petitioners further complain that permission for cellular telephones or pagers may be granted only at the unfettered discretion of the superintendent. "The mere fact that subjectivity may be part of the process does not establish any taint." *J.B. and N.B. for J.B. v. Board of Educ. of Jefferson*, EDU 2826-95, Initial Decision (Oct. 1, 1997), *aff'd*, Comm'r (November 14, 1997) <http://lawlibrary.rutgers.edu/oal/search.html>; *see also Dangler v. Yorktown Central Schools*, 771 *F. Supp.* 625 (S.D.N.Y. 1991) (criteria for election of student by faculty to membership in National Honor Society legitimately subjective). In individual determinations, the superintendent is also constrained by the requirement of reasonableness. *Frisby v. United States Dep't of Housing and Urban Dev.*, 755 *F.*2d 1052 (3d Cir. 1985). I **CONCLUDE** that the policy is not vague.

Based on the whole of the evidence I **CONCLUDE** that the Board's interest in eliminating distractions for teachers in the classroom and during instructional and preparatory periods provides a reasonable rationale to adopt the policy limiting the use of cellular phones and pagers. I **CONCLUDE** that it is insufficient reason to nullify the Board's policy because the policy permits the superintendent on a case-by-case basis to allow personnel to have a portable pager or to issue disciplinary action for violating the policy. Further, I **CONCLUDE** that petitioners have failed to demonstrate that the Board acted arbitrarily, capriciously or unreasonably in adopting a policy that forbids the employees from possessing cellular telephones and pagers during instructional and preparation periods.

ORDER

It is **ORDERED** therefore that the petition filed by North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, and AFL-CIO be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 17, 2000
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

4/26/00
DATE

Debbie Antamarian
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioners
Philip Steinberg
Monica Coyle
Steven Ludwig

For Respondent
Peter J. Fischbach

Exhibits:

For Petitioners

P-1 Cellular Telephone Policy, dated May 1997

P-2 Resolution

P-3 Memorandum, dated May 19, 1997

P-4 Letter

P-5 Request to register Beeper

P-6 Request to register Pager

P-7 Request to use Pager

P-8 Second Request to use Pager

P-9 Letter, dated May 20, 1997

P-10 Request to use Pager

OAL DKT. NO. EDU 9848-97
AGENCY DKT. NO. 289-8/97

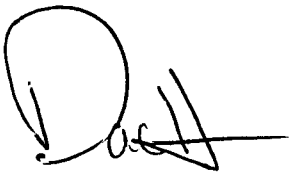
NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AND AFL-CIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his careful and independent review of the within record, the Commissioner concurs with the Administrative Law Judge that petitioners have failed to establish that the Board's adoption of a policy prohibiting the possession and use of portable paging or telecommunication devices by school staff during preparation or professional periods was arbitrary, capricious, unreasonable or a violation of their constitutional rights. Therefore, the Board's imposition of such restrictions was a reasonable exercise of its discretionary authority not subject to disturbance by the Commissioner.

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

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

173-00

HELEN CHELOC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In consolidated matter, petitioner challenged the Board's action withholding her increment for school year 1994-95 and sought reinstatement to her former position of Assistant Board Secretary/Director of Administration. Petitioner contended the Board's actions withholding her increment and reassigning her supervisory duties to a new position of comptroller were arbitrary, capricious, unreasonable and motivated by bad faith (retaliation for her objections to allegedly improper budget-related actions in 1994). The Board argued that petitioner's appeal was untimely filed.

Initially, the ALJ concluded that the first petition was timely filed but that Conscientious Employee Protection Act (CEPA) claims are beyond the jurisdiction of the Commissioner of Education. The ALJ concluded that the Board's decision to withhold petitioner's salary increase was arbitrary because the Board failed to give petitioner sufficient notice that her work was deficient, failed to afford her an opportunity to take corrective action, and failed to articulate the criteria used to reject the recommendation of her supervisor. The ALJ did find that the Board complied with the requirements of the Open Public Meetings Act and acted within its discretion under the Tenure Act. The ALJ concluded that the Board did not act in bad faith, had reasonable grounds to establish a comptroller position with fiscal supervisory duties formerly assigned to petitioner and to demote her on the District organization chart. The ALJ reversed the Board's decision withholding petitioner's salary increase for the school year 1994-95 and affirmed the Board's decision establishing the comptroller position and demoting petitioner.

The Commissioner affirmed in part, modified in part the Initial Decision. The Commissioner concurred with the ALJ that the petition was timely filed and that the Board did not act in bad faith in establishing the comptroller position and demoting petitioner. As to the denial of salary increases, the Commissioner noted that since petitioner was *not* a teaching staff member subject to payment on a salary guide, the Board's actions in twice denying her a salary increase were not reviewable by the Commissioner pursuant to *N.J.S.A.* 18A:29-14. However, since petitioner was not a member of a collective bargaining unit or party to an agreement which might provide a mechanism to resolve such disputes, the Commissioner considered her claim that the Board's actions were taken for retaliatory reasons, but could not find that the Board acted improperly. Petition was dismissed.

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTIAL DECISION

OAL DKT NOs. EDU 5150-95
and EDU 11726-95

Agency Dkt. Nos. 57-3/95 and
384-9/95

CONSOLIDATED

HELEN CHELOC,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Philip Feintuch, Esq., for petitioner, Helen Cheloc
(Feintuch, Porwich and Feintuch, attorneys)

David F. Corrigan, Esq., for respondent, Elizabeth Board of Education
(Murray, Murray and Corrigan, attorneys)

Record Closed: March 7, 2000 Decided: April 24, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Helen Cheloc, challenges the action of respondent Elizabeth Board of Education (Board) to withhold her increment for school year 1994-95

and seeks reinstatement to her former position of Assistant Board Secretary/Director of Administration.

On May 17 and October 24, 1995, the Department of Education transmitted the petitions to the Office of Administrative Law (OAL) as contested cases pursuant to *N.J.S.A.* 52:14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were scheduled for December 6, 1995, September 9 and 10, 1997, February 6 and 7, 1997, February 20, 1997, April 3, 7, and 8, 1997, November 24 and 25, 1997, December 8, 9, and 10, 1997, January 29, 1998, and February 1999. At the parties' request and for good cause many of the hearing dates were adjourned. Hearings were held on February 6 and 7, 1997 and February 10, 1999. The parties filed post hearing briefs and the record closed on March 7, 2000.

FACTS

Based on a review of the relevant evidence I **FIND** as **FACT**:

1. In December 1985, Cheloc began her employment with the Board as assistant board secretary/director of administration. Her responsibilities included supervising the departments of purchasing, payroll, accounting, and workers' compensation. Also, Cheloc assisted the board secretary/business administrator, Linda King.

2. Cheloc holds tenure pursuant to *N.J.S.A.* 18A:17-2.

3. Cheloc earned a Bachelor of Arts degree in economics, a Master of Arts in Education Administration and holds an administrative certificate.

4. During the 1990-91 school year, the budget for the Elizabeth school district increased by approximately forty percent to $150 million. As a result, the accounting functions of the district grew in volume and complexity.

5. The district adopted a reporting method in accordance with generally accepted accounting principles (GAAP).

6. Also, the district adopted a "site-based management" model of school governance and delegated to the schools much of the responsibility for budgeting and bookkeeping.

7. May 1994, Cheloc attended a meeting with various district personnel to discuss a budget surplus of approximately $3 million. Specifically, district personnel were concerned that any surplus in the 1993-1994 fiscal year might reduce its funding from the State for the following year. Cheloc testified that at the meeting, someone proposed that the surplus problem could be remedied with purchase orders addressed to "vendor variable." This was an improvised method of allocating the surplus funds to vendors and projects and purchases that had not yet been approved by the Board. Cheloc objected to this proposal.

8. A subsequent meeting was held with Ernst & Young, the Board's accountants/auditors. Cheloc maintained that the auditors approved of the vendor variable plan. She, however, continued to voice her objection.

9. In August 1994, Cheloc attended another meeting to discuss a project deficit problem. Specifically, funds allocated for certain maintenance projects were spent, but the maintenance work was still incomplete. Someone suggested that the Board hire the contractors as employees until the work was completed. Cheloc objected on the grounds that the contractors would be able to sign off on their own vouchers and receive benefits as district employees.

10. The Board hired the contractors to complete the maintenance work.

11. In December 1994, King held a meeting with the district's business directors. Cheloc testified that King told them that they would all be recommended for salary increases, including Cheloc.

12. The salary increases were not part of a collective bargaining agreement, and Cheloc was not on a salary schedule.

13. On December 15, 1994, Cheloc received a letter from the Board informing her that it intended to "discuss a matter involving your employment" at a meeting on December 21, 1994. Also, the Board informed Cheloc that it would be discussing the issue in private session and offered her the option of a public session. Cheloc did not exercise that option.

14. On December 21, 1994. Cheloc attended the Board meeting. The Board went into Executive Session and voted to award all business directors except Cheloc a salary increase.

15. On December 22, 1994, King informed Cheloc that her salary increase had been denied.

16. As a result of the district's increased budget and financial reporting responsibilities, the Board commissioned an independent audit of the district's business operations. The auditors recommended that the Board appoint a certified public account to the central business office.

17. On July 7, 1995, the Board informed Cheloc that it intended to discuss her employment status at a meeting on July 12, 1995.

18. On July 12, 1995, the Board voted to establish the position of comptroller and reassigned the fiscal supervisory duties performed by the

assistant board secretary/director of administration, Cheloc's position, to the comptroller position.

19. The position of comptroller replaced the position of the assistant board secretary/director of administration on the organization chart.

20. Cheloc retained her title as director of administration, her salary level and responsibility over the workers' compensation department.

21. On September 20, 1995, Cheloc alleged that the Board violated her tenure rights by "abolishing her position, in effect, and reassigning her duties to the comptroller.

ISSUES

1. Whether the Board's decision was arbitrary, capricious, or induced by improper motives when it voted to withhold Petitioner's salary increase.

2. Whether the Board's decision was arbitrary, capricious, or motivated in bad faith when it voted to establish the position of comptroller, to reassign Petitioner's supervisory responsibilities to that position, and to demote her on the district organization chart.

DISCUSSION

There are two preliminary matters. First, the Board argues that Petitioner did not timely appeal the decision to withhold her salary increase. Second, Petitioner argues that the Board retaliated against her for objecting to allegedly improper budget-related actions in 1994, in violation of the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to -8.

Timeliness of Filing

N.J.A.C. 6:24-1.2(c) requires that a petition be filed within 90 days of receipt of notice of a final order, ruling or other board action. Specifically, the 90-day rule provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [*N.J.A.C.* 6:24-1.2(c)]

In *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board have the authority to establish a time limitation of the resolution of disputes arising under the school laws. The court stated that, "adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow, supra.* 131 *N.J.* at 587. Thus *N.J.A.C.* 6:24-1.2(c) respresents a fair and necessary requirement for the proper and efficient resolution of disputes arising under school laws. *Kaprow, supra.* 131 *N.J.* at 582. Therefore, I have carefully considered the timeline of events and facts to determine if the petition was filed in accordance with *N.J.A.C.* 6:24-1.2(c)

The Board denied the salary increase on December 21, 1994. Cheloc was informed of the Board's decision on the following day, December 22, 1994. She filed her petition 90 days later, on March 22, 1995. Accordingly, I **CONCLUDE** that her first petition was filed timely.

CEPA

Petitioner contends that the Board retaliated against her for objecting to allegedly improper budget-related actions in violation of the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to -8. Specifically, Petitioner argues that the Board's actions in withholding her salary increase, establishing the position of comptroller, reassigning her responsibilities to that position and demoting her on the district organization chart were in retaliation for her objections to allegedly improper budget-related actions in 1994. CEPA claims are beyond the jurisdiction of the Commissioner of Education. *See Picogna v. Bd. of Educ. of the Township of Cherry Hill*, 249 *N.J. Super.* 332 (App. Div. 1991). The OAL has jurisdiction over contested cases that are transmitted by "the State agency with appropriate subject matter jurisdiction." *N.J.A.C.* 1:1-3.1. Therefore, I **CONCLUDE** that the OAL lacks jurisdiction to hear these issues under the Conscientious Employee Protection Act.

Denial of Salary Increment

Petitioner alleges that the Board's decision to withhold her salary increase was arbitrary, capricious, or induced by improper motives.

N.J.S.A. 18A:29-14 provides that a teacher's salary increment may be withheld for inefficiency or other good cause. Conversely, the approval of a "salary increment is 'a reward for meritorious service.'" *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Indeed, the purpose of *N.J.S.A.* 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n*, 79 *N.J.* 311, 321 (1979). Consequently, an annual increment is not a statutory right; it is a reward for good performance and the acknowledgment that the teacher's overall performance has met the high

standards of performance required by the District. *North Plainfield Ed. Ass'n v. North Plainfied Bd. of Ed.,* 96 *N.J.* 587, 594 (1984)

The Legislature has vested local boards and state district superintendents with the power to withhold increments from teachers who have not performed satisfactorily during the previous year. *Probst v. Haddonfield Bd. of Educ., supra*, 127 *N.J.* at 526. Indeed, a decision to withhold an increment is a matter of management prerogative. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., supra*, 96 *N.J.* 587; *Bernard Twp. Bd. of Educ., v. Bernard Twp. Educ. Ass'n, supra,* 79 *N.J.* 311. Accordingly, the Commissioner is prohibited from substituting his judgment for that of the board or state district superintendent.

The scope of review on appeal is limited to whether there exists a reasonable basis for the District's decision. The exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). Thus, the Commissioner must determine: "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts." *Id.* at 296-97. The burden of proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Kopera* at 297.

Nevertheless, a school board cannot withhold a salary increase from a tenured employee without according that employee the minimum procedural due process. For example, in *Basile v. Bd. of Educ. of the Borough of Elm Park*, 1 *N.J.A.R.* 199 (Dep't of Educ. 1980), the petitioners were tenured teachers who were recommended for salary increments by their supervisors. After reviewing the written evaluations and oral reports, the superintendent applied his own standard and recommended the salary increments be withheld. The local board of education acted on the superintendent's recommendation without discussion.

In a subsequent appeal, an Administrative Law Judge ("ALJ") ruled, *inter alia*, that the board's action was arbitrary because the teachers were not furnished with the superintendent's evaluation criteria in advance.

On December 15, 1994, Cheloc was notified in writing that the Board intended to "discuss a matter involving" her employment. This notice was sufficient to satisfy the adequate notice requirement of the Open Public Meetings Act at *N.J.S.A.* 10:4-8(d). However, there is no evidence to that. Cheloc was given any notice of her work-related deficiencies prior to the Board meeting on December 21, 1994. King testified that Cheloc did not adapt well to the site-based management model and that instructional directors in the district complained that Cheloc and her departments were uncooperative and excessively rigid. Further, when King attempted to discuss the problem, Cheloc would storm out of her office or hang up the phone. Despite these alleged work-related deficiencies, King did not provide Cheloc with any written evaluations, negative or positive, and always recommended her for a salary increase. In fact, King was Cheloc's supervisor and she recommended to the superintendent that Cheloc receive the salary increase. However, the Board chose to reject King's recommendation and withhold Cheloc's increase. Consequently, the Board's action came as a complete surprise to the Cheloc. *Compare Sturn v. Bd. of Educ. of the Borough of South Plainfield*, 92 *N.J.A.R.*2d (EDU) 661, 669 (teacher was on notice of alleged deficiencies through written observations and was afforded the opportunity to take corrective action).

The record discloses that the Board failed to give the Cheloc sufficient notice that her work was deficient, thereby affording her an opportunity to take corrective action. Also, the Board failed to articulate the criteria used to reject King's recommendation and instead, denied the salary increase at the meeting on December 21, 1994. Accordingly, I **CONCLUDE** that the Board's decision to withhold Cheloc's salary increase was arbitrary.

Abolishment of Petitioner's Position

Petitioner contends that establishing the position of comptroller and reassigning her duties to that position violated her tenure rights and was arbitrary and unreasonable. A local board of education is entitled by statute to abolish a position "for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization" or for other good cause. *N.J.S.A.* 18A:28-9. *In Wollman v. Bd. of Educ. Of the City of Trenton*, 96 *N.J.A.R.* 2d (EDU) 20, petitioner was a tenured assistant director of buildings and grounds whose position was abolished by the local board of education, pursuant to the recommendation of an accounting firm's efficiency study. The ALJ found that the local board was entitled to abolish a position for reasons of economy and its actions were to be accorded a presumption of correctness. Further, the ALJ concluded that petitioner had failed to prove the board's action was arbitrary, capricious, undertaken in bad faith, or contrary to *N.J.S.A.* 18A:28-9.Indeed, "a local Board's decision concerning reduction in force are properly reviewable 'to determine whether the position ostensibly abolished has not in fact been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights...'" *Cochran, et al. v. Watchung Hills Board of Education*, No. A-2327-85T7 (App. Div. Dec. 22, 1986) (citation omitted). Thus, when a board abolishes a position for reasons of economy, the abolition must be one of substance and not merely of appearance. *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949). A petitioner who opposes the abolition must prove by a preponderance of the credible evidence that the board's decision was arbitrary, capricious or motivated in bad faith.

The Board argues that the petitioner's position was not abolished because she retained her salary and job title. The argument is untenable. The Board established the position of comptroller and assigned to the comptroller the duties previously performed by petitioner as assistant board secretary/director of administration. Indeed, before the Board created the comptroller position, Cheloc was responsible for managing the departments of purchasing, payroll,

accounting and workers' compensation. And, she supervised a staff of 25 people. She reported directly to Linda King, the board secretary/business administrator. After the comptroller position was established, Cheloc had only the workers' compensation department and supervised a staff of two. She was supplanted on the district organization chart. The Board effectively "abolished" petitioner's position. Thus, the issue is whether the Board had reasonable grounds for its action.

The evidence reflects that the Board made changes in response to recommendations from an independent accounting firm. In school year 1990-91, the budget for the Elizabeth school district increased by approximately forty percent to $150 million. The district's accounting firm studied the business operations and made recommendations. In response, the district adopted a new reporting method, established the position of comptroller and appointed a certified public accountant in the central office. Petitioner is not a CPA and does not have a public accounting background or degree.

Based on the evidence presented, I **CONCLUDE** that the Board had reasonable grounds to establish the comptroller position and assign fiscal supervisory responsibilities formerly assigned to petitioner.

Further, I **CONCLUDE** that petitioner failed to prove that the Board abolished her position in bad faith. Specifically, Cheloc failed to prove a connection between her objections to allegedly improper budget-related actions in 1994 and the abolition of her position in 1995. Although the Board's decision to withhold her salary increase on December 21, 1994 was arbitrary for lack of adequate notice, as discussed, *supra*, the Board complied with the requirements of the Open Public Meetings Act and acted within its discretion under the Tenure Act. Petitioner's supervisor provided credible evidence that Cheloc lacked the adaptive skills and expertise to retain her fiscal supervisory responsibilities. Thus, the Board replaced her position in July 1995 with the position of

comptroller, and required the person in that position to have an accounting background. Subsequently, the Board hired a C.P.A. for the position of comptroller.

CONCLUSIONS

Based on the whole of the record, I **CONCLUDE** that the Board's decision to withhold petitioner's salary increase was arbitrary because it failed to give petitioner sufficient notice that her work was deficient and afford her an opportunity to take corrective action. Further, the Board failed to articulate the criteria used to reject the recommendation of petitioner's supervisor.

Further, I **CONCLUDE** that the Board's decision to establish the position of comptroller, to reassign petitioner's supervisory responsibilities to that position, and to demote her on the district organization chart was based on reasonable grounds and was not motivated in bad faith.

ORDER

It is **ORDERED** that the decision of the Board to withhold petitioner's salary increase for school year 1994-95 be **REVERSED**.

Further, it is **ORDERED** that the decision of the Board to establish the position of comptroller and reassign supervisory responsibilities to petitioner, and to demote her on the district organization chart be **AFFIRMED**.

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

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

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

April 24, 2000
DATE

Mumtaz Bari Brown
MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

Apr 25 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 2 2000
DATE

Barbara A Hermesh
OFFICE OF ADMINISTRATIVE LAW

Cb

APPENDIX

Witnesses:

For Petitioner
- Helen Cheloc
- Angelo Paternoster
- Joseph Pellegrino

For Respondent
- Linda King

Exhibits:

P-1 Description of Job

P-2 Memorandum detailing Job Description

P-3 Exhibits Index

P-4 Ficarra Letter to Helen Cheloc, dated December 15, 1994

P-5 Memorandum of King, dated December 7, 1994

P-6 Memorandum of Helen Cheloc, dated April 6, 1995

P-7 Memorandum of Helen Cheloc, dated March 28, 1995

P-8 Memorandum from King to Ficarra, dated April 11, 1995

P-9 Memorandum of Helen Cheloc, dated June 23, 1995

P-10 Contract dated February 1, 1995

P-11 Memorandum from King, dated August 8, 1994

P-12 Memorandum from Helen Cheloc, dated May 18, 1995

P-13 Memorandum from Helen Cheloc, dated May 18, 1995

P-14 Memorandum from Helen Cheloc, dated May 17, 1995

P-15 Memorandum from Helen Cheloc, dated May 5, 1995

P-16 Memorandum from Helen cheloc, dated May 16, 1995

P-17 Memorandum from Helen Cheloc, dated May 16, 1995

P-18 Memorandum from Helen Cheloc, dated May 15, 1995

P-19 Memorandum from Helen Cheloc, dated May 3, 1995

P-20 Memorandum from Helen Cheloc, dated May 1, 1995

P-21 Memorandum from Helen Cheloc, dated April 27, 1995

P-22 Memorandum from Helen Cheloc, dated April 21, 1995

P-23 Memorandum from Helen Cheloc, dated February 10, 1995

P-24 Memorandum from L. King, dated February 10, 1995

P-25 Procedures regarding Evaluation

P-26 Evaluation – Helen Cheloc, dated June 23, 1995

P-27 Letter from King to Helen Cheloc, dated September 21, 1995

P-28 Board of Education Agenda

P-29 Board of Education Meeting, dated July 12, 1995

P-30 Job Description of Comptroller

P-31 Letter from King to Helen Cheloc, dated August 29, 1995

P-32 Interrogatories – Answers
32a Interrogatories – Questions

P-33 Requisition

P-34 Grievance Rules

P-35 Organization Chart 96-97

P-36 Memorandum of Helen Cheloc, dated October 3, 1994

For Respondent

R-1 Interrogatories from Board of Education to Helen Cheloc, dated October 23, 1995

R-2 Answers to Interrogatories, dated December 30, 1996

R-3 Resolution (7/12/95)

HELEN CHELOC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner and the Board filed exceptions and replies in accordance with *N.J.A.C.* 1:1-18.4.

The Board initially excepts to the Administrative Law Judge's (ALJ) treatment of petitioner's denial of a salary increase in December of 1994 as an "increment withholding." In this regard, the Board contends that:

> [I]t is undisputed that Petitioner is an administrator and is not part of any bargaining unit that has entered into a collective bargaining agreement with the Board which sets forth her annual salary and subsequent salary increases for specific years. Furthermore, Petitioner is not part of any salary schedule established by the Board. *** It is also undisputed that Petitioner is not a teacher, and as such, does [not] fall within the statutory mandates of *N.J.S.A.* 18A:29-4.1. Instead, Petitioner's salary is set forth by the Board. (See Exhibit P-1). The Board also has the authority to determine whether Petitioner is entitled to a salary increase. Unlike teachers or other members of a collective bargaining unit, Petitioner is not guaranteed any predetermined increment each year. Therefore, Petitioner was never legally entitled to an "increment." (Board's Exceptions at 3)

The Board further argues that, contrary to the ALJ's finding, petitioner was not without notice that she would be denied a salary increase, even assuming such notice was a prerequisite for the Board's action. The Board then cites to *N.J.S.A.* 18A:29-14, which it points out, "has no requirement for advance written notice of the intent to withhold. Rather, it requires that within 10 days following its action a board must notify the employee of the reasons why the increment is being withheld." (*Id.* at 4) Further, to the extent notice is required, the Board contends that the record clearly demonstrates that petitioner knew, or should have known, that the Board had concerns about her work. Here, the Board reflects on the testimony offered by Linda King, the School Business Administrator/Board Secretary to whom petitioner reports, noting that Ms. King testified that she had to speak with petitioner a number of times about her failure to cooperate with the instructional directors in order to effectuate a successful site-based management system. (*Id.* at pp. 6-8) The Board concludes that its decision to deny petitioner a salary increase in December of 1994, in light of the testimony, was clearly reasonable. (*Id.* at 9)

Petitioner initially objects to the ALJ's conclusion that the Commissioner does not have jurisdiction to consider her claim that the Board's actions violated the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq,* reasoning, instead, that such claim is "colorable under State Education Law." (Petitioner's Exceptions at 17) Additionally, petitioner notes that the Initial Decision failed to consider her claim that she was denied a *second* salary increase for the 1995-96 school year in July of 1995. (*Id.* at 17-18)

Petitioner further asserts that the ALJ incorrectly concluded that the Board's decision to abolish her position in July 1995 was not improper. Here, petitioner argues that the ALJ cites *N.J.S.A.* 18A:28-9, the statute establishing the standard for abolishing the positions of *teaching staff members*, which she was not. Citing *N.J.S.A.* 18A:17-2, petitioner contends that as

a tenured assistant board secretary, she could be dismissed only for inefficiency, incapacity, unbecoming conduct, or other just cause. (*Id.* at 20, 22) However, to the extent the Commissioner should consider the Board's action under the "arbitrary and capricious standard," as did the ALJ, petitioner underscores that "the abolition must be one of substance [and] not merely appearance." (*Id.* at 21, citing to the Initial Decision at 10, citing to *Viemeister v. Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949))

In response to the Board's exceptions, *supra,* petitioner maintains that her salary increases were arbitrarily denied, notwithstanding that she was not on a salary guide. (Petitioner's Reply at 1) Further, underscoring that *N.J.S.A.* 18A:29-14 is *not* applicable to the instant matter, although the Board cites to its relevance, petitioner notes that, *if* that provision is applicable, she never received written notice of the Board's action within 10 days of such denial. (*Id.* at 2) Moreover, petitioner highlights her testimony affirming that she had no notice of deficiencies in her work.

Upon careful and independent review of the record in this matter, which included transcripts from the hearings conducted at the OAL on February 6, 1997, February 7, 1997 and February 10, 1999[1], the Commissioner affirms in part, and modifies in part, the Initial Decision of the ALJ, for the reasons set forth herein.

Initially, the Commissioner finds, for the reasons set forth by the ALJ, that the petition filed on March 22, 1995 was timely. Additionally, as a preliminary matter, while petitioner contends that the Board retaliated against her in violation of the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq.*, inasmuch as petitioner's counsel asserts that petitioner does not seek "the benefits of that statute in this forum," but, rather,

[1] Hereinafter, the transcripts shall be referenced in the following manner: T1 is the transcript for February 6, 1997; T2 is the transcript for February 7, 1997; and T3 is the transcript for February 10, 1999.

attempts to argue "that as a consequence of improprieties pointed out to the Board" by petitioner, she suffered reprisals with respect to her position, (T1 at 143, 144), the Commissioner determines to consider such claims of retaliation within the context of petitioner's general assertion that the Board's actions herein were taken in bad faith.[2]

With respect to the Board's decision to deny petitioner her salary increases on December 21, 1994 and July 12, 1995, the Commissioner notes that the parties do not dispute that petitioner is *not* a "teaching staff member" subject to payment on a salary guide.[3] Consequently, the Board's actions on the aforementioned dates are not reviewable by the Commissioner pursuant to *N.J.S.A.* 18A:29-14. However, inasmuch as petitioner is not a member of a collective bargaining unit or party to an agreement which might otherwise provide a mechanism to resolve such disputes with the Board, s*ee Randolph Bd. of Educ. v. Educ. Ass'n*, 328 *N.J. Super.* 540 (App. Div. 2000), the Commissioner herein considers her claim that the Board's action to twice deny her salary increases was taken for retaliatory reasons.

In this regard, however, where the Board contends, and the record substantiates, that petitioner failed to adapt to its site-based management plan, and was too rigid in carrying out her duties, (Board's Post-hearing Brief at 11) the Commissioner cannot find that petitioner has demonstrated that the Board's decision on December 21, 1994 was made for retaliatory reasons. With respect to the Board's denial of petitioner's salary increase in July 1995, after the reorganization of the business office, see *infra*, and after the formal evaluation, on which

[2] In so doing, the Commissioner does not reach the ALJ's findings with respect to the Commissioner's jurisdiction to hear and determine CEPA claims. (Initial Decision at 7)

[3] The job description for the Assistant Board Secretary/Director of Administration did not require certification (P-1). Petitioner affirmed in her testimony that, when she was hired in 1985, there was no certification requirement and she did not then possess a certificate (T2 at 21, 22). *See N.J.S.A.* 18A:1-1, and the definition of "teaching staff member."

petitioner did not receive any "above average" or "outstanding" scores (Board's Post-hearing Brief at 3)[4], the Commissioner finds that petitioner has similarly failed to meet her burden.

Turning to the issue of the Board's reorganization of its business office in 1995, the Commissioner assumes, for the purpose of this discussion, that petitioner was tenured in her prior position as Assistant Board Secretary/Director of Administration (Initial Decision at 2).[5] Like the ALJ, the Commissioner finds that the record supports the conclusion that the Board abolished her prior position subsequent to its reorganization and created the comptroller's position to "provide greater assurance of fiscal responsibility."[6] (Board's Post-hearing Brief at 4) The Board also noted that "to break apart the areas and hire a [comptroller] for some of the duties that Petitioner had been in control of would [help] the district meet all of the state guidelines and regulations in that area." (*Id.*) The job description for the Comptroller position (P-30), when compared with that of petitioner's prior position (P-1), demonstrates that the Comptroller was assigned a greater breadth of responsibility and accountability within the District. Additionally, the holder of the new position is required to possess "a valid certificate as a Registered Municipal Accountant or Certified Public Accountant issued by the New Jersey Board of Certified Public [Accountants]," (P-30), a credential which petitioner does not possess. Consequently, the Commissioner cannot find on the record before him that the Board's abolishment of petitioner's prior position, its creation of a new Comptroller position and/or its hiring of a properly credentialed individual to fill the new role were arbitrary and capricious.

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[4] The Board indicates that, "[o]f the 20 subparts [to the evaluation], Petitioner received 14 "needs improvement" and 6 "averages." (Board's Post-hearing Brief at 3)

[5] Although the Board asserts in its post-hearing submission to the ALJ that petitioner did *not* acquire tenure rights in her prior position (*id.* at 16), it did not object to the ALJ's finding to the contrary.

Neither can the Commissioner conclude that the Board's actions were retaliatory or otherwise carried out in bad faith. Additionally, like the ALJ, the Commissioner finds this record insufficient to establish *a connection* between petitioner's stated concerns about the Board fiscal practices and the Board's consequent reorganization in July of 1995.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and modified in part, as set forth herein. The Petition of Appeal is dismissed.[7]

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

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[6] The Board points out that, as a result of the reorganization of its business office, "many new positions were created." (Board's Post-hearing Brief at 5) A second reorganization took place in July of 1996, with emphasis on the instructional positions in the District. (*Id.*)

[7] In accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of February 11, 1999.

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

174-00

D.B., on behalf of minor, B.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, THE SUPERINTENDENT OF SCHOOLS AND THE ADMINISTRATION OF MORRISTOWN HIGH SCHOOL,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent alleged the Board improperly required high school student B.B. to be referred to the Board's Core Team for further investigation into possible chemical dependency. B.B. had been one of the students found to be in attendance at a "senior cut day" party where extensive drinking had taken place. The Board contended it was complying with the provisions of *N.J.S.A.* 18A:40A-8 through -21 (Act).

The ALJ concluded that, as a matter of law, it was reasonable and not an abuse of the District's discretion to determine that this was a high-risk situation and to refer B.B. to the Core Team for further investigation. The ALJ also concluded that the District was required to carry out its obligations under the Act, and the regulations and policies promulgated thereunder, even if the perceived risk to a student did not occur on school premises. The ALJ found it reasonable for the school officials to suspect that B.B. might be at risk for substance abuse regardless of whether she actually consumed alcohol on the date in question. Thus, the District implemented its required procedures outlined in its substance abuse policy and, only if the Core Team determined that there was reasonable suspicion to believe that B.B. was affected by substance abuse would she be required to have a chemical dependency assessment and urine drug screen. Accordingly, the ALJ concluded that as a matter of law under the circumstances of this case, the District did not exceed the parameters of its lawful authority nor did it violate any of B.B.'s constitutional rights. The ALJ concluded that the District was entitled to summary decision dismissing the appeal and petitioner was entitled to no relief in this forum. The ALJ ordered the evaluation of B.B. by the Core Team to proceed at the earliest possible time.

The Commissioner concurred that the matter was ripe for summary decision since there was no genuine issue as to any material fact. The Commissioner found that petitioner failed to demonstrate that the Board abused its discretion when it applied its policy which was adopted pursuant to the Act. The Commissioner granted summary decision to the Board. Petition was dismissed.

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10390-99

Agency Dkt. No. 349-11/99

D.B. ON BEHALF OF MINOR B.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, THE SUPERINTENDENT OF SCHOOLS AND THE ADMINISTRATION OF MORRISTOWN HIGH SCHOOL,

Respondents.

D.B., on behalf of **B.B.**, petitioner, *pro se*

John G. Geppert, Jr., Esq., for respondents (Wiley, Malehorn and Sirota, attorneys)

Record Closed: March 29, 2000 Decided: May 4, 2000

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On December 2, 1999, petitioner, D.B., filed a Verified Petition with the Commissioner of Education (Commissioner) seeking a declaratory judgment to prevent the respondents, the Morris School District Board of Education, the Superintendent of

Schools, and the administration of Morristown High School, from complying with the provisions of *N.J.S.A.* 18A:40A-8 through -21 (Act) with respect to his daughter, B.B., a senior at Morristown High School. On December 3, 1999, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

D.B. made an emergent application for a stay to prevent the District from carrying out its obligations under the Act. The emergent application was heard by Administrative Law Judge August E. Thomas, t/a, who issued an Order, dated December 6, 1999, staying the District from taking any further action with respect to B.B. pending the outcome of a plenary hearing.

The matter was assigned to the undersigned for plenary hearing. The District then made a motion for summary decision to allow it to proceed with its obligations pursuant to the Act. Petitioner made a cross-motion for summary decision to permanently enjoin the District from carrying out its procedure. Both sides submitted briefs and the motions were argued on the record before the undersigned on March 29, 2000. The record closed on that date.

THE APPLICABLE LAW

This appeal involves the application of the following statute:

N.J.S.A. 18A:40A-10 Comprehensive substance abuse intervention, prevention and treatment referral programs in public elementary and secondary schools; establishment; policy statement

> Each local board of education shall, pursuant to guidelines developed by the Commissioner of Education, in consultation with the Commissioner of Health, establish a comprehensive substance abuse intervention, prevention and treatment referral program in the public elementary and secondary schools of the district. The purpose of the program shall be to identify pupils who are substance abusers, assess the extent of these pupils' involvement with these substances and, where appropriate, refer pupils and their families to organizations and agencies approved by the Department of Health to offer competent professional treatment. Treatment shall not be at the expense of the local board of education.

> Each school district shall develop a clear written policy statement which outlines the district's program to combat substance abuse and which provides for the identification, evaluation, referral for treatment and discipline of pupils who are substance abusers. Copies of the policy statement shall be distributed to pupils and their parents at the beginning of each school year.

For purposes of the Act, "substance" includes alcoholic beverages. *N.J.S.A.* 18A:40A-9.

Further, in regulations promulgated pursuant to the Act, the New Jersey Administrative Code instructs local districts to implement policies and procedures relating to the prevention of substance abuse. *N.J.A.C.* 6:29-6.3(a) states in relevant part:

> District boards of education shall adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils whose use of alcohol and other drugs has affected their school performance or who possess, consume or who on reasonable grounds are suspected of being under the influence of the following substances in school or at school functions.

In order to comply with the requirements of the Act and the regulations, the District developed the following written policy statement outlining its program (Regulation, File Code: 5131.6):

> B. Procedure when a student is suspected of having a chemical abuse problem:
>
> 1. When a student has observable physical or behavioral changes that may be indicative of a substance related problem, or is at high risk for a substance abuse problem, the staff member shall refer the student to the SAC, Core Team and/or principal. A behavioral checklist designed to identify possible substance abuse shall be distributed to appropriate staff members. The Core Team shall review the results of the checklists along with attendance, academic and disciplinary information.
>
> 2. If the Core Team's assessment indicates that it is probable that the student is affected by substance use, the Core Team chairperson shall notify the principal immediately. A conference with the student, parents/guardians, SAC, or members of the Core Team, and/or principal as appropriate will be arranged by the chairperson. The Core Team shall refer the student to an outside resource agency recommended and approved by the New Jersey Department of Health and the school district for a chemical dependency assessment and urine drug screen. The SAC shall make the arrangements for the assessment as soon as possible and shall

provide assistance to the parents/guardians and student in making appointments. Parents/guardians who wish to obtain an assessment and urinalysis through a provider other than the agency recommended by the Core Team may do so at their own expense; in such a case, the assessment initiated by the parents shall be in addition to the assessment required by the District, unless the Core Team agrees to approve the parent's/guardian's request in place of its recommendation.

3. The components of a comprehensive chemical dependency evaluation consist of:

   a. signed release forms permitting the school and evaluating agency to exchange information;

   b. substance abuse history;

   c. drug screen urinalysis;

   d. developmental, family/social, academic and behavioral histories;

   e. mental status evaluation;

   f. review of findings by a Team trained in substance abuse and treatment planning, including a psychiatrist;

   g. psychiatric evaluation when recommended by the chemical dependency evaluator and/or the Core Team.

In accord with the District's policy, checklist forms designed to identify possible substance abuse problems are distributed to the teachers of those students, such as B.B., believed to be at risk. The Morris School District, however, was required to stay any further action on the present matter pending the outcome of this appeal. If the District prevails here, the Core Team, composed of four administrators, three child study team members, one high school teacher, one SAC counselor and the school nurse, will review the returned checklists and any additional information with regard to B.B. It will then assess whether the matter should cease with no further action or whether there is reason to refer B.B. for a chemical dependency assessment and urine drug screen.

Only if the Core Team determines that it is "probable that the student is affected by substance use" does the Core Team refer the student for a "chemical dependency assessment and urine drug screen" (Regulation, File Code: 5131.6, sec. B.2). The only

purpose of the whole process is to obtain evaluation and treatment for the child, if necessary. There is no disciplinary component of the evaluation process and only the school district, not the child, may be in violation of the Act. All results are confidential and do not appear on the student's record.

The Act is purely remedial. The Legislature of the State of New Jersey has determined that:

> a. A significant number of young people are unfortunately already involved in the abuse of alcohol and other drugs;
>
> b. Research indicates that particular groups of youngsters, such as the children of alcoholic parents, may in fact face an increased risk of developing alcohol and other substance abuse problems and that early intervention services can be critical in their prevention, detection and treatment; and,
>
> c. School-based initiatives have proven particularly effective in identifying and assisting students at a high risk of developing alcohol and other drug disturbances and in reducing absenteeism, decreasing the consumption of alcohol and other drugs, and in lessening the problems associated with such addictions.
>
> [*N.J.S.A.* 18A:40A-8.]

THE ASSUMED FACTS

For purposes of both motions, the material facts will be taken as set forth by D.B. This is appropriate since the District argues that it is required by law to apply the Act to B.B., even if the facts are as stated by D.B. In opposition, D.B has moved to prevent the District from having B.B. evaluated by the Core Team at the high school, and the District does not claim to have knowledge sufficient to counter his version of certain facts for purposes of his cross-motion.

On October 29, 1999, B.B. was given permission by her parents to miss school. That morning, she went to another classmate's home to celebrate that classmate's birthday and to watch the Yankees World Series parade. The parents of the host child had given their permission for their daughter to stay home and to have guests.

According to D.B., they were "celebrating the tradition commonly known as 'senior cut day.'"

Many other students arrived, some of whom had also cut their classes at the high school. At about noon, the principal of Morristown High School received an anonymous telephone call informing him that there was a party with alcohol present.

The principal called the Morris Township police. The principal and vice principal went to the home and found nine students, one of whom was B.B., still there. Twenty or thirty other students who had been in the house had already left by that time. There was evidence that alcohol was present and had been consumed.

The police arrived and, after investigation, took the remaining students into custody. D.B. claims that the police and the District personnel on the premises determined that B.B. had not been drinking and she was allowed to drive her car to the police station. He says that no charges were filed against her. The District has no evidence to contradict these statements.

In support of its motion, the District produced Morris Township Police Department Incident Report Number: 99-21217 and Supplementary Report giving the police account of the raid. This report was undisputed by D.B. The investigating officer wrote:

> I observed in plain view the following: sitting on center island of kitchen was open paper bag with remains of two six packs of Budweiser 12 oz. long neck bottles. On kitchen floor were paper bags filled with empty beer cans and bottles. Leaving the kitchen through open sliding door to patio area I observed open case box of Budweiser with remains of case. No persons there admitted knowledge of beer found.

Four male Morristown High School students were arrested and charged with underage possession of alcohol.

In a Supplemental Affidavit dated March 17, 2000, given in support of the District's motion, Michael Bruchac, vice principal at Morristown High School, stated that he was at the house on the day of the police raid and could see through the kitchen window that there was an open bottle of Bacardi rum next to a blender on the counter and two students were standing in the kitchen. He also noticed open beer bottles on the counter and beer on the steps by the side of the door. D.B. did not dispute these statements.

The only disciplinary action that was taken against B.B. by the District was a two-day suspension for cutting school, and this was reflected only on her attendance record, not on her permanent transcript.

D.B. claims that they were initially assured by the Superintendent that this would be the only action that would be taken against B.B. The Superintendent later reversed himself, possibly after being made aware of the District's board policy and its statutory obligations to its students, and directed the principal to refer B.B. to the Core Team. D.B. subsequently filed this appeal on behalf of B.B.

THE POSITIONS OF THE PARTIES

The District argues that it was following the requirements of the Act and *N.J.A.C.* 6:29-6.3 and its own policy formulated under the Act by identifying B.B. as a possible child at risk. Its only action was to refer her to the Core Team for evaluation to see if there was any reason to suspect her involvement with alcohol or drugs. There was no attempt to refer her for a "chemical dependency assessment and urine drug screen," since that would have to await the Core Team evaluation (Regulation, File Code: 5131.6, sec. B.2).

D.B. argues that that the District is violating his daughter's constitutional rights by forcing her to submit to a Core Team evaluation. In support of his argument, he has submitted statements, documents and affidavits which testify to his daughter's good

character and reputation and, allegedly, to demonstrate conclusively that she is unlikely to be involved in the use of substances illegally. At hearing on the motion, he argued that he and the child's mother know their daughter better than any Core Team could and they are satisfied that she is not engaged in any prohibited activity.

DISCUSSION OF LAW

Boards of education enjoy wide policy-making discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Thus, the applicable standard of review in this case is whether the actions taken by the Board were arbitrary, capricious or unreasonable. The petitioner has the burden of establishing by a preponderance of the credible evidence that the action taken by the local board was improper, that is, "patently arbitrary, without rational basis or induced by improper motive." *L.B. v. Elizabeth Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 110, 111. In *Barna v. Irvington Bd. of Educ.*, 97 *N.J.A.R.*2d (EDU) 345, 347, the Commissioner of Education stated, "It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable." Consequently, if D.B. cannot show that the actions taken with respect to B.B. by the Morris School District following the October 29, 1999, incident were arbitrary, capricious or unreasonable the Board's determination should not be disturbed.

In the present case, the District deemed B.B. to be a possible child at risk since she cut school and was caught during school hours in a raid by school officials and the Morris Township police in a home where underage drinking was openly and undisputedly taking place. I **FIND**, under the facts and circumstances as D.B. presented them or did not dispute them, that there are no relevant material facts that could be developed at plenary hearing to show that the District's view of the situation was "patently arbitrary, without rational basis or induced by improper motive." *L.B.,*

supra, 95 *N.J.A.R.*2d (EDU) at 111. I therefore **CONCLUDE**, as a matter of law, that it was reasonable and not an abuse of the District's discretion to determine that this was a high-risk situation and to refer B.B. to the Core Team for further investigation.

Schools have a custodial and tutelary responsibility for their students. *Vernonia Sch. Dist. v. Acton*, 515 *U.S.* 646, 656, 115 *S. Ct.* 2386, 2392, 132 *L. Ed.* 2d 564, 576 (1995). They are responsible for their students during the school day as well as on the way to and from school. *See N.J.S.A.* 18A:25-2; *N.J.S.A.* 18A:38-27, -31. The Commissioner has extended this authority to reach out-of-school conduct. *See F.G. v. Hamilton Township Bd. of Educ.*, 1982 *S.L.D.* 382, 390. The school's responsibility includes the obligation to see that its students do not engage in disorderly conduct during the school day. *N.J.S.A.* 18A:25-2. In *R.R. v. Shore Regional High School District Board of Education*, 109 *N.J. Super.* 337, 344 (Ch. Div. 1970), the court held that school officials have a right to suspend students for events happening out of school hours, "where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property."

Even without the mandates of the Act, school districts are responsible for the safety and welfare of their students in conjunction with the duty to educate and discipline. In *A.F. v. Holmdel Board of Education*, 91 *S.L.D.* 914, 921, the Commissioner recognized the "degree to which alcohol consumption is prevalent among students and that its abuse has frequently led to tragedy." The Commissioner stressed that he "must strongly support in every way possible the efforts of school administrators and officials to prevent students from imbibing alcoholic beverages or partaking of other controlled dangerous substances." 91 *S.L.D.* at 921. In that case the Commissioner concluded that neither the student's unblemished record, her leadership role, nor her participation in Students Against Drunk Driving had any bearing on the fact that she failed to behave responsibly before and during a prom. *Id.* at 920-21.

Nothing in the Act, the regulations and policies promulgated pursuant to it, or the applicable case law, restricts the District's obligation to identify students at risk and make appropriate interventions only to situations occurring on school premises during regular school hours. Under certain circumstances, a District is required by statute to intervene even in a student's home, if necessary, to protect its children from substance abuse. *N.J.S.A.* 18A:40A-7.1. In this case, I **CONCLUDE** that the District was required to carry out its obligations under the Act, and the regulations and policies promulgated thereunder, even if the perceived risk to a student did not occur on school premises.

D.B. argues that B.B.'s constitutional rights were violated by her referral to the Core Team. Although a child does not shed his/her constitutional rights at the schoolhouse gate, it is clear that students do not have an absolute right of privacy. A child's interest in privacy is to be balanced against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *Desilets v. Clearview Reg. Bd. of Educ.*, 265 *N.J. Super.* 370, 373 (App. Div. 1993) (citing *New Jersey v. T.L.O.*, 469 *U.S.* 325, 339, 105 *S. Ct.* 733, 741, 83 *L. Ed.* 2d 720, 733 [1985]). Students "have a lesser expectation of privacy than members of the population generally." *T.L.O., supra*, 469 *U.S.* at 348, 105 *S. Ct.* at 746, 83 *L. Ed.* 2d at 739. School officials can conduct searches of students, including drug tests, when there is a reasonable suspicion. *Vernonia*, *supra*, 515 *U.S.* at 661, 115 *S. Ct.* at 2394, 132 *L. Ed.* 2d at 579. Reasonable suspicion is "the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people' – including government officials – are entitled to rely." *T.L.O., supra*, 469 *U.S.* at 346, 105 *S. Ct.* at 745, 83 *L. Ed.* 2d at 737; *see also Hedges v. Musco*, 204 *F.*3d 109 (3d Cir. 2000), in which the application of the Act is discussed.

B.B. chose to participate in senior cut day and to remain at a party where alcohol was freely and openly being consumed by underage people including her friends and classmates. Based on the conduct of B.B. and the decisions she made on October 29, 1999, I **FIND** it reasonable for the school officials to suspect that B.B. might be at risk for substance abuse regardless of whether she actually consumed alcohol on the date

in question. Consequently, I **FIND** that the Morris School District implemented the required procedures outlined in its policy to curb the presence of substance abuse amongst the students in its school district, a valid concern that has sparked legislation at the state and federal level.

To suggest that B.B. should not have to go through the same procedure as other students simply because her parents believe that she has done nothing wrong ignores the legislative purpose behind the program, which is to require schools to identify pupils who may be at risk for substance abuse.

Pursuant to the District's policy, only if the Core Team determines that there is reasonable suspicion to believe that B.B. is affected by substance abuse will she be required to have a chemical dependency assessment and urine drug screen. This is within the acceptable limits of the District's authority pursuant to the Act and does not violate the constitutional rights of B.B. *Hedges*, *supra*, 204 *F.*3d 109.

If there is no reason to suspect B.B. of being at risk for substance abuse, as her father strongly maintains, she most likely will not reach the point in the program where she will have to submit a urine sample or have a chemical assessment. It is important to note that, in either case, any information concerning the involvement of B.B. in the school intervention or treatment program will remain strictly confidential. *N.J.A.C.* 6:29-6.3(b)(2).

The responsibility of D.B. for his daughter's welfare as a parent is separate and distinct from the statutory responsibility of the District under the Act. However, the arguments and evidence that D.B. puts forth in support of his motion, and the appeal itself, reveal an underlying assertion that he, as a parent, should be allowed to substitute his judgment for the objective evaluation of the Core Team. Alternatively, in the event a plenary hearing is held, the arguments and documents proffered by petitioner for consideration will, in effect, substitute the judgment of the undersigned and the Commissioner for that of the District's Core Team. Consequently, I

CONCLUDE that there are no material facts in dispute here because the evidence as to the performance, record and reputation of B.B. offered for consideration by petitioner is exactly that which should first be considered by the Core Team pursuant to the Act.

I **CONCLUDE** that as a matter of law under the circumstances of this case, Morris School District has not exceeded the parameters of its lawful authority nor has it violated any of B.B.'s constitutional rights. Consequently, I **CONCLUDE** that D.B., and B.B., are entitled to no relief as a result of this appeal.

SUMMARY DECISION

The New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-1.1, -21.6) provide that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(b). In considering respondents' motion for summary decision, this tribunal must determine whether "the papers and discovery . . . , together with the affidavits . . . , show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1.1-12.5(b).

The Supreme Court of New Jersey held that when deciding a motion for summary judgment under *R.* 4:46-2:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [*Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995).]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S. Ct.* 2505, 2512, 91 *L. Ed.* 2d 202, 214 [1986]); *see also N.J.A.C.* 1:1-12.5(b) (stating,

"an adverse party [to a summary decision motion] in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding"). Therefore, through the application of summary judgment, a legal issue may be quickly and inexpensively disposed of where there is clearly no genuine issue of material fact necessitating disposition at a hearing. *Brill, supra*, 142 *N.J.* at 540.

When these standards are applied in this case, it is clear, based upon the arguments and the affidavits and documents submitted by the parties, and resolving all disputes in favor of the petitioner, that there are no material facts in dispute which require a hearing in this forum. Consequently, I **CONCLUDE** that the District is entitled to summary decision dismissing this appeal as a matter of law. I further **CONCLUDE** that petitioner is entitled to no relief in this forum.

ORDER

It is **ORDERED** that summary decision is hereby **GRANTED** to respondents and the petition herein is **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that the evaluation of B.B. by the Core Team proceed at the earliest possible time.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 4, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

5-9-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EK/cb

OAL DKT. NO. EDU 10390-99
AGENCY DKT. NO. 349-11/99

D.B., on behalf of minor, B.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, THE SUPERINTENDENT OF SCHOOLS AND THE ADMINISTRATION OF MORRISTOWN HIGH SCHOOL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.[2]

Upon careful and independent review of the record in this matter, the Commissioner concurs that this matter is ripe for summary decision, since there is no genuine issue as to any *material* fact. (*N.J.A.C.* 1:1-12.5)

Initially, the Commissioner cautions that this matter is distinguishable from *Hedges, supra*, wherein the student was suspected of being under the influence of a controlled dangerous substance while in school and was thereafter required to undergo an immediate

[1] In addition to his exception arguments, by letter dated May 25, 2000, petitioner also requested an opportunity for oral argument.
[2] Although the Board did not submit exceptions, it did go on record informing the Commissioner that graduation for students from the Morristown High School is scheduled for June 21, 2000, and that, as a senior, B.B. may graduate

medical examination, pursuant to *N.J.S.A.* 18A:40A-12. Rather, the dispute herein arises upon application of the Board's policy which was adopted pursuant to *N.J.S.A.* 18A:40A-10, and the regulations relevant thereto. (Initial Decision at 2, 3) Like the Administrative Law Judge (ALJ), the Commissioner finds that, under these circumstances, petitioner has failed to demonstrate that the Board abused its discretion when it determined that B.B., who was found to be in attendance at a "senior cut day" party where extensive drinking had undisputedly taken place, was involved in a high-risk situation, thereby activating the policy which compelled her referral to its Core Team for further investigation. (Initial Decision at 9) Neither can the Commissioner find that the Board's application of its policy constitutes a violation of law.

Accordingly, the Commissioner adopts the ALJ's findings and concludes that summary decision is properly granted to the Board. The within petition is dismissed,[3] thereby leaving undisturbed the Board's decision to refer B.B. to its Core Team. [4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

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on that date. The Board, therefore, urged the Commissioner's "prompt attention to affirming this matter to allow the District to fulfill its obligations ***" as per the Initial Decision. (Board's Letter dated May 16, 2000)

[3] D.B. notes in his exceptions that B.B. has now turned 18 years old and, therefore, joins in this petition, as well as the submission of exceptions to the Initial Decision. (Petitioner's Exceptions at 1)

[4] The Order, issued by the OAL on December 6, 1999 granting an interim stay of Board action pending review of this matter on its merits (Initial Decision at 2) was not transmitted to the Commissioner for review. Accordingly, the Commissioner makes no finding herein as to whether petitioner would have satisfied the standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

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

175-00

IN THE MATTER OF THE TENURE	:	
HEARING OF HATTIE BLACK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11665-98
Agency Dkt. No. 36-2198

IN THE MATTER OF THE TENURE HEARING OF HATTIE BLACK, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Cherie L. Maxwell, Esq., for petitioner, State Operated School District of the City of Newark, (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

James M. Weinberg, Esq., for respondent, Hattie Black, (Weinberg and Weinberg, attorneys)

Record Closed: April 19, 2000 Decided: April 19, 2000

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on from the Department of Education on December 18, 1998, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to 13.

A hearing was scheduled to begin on June 1, 2 and 3, 1999.

Prior to that date, the parties settled the matter and on April 19, 2000, they submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND**.

1. The Settlement Agreement complies with the requirements of *Cardonic v. Brooklawn Bd. of Ed.*, 193 *S.L.D.* _____ (St. Bd. April 6, 1983).

2. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or the signatures of their representative.

3. The agreement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

April 19, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

April 25 2000
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 2 2000
DATE

Barbara A Hermak
OFFICE OF ADMINISTRATIVE LAW

cb

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

APR 13 4 07 PM '00

COMMISSIONER OF EDUCATION
OAL Docket No. EDUTH 11665-98N
Agency Ref. No. 36-2/98

In the Matter of the
Tenure Hearing of

HATTIE BLACK

STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF
NEWARK

VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Hattie Black ("Black"), agree to the following terms in full resolution of this matter:

WHEREAS, Black disputes the allegations of the tenure charges, and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation, and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district,

NOW, THEREFORE, the parties agree as follows:

1. Black agrees to retire from employment with the District, effective April 1, 2000.

2. Black shall be placed on administrative leave, with pay, through March 31, 2000

3. Black shall waive any entitlement to lost wages for any salary lost during the 120 day suspension without pay period already served by Black

4 The District shall, upon approval of this Agreement by the State District Superintendent and the Commissioner of Education, withdraw the tenure charges filed against Black.

5. Black acknowledges that the payments reflected in this agreement constitute the full financial obligation of the District and that she shall receive no additional payments, except as set forth below. In exchange for the above consideration, Black, on behalf of herself, her heirs, successors and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities of whatsoever kind or character, except as set forth below, that she has had or may now have against any of them, including without limitation any and all claims related to her employment with the District or the termination of that employment. Black does not waive her rights to any payments or benefits that she may be entitled to under the contract between CASA and the District and any claims or payment Black may be due pursuant to the negotiated contract as a result of retroactive salary adjustments at the conclusion of negotiations between the District and CASA, Black's bargaining unit, for the period up to her date of retirement and any payments Black may be due as a result of Grievance 1318 filed on her behalf by CASA.

6. The District shall certify the period from February 11, 1998 through March 31, 2000 as administrative leave with pay for pension purposes.

7. Black acknowledges, as required under *In re Cardonick*, that, despite the approval of this agreement, the issue of possible revocation of her teaching certificate may be considered by

the State Board of Examiners. Ms. Black understands that the Commissioner of Education may accept, reject or modify this Settlement, and that the Commissioner of Education may forward this matter to the State Board of Examiners for consideration of revoking her certificate.

8. The parties agree that it is in the public interest to avoid the time, expense and uncertainty attendant to litigation. It is not in the District's interest to litigate the charges because Ms. Black disputes those charges

9. The parties further agree that the charges at issue do not represent a danger to the public welfare.

10. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

11. This Agreement is subject to the approval of the State District Superintendent and the Commissioner of Education. Should the Commissioner fail to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement shall be null and void.

State-Operated School District of the
City of Newark

Hattie Black
Hattie Black

Dated: 4/12/00

Hope L Blackwell
By:

Dated: 4/13/00

OAL DKT. NO. EDU 11665-98
AGENCY DKT. NO. 36-2/98

IN THE MATTER OF THE TENURE	:	
HEARING OF HATTIE BLACK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) in the form of a Voluntary Settlement Agreement, Waiver and Release have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

Here, respondent, a school principal, is charged with unbecoming conduct by virtue of her alleged breach of security of the policies and procedures relating to the Elementary School Proficiency Assessment (ESPA), as well as her alleged unauthorized purchases, absent District approval. The District now affirms that:

> [I]t is in the public interest to avoid the time, expense and uncertainty attendant to litigation. It is not in the District's interest to litigate the charges because Ms. Black disputes those charges.

> The parties further agree that the charges at issue do not represent a danger to the public welfare. (Settlement at 3)

The Agreement provides, in relevant part, that respondent shall retire from employment in the District, effective April 1, 2000, and the District will withdraw its charges against her.

It is clear that where charges are made against any tenured employee of a District, the Commissioner anticipates that the charges are fully investigated and evaluated, vis-a-vis the evidence thereto, prior to the District bringing the weight of the legal process down on the teaching staff member:

> Certification of tenure charges by a [District] is predicated on the [District's] belief that the charges *** and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. *N.J.S.A.* 18A:6-11.
>
> On the basis that the board believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide [District] personnel, and hire legal counsel to obtain relief; *i.e.*, dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. *Where it is in the public interest to fully determine the issues, a plenary hearing is required.* (emphasis added) (*Cardonick* at 850)

Notwithstanding the parties' bare assertion that this settlement protects the public's interest, the Commissioner disagrees. In tenure matters such as this, where a teaching staff member loses tenure and/or is dismissed for inefficiency, incapacity, conduct unbecoming or other just cause, the case is forwarded to the State Board of Examiners for a determination as to possible revocation or suspension of the teaching staff member's certificate. Upon such referral, and after review of the record, the State Board of Examiners "shall determine by public vote whether or not the offense *[as] proven* is of such a nature as to warrant revocation or

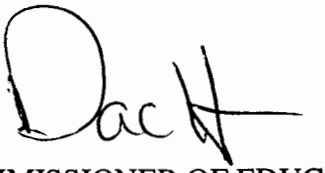
suspension consideration, or dismissal of the case." (emphasis added) (*N.J.A.C.* 6:11-3.6) Therefore, although the within agreement acknowledges respondent's awareness of the Commissioner's duty to refer this matter to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6, absent any factual findings on the record with respect to the specific allegations, and noting that respondent continues to dispute such allegations, it is unlikely that the Board of Examiners would have any basis for meaningful review and determination. Thus, the Commissioner cannot find that the public good is served by the within agreement. In this connection, the Commissioner underscores that

> the mere fact that one of the terms of a proposed settlement *** calls for the teaching staff member's resignation does not in and of itself assure [the Commissioner] that the *Cardonick* standards have been met because concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.*** (*In re Robert Barnes Driscoll, Board of Education of Cape May County Vocational-Technical School District, Cape May County*, decided November 10, 1999, Slip Opinion at 5)

Accordingly, the proposed settlement is rejected for the reasons expressed herein.[1] The Commissioner hereby remands this matter to the OAL for revision of the settlement documents consistent with the decision, which revisions shall specify that respondent *will not oppose* proceedings before the State Board of Examiners to suspend or revoke her certificate(s) pursuant to *N.J.A.C.* 6:11-3.6. However, if the parties are unwilling or unable to reach accord on an agreement modified in this fashion for submission to the Commissioner, the matter shall proceed to a hearing on the merits so that charges may either be proven, or respondent vindicated.

[1] To the extent the terms of the settlement have already been effectuated, the parties are admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

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

176-00

V.R., on behalf of minor child, J.D.C.,	:	
PETITIONER,	:	
V.	;	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 3123-00

AGENCY DKT. NO: 384-12/99

V.R. obo of minor child**, J.D.C.,**

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Mark Tepper, Esq., for petitioner
(Tepper and Scherling, P.C., attorneys)

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

Record Closed: April 14, 2000 Decided: April 19, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 22, 2000 for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

4/19/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

4/26/00
DATE

Delli Antoniatis/PP
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 27 2000
DATE

Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

/g

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
South Orange and Maplewood Board of Education

V.R., ON BEHALF OF J.V.C., PETITIONER, v. SOUTH ORANGE AND MAPLEWOOD BOARD OF EDUCATION, RESPONDENT/COUNTER CLAIMANT.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Ref. No. 384-12/99 **STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL**

Petitioner Virgil Roberts and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate as follows:

1. The pupil, J.C., will be permitted to continue in District schools for such time as he is eligible pursuant to N.J.S.A. 18A:38-1.

2. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

3. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

4. As a result of the foregoing, Petitioner Roberts hereby withdraws his Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Virgil Roberts 2/22/00
VIRGIL ROBERTS Date

Nancy A. Grossman 4/10/00
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION Date

Mark S Tapper 2/22/00
Counsel for Petitioner Date

J Butler 4/12/00
Counsel for Respondent Date

Document #: 397918/JLB

OAL DKT. NO. 3123-00
AGENCY DKT. NO. 384-12/99

V.R., on behalf of minor child, J.D.C.,	:	
PETITIONER,	:	
V.	;	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

COMMISSIONER OF EDUCATION

Date of Decision: June 12, 2000

Date of Mailing: June 12, 2000

177-00

S.T. and J.T., on behalf of minor child, H.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU1066-00
AGENCY DKT. NO. 1-1/00

S.T. and J.T., on behalf of minor,
H,T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF IRVINGTON,
UNION COUNTY,
Respondent.

S.T. and J.T., *pro se*

Vito Gagliardi, Jr., Esq., for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: April 3, 2000 Decided: April 25, 2000

BEFORE **MICHAEL L. RAVIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 6, 2000, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

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

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

April 25 2000
DATE

MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 2 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

al

PORZIO, BROMBERG & NEWMAN
A Professional Corporation
163 Madison Avenue
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Respondent
Springfield Board of Education

SAMUEL TUCHMAN & JAYNE TUCHMAN, o.b.o. H.T., Petitioners, v. SPRINGFIELD BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDUOS 01066-00N Agency Ref. No.: 1-1/00 **CONSENT ORDER**

This matter having come before the Court by way of Verified Emergent Relief Petition filed by Petitioners Samuel and Jayne Tuchman, *Pro Se,* against Respondent, the Springfield Board of Education (the "Board"); and the Board having filed opposition by and through its attorneys, Porzio, Bromberg & Newman, P.C.; and the parties having negotiated and amicably resolved this matter, it is hereby agreed as follows:

1. Petitioners are to pay the Board $2526.27 representing tuition payment for the enrollment of their daughter, Hara Tuchman, for the 1999-2000 school year at Jonathan Dayton High School. Petitioners have already paid $500 of the $2526.27 to the Board as a "good faith" offer. The remaining balance of the money will be paid according to the following schedule:

   a. $675 to be paid on March 1, 2000.

b. $675 to be paid on April 1, 2000.

c. $676.27 to be paid on May 1, 2000.

2. In exchange for the above, Petitioners agree to withdraw the within Petition with prejudice.

3. For and in consideration of the mutual promises set forth herein, Petitioners, for themselves and for their successors and assigns, fully, irrevocably, and unconditionally release and discharge Respondent from any and all claims, demands, causes of action and liabilities of any kind, including claims for fees and expenses, related to the matters at issue in this action. This release specifically includes any claims for injunctive relief, claims seeking reformation of the Tuition Agreement between the Board and the Petitioners and claims seeking a declaration that the Board acted arbitrarily, capriciously or in bad faith.

4. The parties recognize and agree that their entering into this Consent Order is not intended to and does not constitute or imply an admission of liability or any type of wrongdoing by any party, or of any violation of any federal, state or local statute, regulation or ordinance, or violation of any other right by any party, upon any legal or equitable theory, whether contractual, common law, statutory or otherwise. The parties agree that this Consent Order may not be used in any future proceeding of any type whatsoever, and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same.

5. This agreement is specifically contingent upon approval by the Springfield Board of Education by recorded roll call vote at a public meeting. If not so approved, this agreement is null and void, with the parties having reserved all rights. In the event that Petitioners fail to perform their obligations under this Consent Order, it is recognized and agreed that the Board retains all rights to initiate proceedings in the Superior Court of New Jersey to recover $7,894, the initial amount of tuition that was charged. In the event that such action is necessary, it is recognized and agreed that the Board shall be entitled to recover the costs of pursuing such an action.

6. This agreement is final only upon its approval by the Commissioner of Education. Should the Commissioner fail to approve this agreement, this matter may proceed on the merits.

Vito A. Gagliardi, Jr., Esq.
Porzio, Bromberg & Newman
Attorneys for Respondent,
Springfield Board of Education

Samuel Tuchman, *Pro Se*

Jayne Tuchman, *Pro Se*

IT IS SO ORDERED

, A.L.J.

Dated: ~~February~~ _____, 2000

419069

OAL DKT. NO. EDU 1066-00
AGENCY DKT. NO. 1-1/00

S.T. and J.T., on behalf of minor child, H.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement set forth by the parties in the form of a Consent Order and adopts the settlement as the final decision in this matter.[2] The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement. In so holding, however, the Commissioner notes for the record that several of the settlement terms were effectuated prior to his approval of the settlement. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants, whose controverted

[1] It is noted for the record that the title of the Initial Decision erroneously lists respondent as the Board of Education of Irvington.

[2] The Commissioner notes for the record that a copy of the resolution memorializing the Board's approval of the settlement agreement at its meeting on February 28, 2000 is contained within the case file and finds that the resolution conforms with the specifications of term 5 of the agreement.

matters have been duly transmitted to the OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 12 2008

Date of Mailing: JUN 12 2008

178-00

J.O. AND K.O., on behalf of minor child, C.J.O.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 12, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 101-00

AGENCY DKT. NO. 8-1/00

J.O. AND K.O. ON BEHALF
OF MINOR CHILD, C.J.O.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF MAPLE SHADE,
BURLINGTON COUNTY,

Respondent.

Mark W. Catanzaro, Esq., for petitioners

Frank P. Cavallo, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: April 25, 2000 Decided: April 26, 2000

BEFORE **STEVEN C. REBACK**, ALJ:

On January 10. 2000, this matter was transmitted to the Office of Administrative Law (OAL) on an emergent relief request by the petitioner. The request essentially was addressed to the issue of expulsion from school. The matter was scheduled to be heard on February 1, 2000 at which time the emergent issue was resolved. The parties have prepared a stipulation indicating

the terms thereof, which is attached and fully incorporated herein. The settlement fully disposes of all aspects of the appeal.

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

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

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

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

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

4/26/00
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

4/27/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 28 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

File No. 06310-0003

Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
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Attorneys for Respondent, Maple Shade Board of Education

2000 MAR 25 P 1:39

CHRISTOPHER J. OBCHINETZ, by his natural guardians, JAMES and KATHLEEN OBCHINETZ, Petitioners, v. BOARD OF EDUCATION – MAPLE SHADE TOWNSHIP, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF. NO. 8-1/00 OAL DOCKET NO. EDUOS-00101-00S CIVIL ACTION **STIPULATION OF SETTLEMENT**

Whereas, the Respondent, Township of Maple Shade Board of Education (hereinafter "Board"), following a Discipline Hearing voted to exclude the Petitioner, C.O. (hereinafter "C.O.") from the Maple Shade High School;

Whereas, a Petition of Appeal and Application for Emergent Relief were filed on behalf of C.O. challenging the decision of the Board;

Whereas, an Order was entered by the Honorable Steven Reback, A.L.J., requiring the Board to provide Home Instruction to C.O. during the appeal pending of the Board's decision;

Whereas, the Board and C.O. have, through their respective counsel entertained settlement discussions in effort to satisfy the safety concerns of school district and provide a continuity of educational opportunity for C.O.;

IT IS ON THIS day of March, 2000, STIPULATED AND AGREED AS FOLLOWS:

(1) C.O. shall remain on Homebound Instruction for the remainder of the 1999-2000 School Year;

(2) C.O. shall undergo, at the parent's expense, a Psychiatric Examination with a report to be furnished to the Maple Shade School District;

(3) C.O. shall participate in psychiatric treatment, if required by the Psychiatrist performing the examination, at the parent's expense;

(4) As long as the Psychiatric Report, required under paragraph 2 above, indicates that C.O. should return to the Maple Shade School District, then C.O. shall be re-admitted to the Maple Shade High School for the 2000-2001 School Year; and,

WE HEREBY AGREE TO THE TERMS SET FORTH IN THE ABOVE STIPULATION OF SETTLEMENT

JAMES OBCHINETZ,
Individually and behalf of
Christopher Obchinetz

Dr. Michael Baltish, Interim
Superintendent on behalf of
Maple Shade Board of Education

Kathleen OBCHINETZ,
Individually and behalf of
Christopher Obchinetz

Mark W. Catanzaro, Esquire

Frank P. Cavallo, Jr., Esquire

OAL DKT. NO. 00101-00
AGENCY DKT. NO. 8-1/00

J.O. AND K.O., on behalf of minor child, C.J.O.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

COMMISSIONER OF EDUCATION

Date of Decision: JUN 12 2000

Date of Mailing: JUN 12 2000

J.F. AND B.F., on behalf of minor Child, M.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision to suspend their daughter, M.F., for one day for allegedly writing inappropriate notes to her teachers. The Board had originally suspended M.F. for three days and referred matter to the Child Study Team.

In light of the testimony of witnesses and the provisions of the Student Handbook, the ALJ determined to affirm the suspension. The ALJ noted that M.F.'s First Amendment Rights were not violated since the concept of free speech can be subject to appropriate restrictions such as abusive behavior.

The Commissioner agreed with the conclusion of the ALJ that, under the circumstances herein, the Board's one-day suspension was not arbitrary, capricious, unreasonable or a violation of her constitutional rights. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8906-99

AGENCY DKT. NO. 329-11/99

J.F. and B.F. ON BEHALF OF MINOR CHILD M.F.,

Petitioners,

v.

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

Respondent.

J.F., petitioner, *pro se*

Frederick W. Hardt, Esq., for respondent

Record Closed: April 13, 2000 Decided: May 25, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

Petitioners challenged the Board of Education's determination to suspend their daughter for 1 day. The petitioners appealed to the Department of Education and on November 3, 1999, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. After several adjournments, the matter was heard on April 7, 2000. The record closed upon transmittal of documents on April 13, 2000.

STATEMENT OF THE CASE

M.F., a 7th grade student, left a note on a teacher's desk on May 13, 1999 which said "Have a nice summer. I hope you die" and "To Mrs. L., Roses are red. Violets are black. Why is your chest as flat as your back. From M. and S.". The school principal, Vincent Fynan, issued M.F. a 3-day suspension for inappropriate conduct, in accordance with the Student Handbook. (P-1, Handbook, at page 13.)

The parents of M.F. appealed to the Superintendent of Schools, Dr. Wendy L. Schadt. On September 1, 1999, the Superintendent of Schools reduced the suspension to 1 day, and waived any referral to the Child Study Team. (The Student Handbook provides for a 2 day suspension for a 1st offense and a 3 to 5 day suspension for a 2nd offense of inappropriate conduct. The suspension was set at 3 days because this was a 2nd offense.)

WITNESSES

Lorraine Lodge said she was M.F.'s math teacher, and that she found the note in question on her desk on the last day of school in 1999. She said that she had told M.F. to "sit up because someone could see down (her) shirt." She also said she discussed the school's dress code with another teacher.

Vincent Fynan said that, as Principal of Helen A. Fort Middle School, he reviewed the incident, and determined that the appropriate suspension should be 3 days. He said that the Superintendent, upon review, reduced this to a 1-day suspension. He also said that the suspension has not yet been served, pending the resolution of the instant appeal.

DISCUSSION

Petitioners have several issues involving the school, however, the only one that has been transmitted to me for hearing, and the only one over which I have jurisdiction, is the 1 day suspension.

Petitioners, *pro se*, made the following arguments: "the board of education's inconsistent enforcement of the rules set forth in the student handbook; a hostile educational environment was created by the teacher's repeated remarks; the student's right to a fair and equal education was denied when she was removed from the class and sent to the library for that period without benefit of a tutor; student's 1st amendment rights were violated."

The "inconsistent enforcement" complained of was that the Board did not discipline another student (not the S. who co-authored the note), in a situation not identical to this one. This complaint cannot stand. Each student should be dealt with individually.

The "teacher's repeated remarks," presumably about M.F.'s posture or mode of dress, will only be addressed in that the parents contended that the remarks may have lead to the writing of the note. Comments or directions made by a teacher to M.F. about her posture or clothing in no way justify writing an inappropriate note.

Sending M.F. to the library during a class period is also not an issue in this case, as it is unrelated to the 1-day suspension.

As to the petitioners' First Amendment argument, it is also unavailing. The concept of free speech, revered as it is, can be subject to appropriate restrictions.

In Karins v City of Atlantic City 152 N.J. 532 (1998), the New Jersey Supreme Court rejected constitutional arguments concerning free speech and due process and held that a firefighter could be disciplined for directing an epithet at a police officer. The Court found that even applying a strict scrutiny standard because of First Amendment issues, the fire department regulations were neither unconstitutionally vague nor overbroad. The use of a catchall provision, in this case "conduct unbecoming," was permissible since it is impossible to predict every instance of proscribed conduct. The school's Student Handbook use of the phrase "abusive behavior" is comparable.

On the First Amendment issue, the Court balanced Karins' freedom of expression against the interest of the State as an employer in promoting the efficiency of public services. Since the comment was not related to an issue of public concern and could disrupt the harmony and working relationship between the two departments, it was not constitutionally protected. The penalty imposed by the appointing authority, a 48-day suspension, was reinstated. The school has a similar interest in promoting the efficiency of public education.

In *Desilets v. Clearview Regional Bd. of Educ.*, 137 *N.J.* 585 (1994), the New Jersey Supreme Court found that local school authorities violated a junior high school student's First Amendment rights by deleting his R-rated movie reviews from the school newspaper without a legitimate pedagogical reason. Examples of legitimate pedagogical reasons include "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* at 591 (quoting *Hazelwood School District v. Kuhlmeier*, 484 *U.S.* 260, 271, 98 *L.Ed.*2d 592, 605 (1998)), see also *N.J.S.A.* 18A:37-2 (habitual use of profanity or obscene language by pupils is cause for suspension or expulsion).

In *J.G. v. Lakewood Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 433, a parent appealed her daughter's three-day suspension from school for using profanity toward a teacher during class. Citing to *N.J.S.A.* 18A:37-2 and the student handbook for the district (which stated that profanity was cause for suspension), the ALJ upheld the suspension, and the Commissioner of Education adopted the decision.

Thus, it is clear that a wish that someone die, coupled with immature doggerel, can raise a legitimate pedagogical concern and may be subject to reasonable restrictions, such as the Student's Handbook's prohibition against abusive, offensive behavior directed toward a teacher.

Appropriate school authorities have decided that the suspension to be served should be 1 day. I will not disturb this conclusion.

ORDER

The appeal of petitioners is **DENIED.** The school district may impose the 1-day suspension.

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

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

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

5/25/10
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

5/30/00
DATE

Debra Catanuti/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

J.F., petitioner

For Respondent:

Lorraine Lodge, teacher, Helen A. Fort Middle School
Vincent Fynan, Principal, Helen A. Fort Middle School

DOCUMENTS IN EVIDENCE

For Petitioners:

P-1 documents

For Respondent:

R-1 documents

OAL DKT. NO. 8906-99
AGENCY DKT. NO. 329-11/99

J.F. AND B.F., on behalf of minor Child, M.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in making his determination herein.

Upon his full and independent review of the record, the Commissioner agrees with the conclusion of the Administrative Law Judge that, under the circumstances existing here, the Board's imposition of a one-day suspension on minor child M.F. was not arbitrary, capricious, unreasonable or a violation of her constitutional rights and, therefore, the imposition of this suspension cannot be disturbed by the Commissioner.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 13 2000

Date of Mailing: JUN 13 2000

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

G.L., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

June 13, 2000

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 5212-00
AGENCY DKT. NO. 151-5/00

G. L., on behalf of R. M.

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY

Respondent.

Michael A. Rowek, Esq., on behalf of petitioner

Charlotte Kitler, Esq., on behalf of respondent

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the legal guardian of R.M., applies for emergent relief in the form of an order directing the immediate reinstatement of R.M. to a specific school in the district, Ferris High School. R.M. was suspended on March 29, 2000. On May 8, 2000, the district allowed him to return to school, but reassigned him from Ferris High School to another district public school, Dickinson High School. On the same day, petitioner filed this Notice of Motion for Emergent Relief. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case on May 10, 2000. Oral argument was scheduled for and did take place on June 1, 2000. Despite the position

taken in its brief, at the hearing, petitioner stipulated that the propriety of the initial imposition of the 10-day suspension by the district was not at issue. After hearing oral argument, the record closed.

FACTUAL DISCUSSION

The evidence considered in determining whether to grant or deny this application consisted of an Affidavit of Francis X. Dooley, the district's Associate Superintendent and a Petition prepared by counsel and verified by G.M., with attachments.

R. M. is seventeen years of age and is in twelfth grade. He has attended Ferris High School in Jersey City for the last four years. He has passed all of his academic subjects and been promoted year to year. He is a good student with no prior disciplinary problems. He has been accepted into college and has numerous letters of recommendation from his teachers at Ferris.

Some time between March 24, 2000 and March 29, 2000, R. M. submitted a paper in response to a required English class assignment. Part of it, in its original form (prior to the insertion of "corrections" by the English teacher), follows:

UNSPOKEN

> What most don't realize is the power in words and actions taken, for the sole purpose to cause pain to another. Though they do not fight back, so they are considered to be easy prey or push over's, but vengeance is truly sweeter then anything imagined.
>
> * * *
>
> As I walked out of the school through the long walkway I could see many of my fellow students . . . We all had one thing in common though, for we all hated and despised Ms. Kar.
>
> * * *
>
> The bell has rung and class is over, . . . and I was free from my prison known as Ferris High School . . . [O]f course this day was not a good, for when I almost made it to the main exit, their was that

> insufferable woman as if she was almost waiting for me. There began the exact same speech since the beginning of the school year on September which was merely four months ago. I've heard this from Ms. Kar so many times I could mouth every word she was going to say. "Frederick", she said his name as if they were on friendly terms. She had suspended him three times before this date. I had so many curses just waiting to burst out as they have before, but a suspension now would ruin my plans. So Ms. Kar went on and on about his particularly sharp rings, almost satanic jewelry, and daily wear of black clothes.
>
> * * *
>
> "Freddy!" Its Dad calling me. "Coming!. . . "Hey Dad, what's up." "I received a call from your principle." he said softly. "She said you were disrespectful today and that I should have a talk with you." He spoke in oddly calm voice. "But Dad." But before I could finish I was smacked a cross the face with such force that it knocked me right off my feet. "WHAT HAVE I TOLD YOU ABOUT THIS DAMN PRINCIPLE, I DID NOT WANT TO GET ANOTHER CALL FROM THAT BITCH."
>
> . . . . . Now Ms. Kar wants to challenge me, well lets see. Its only seven o'clock, this is about the time when she leaves the school. I think I'll a pay her a visit. I ran to the school hoping not to miss her. I passed the flag pole and ran into the schools parking lot. Thanks to luck, there she was making her way to her car. "Hello Ms. Kar." I said as soon as I was close enough to be heard. "Frederick! you scared me." she said after she turned around to face me. "Shouldn't you be Home?" She asked me. "You called my father." I said as I looked about the empty parking lot. She turned and began walking to her car again "Good night Frederick." With that said I grabbed the bitch in the back of the neck stopping Ms. Kar in her tracks. There came my other hand to completely rap around her neck and I began to squeeze. She was kicking and a trying to get a gasp of air, this only made me squeeze tighter. Soon her movement stopped and all I had in my hands was a dead corpse in a gray suit. I dropped it to the ground where I watched it lay.

It is crucial to emphasize that the paper specifically mentions Ferris High School on page 1, and describes acts of violence against a number of persons, including the Principal of Ferris High School who is named "Ms. Kar" in the paper. The Principal of Ferris High School is Georgina Rey Fauta. Ms. Karas is a teacher at Ferris who had R. M. in her science class during the 1997-98 school year. It is uncontradicted that in the paper, R. M. made reference to actual incidents while using, in the view of the district, thinly disguised pseudonyms. The actual incidents are the several times when the Principal spoke to him about his appearance.

Even more pivotal, as will be demonstrated, is that the paper specifically refers to searching for "Ms. Kar" in the school's parking lot, confronting her there and strangling her to death.

The English teacher gave R.M.'s paper to the school's guidance counselor, who apparently showed it to Principal Rey Fauta. As a result, on March 29, 2000, R.M. received a School Notice of Suspension for 10 days, signed by Principal Rey Fauta. The reasons cited were "Threats of Violence – Other – Terroristic Threats" and "Violent and/or Criminal Act – Other – Terroristic Threats."

On March 30, 2000, the day following his suspension, R. M. was seen at approximately 3:00 p.m. by a security guard in the parking lot of the school where the Principal and other school staff park their cars. Parking in this lot is restricted to school staff only. It is uncontradicted that R.M. knew he was forbidden from being on school property during his suspension. When Mr. Dooley learned of this incident, he assigned a security guard to accompany the Principal to and from her car and to be present in the Principal's office after school hours.

It is clear that there was some discussion between the district and petitioner concerning the necessity of receipt by the district of psychiatric "clearance" as a condition to lifting the suspension. However, it is in dispute exactly what was said, by whom, or when.

Attached to the verified petition is a "psychiatric care form" dated March 30, 2000 which refers to authorization by a Mobile Crisis Unit for R.M.'s return to school on March 31, 2000, without the need for additional treatment. This form was executed and signed not by a psychiatrist, but by a "mobile crisis worker".

It is without contradiction that on March 31, 2000 R.M. and petitioner met with Principal Rey Fauto regarding the suspension. R.M. was referred to Dr. Kahn, the school

physician, who ordered, in written form, that R.M. should not be re-admitted to school until he had been evaluated by a psychiatrist.

On April 10, 2000, it appears from a report attached to the verified petition that R.M. was evaluated by Dr. Shams Qureshi, a psychiatrist. Dr. Qureshi did not generate a report until May 10, 2000 and petitioner provided no evidence as to when that report, which will be discussed below, was received by the district.

On April 13, 2000, petitioner's counsel wrote to District Superintendent Dipatri and Mr. Dooley. Counsel indicated that initially petitioner was advised that R.M. could return to class upon a showing of a satisfactory "psychological" evaluation. Counsel indicated that there were two such evaluations, that R.M. was still not being allowed to return and that he was "requesting immediate appeal" of the decision not to allow R.M. to return to school. It is worth noting at this juncture, that despite what counsel represented in his April 13th letter, no reports authored by any psychiatrist or psychologist prior to April 13, 200 were submitted with the verified petition.

The district's public schools were closed for spring break from April 17, 2000 to April 24, 2000.

According to Mr. Dooley's affidavit, he heard that petitioner "brought some papers regarding a psychiatric evaluation" to Principal [Rey Fauta] at Open House on April 25, 2000 and was advised to call Mr. Dooley at his office.

On April 28, 2000, according to counsel's moving papers, "a hearing was held" before Mr. Dooley. It is not in dispute that R.M. expressed regret at that hearing and that he intended no harm to anyone by his paper. R.M. stated that he was in the parking lot on March 30 because he was coming to choir practice. Mr. Dooley found that R.M.'s explanation made no sense.

On May 1, 2000, R.M. submitted a letter of apology to Principal Rey Fauta in which he indicated that his paper did not pertain to her, he did not intend for her or anyone else to be threatened by it, that his English teacher had told the class to be creative, that he has an interest in becoming a horror-film maker and that he was "sorry for all the trouble this fictional story had caused."

On May 4, 2000, Mr. Dooley wrote to petitioner's attorney. The letter reads, in pertinent part:

> As I mentioned at our meeting last Friday, we regard [R.M.'s] actions at Ferris as extremely serious and threatening. The Principal of Ferris has been so frightened that I assigned a security guard to protect her throughout the work day. The opportunity is being offered to [R.M.] to return to public school – at nearby Dickinson High School – in order to graduate this year. He may report to the Principal at Dickinson High School any time on or after Monday, May 8, 2000.

Mr. Dooley further advised petitioner's attorney, in part, that:

> (R.M.) is prohibited from being on the premises of Ferris High School at any and all times. He may not attend classes at Ferris nor may he participate in any after-school activities at Ferris High School. However, he can attend the prom and exit day luncheon for Ferris High School students, as these activities are held off the premises of Ferris High School.
>
> (R.M.) will graduate in Dickinson High School ceremonies, but he will receive a diploma issued by Ferris High School.

It is uncontradicted that between April 11, 2000 and May 8, 2000, R.M. received home instruction, although the amount of it is in dispute.

It is further uncontradicted that R.M. reported to Dickinson High School on Monday, May 8, 2000. According to his school records, he has earned 160 credits to date, which is more than the total number of credits (135) needed to graduate, but he still needs to complete one required course, English 4. He is enrolled in English 4 at Dickinson High School and will also be permitted to continue with any course in which

he was enrolled in Ferris which is also offered by Dickinson. Petitioner does not dispute that he will be academically qualified to graduate on time.

On May 10, 2000, two days after this motion was filed, Dr. Qureshi wrote a one-page report concerning his April 10 psychiatric evaluation of R.M. In his report, which parenthetically, is not in the form of a sworn affidavit, he indicates that he reviewed R.M.'s paper with R.M. The young man told him about his "strong interest in horror movies" and that he wishes to pursue a major in film making. R.M. also told him that his paper was fictional and intended "no personal harm" to anyone.

According to Dr. Qureshi's report, R.M. told him that after he wrote the paper, he showed it to his mother and sister as he wanted to know if it was scary enough.

The report states, in pertinent part:

> [R.M.] has also advised that he is quite anxious with the amount of time he is missing from school; any impact this may have upon his acceptance to college; graduation with his classmates, along with how upset he is that his parents may not see him graduate with his class.

Dr. Qureshi's report concluded that:

> . . . . having reviewed the story [R.M.] submitted to English class and the findings of my objective examination, I find with a high degree of medical certainty that [R.M.] is able to return to his high school, as he is not a threat to himself or anyone else.
>
> Furthermore, I wish to point out that if [R.M.] is denied reinstatement to his high school and graduation with his classmates of the last four years, will in all medical probability be left with permanent psychological injury.

DISCUSSION AND CONCLUSIONS

Emergent relief is authorized by *N.J.A.C.* 6:24-1.5 and 1:1-12.6. The most recent statement of the standards for granting relief are found in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). It should not be granted except if:

1. Irreparable injury will result to the party if the injunction is not granted; and

2. the party has a reasonable probability of success on the merits; and

3. the relative hardship to the moving party outweighs the hardship to the non-moving part.
Id. at 132-134.

With regard to irreparable harm, petitioner correctly observes that the right to a thorough and efficient public education is a right guaranteed under the New Jersey Constitution, Article VIII, Section IV, paragraph 1. By the district not allowing him to return to Ferris High School, argues petitioner, he has irreparably missed a considerable amount of school time and has not been given sufficient home instruction in lieu of school instruction.

Because it is uncontradicted that R.M. has sufficient number of credits to graduate and in the absence of any assertion that he will be academically precluded from graduating, I **CONCLUDE** that irreparable harm to R.M. 's right to a thorough and efficient education has not been demonstrated.

In the same vein, petitioner argues that irreparable harm is being placed on R.M. because he is being forced to undertake his education with a new student body, new teachers and at a distant high school. While this may understandably cause R.M. anxiety and inconvenience, I **CONCLUDE** that petitioner has not proven this would constitute irreparable harm.

Last, petitioner points to Dr. Qureshi's report as sufficient, credible evidence from which to find irreparable harm. Counsel states "the doctor has indicated that the actions taken to date ... [have] resulted in psychological injury." As I read the report, it refers to R.M. being "quite anxious" and "upset", which is quite understandable - I can certainly empathize. However, the report does not indicate any then-observed psychological injury. I also note that Dr. Qureshi's report is based on an evaluation which took place on April 10, which was prior to the district's decision allowing him to return to school, to attend the prom and to attend graduation ceremonies (albeit at Dickinson High School.) In other words, the report, although uncontradicted, is now stale and not deserving of much weight. Even if it were not stale, without more specificity as to the nature of the alleged "permanent psychological injury, I do not find the report particularly trustworthy. Rather, I find it bald and conclusory.

Even if one assumes that petitioner has proven irreparable harm petitioner has failed to meet the second prong of the *Crowe v. DeGioia* test, *i.e.*, that there is a reasonable probability of success on the merits.

Petitioner first contends, in this regard, that R.M.'s right to procedural Due Process was denied by the District's refusal to allow R.M. to return to Ferris High School after ten days.

The procedural safeguards to which petitioner was entitled must be addressed in the context of the actions of the district. The district did not expel R.M., as expulsion refers to the total exclusion of a pupil from the schools of a district. *See, e.g., Scher v. Board of Education of West Orange*, 1968 S.L.D. 92, 97. Rather, the district transferred him to another public high school within the district after a suspension.

As noted at the onset of this decision, petitioner does not contend that the propriety of the district's initial 10-day suspension was imposed inconsistent with R.M.'s constitutional rights. Therefore, I need not recite, the causes for suspension listed in

N.J.S.A. 18A:37-2 or even decide whether or not R.M.'s conduct constituted "good cause" for same, since petitioner concedes the point.

While there is no statutory guidance, petitioner cites *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 N.J. Super 337 (Ch. Div. 1970) for the proposition that for any suspension beyond 10 days, a student is entitled to a formal hearing by the district within 21 days from the start of the suspension. By my calculation, the district's hearing in this case should have occurred on April 26, 2000. It in fact occurred on April 28, 2000. Petitioner argues the remedy for this 2-day delay is immediate reinstatement. Arguably, the district may deserve criticism for not holding the hearing within 21 days. However, this is not a situation of mistaken identity or particularly credible protestations of innocence and R.M., unlike R.R., did have a preliminary hearing. Therefore, this matter is factually dissimilar from R.R..

Just as important, the instant case must be distinguished from those cases in which during the period of suspension, the student received no education at all. R.M. received home instruction. Although the amount is disputed, it seems to have been sufficient enough to meet his academic requirements for graduation.

In order for petitioner to prevail, petitioner must ultimately demonstrate that R.M. has not only an inherent right to a thorough and efficient public education, which he does, but an inherent right to attend the particular school of petitioner's choice within the district. Petitioner cites no authority in support of this proposition, nor does my research disclose any.

Finally, petitioner must prove at this juncture there is a reasonable probability of proving that the district's decision not to allow R.M. to return to the premises of Ferris High School is arbitrary, capricious and unreasonable. It is well established that actions of local boards that lie within their discretionary powers may not be upset unless they are arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 N.J. 288 (App. Div. 1960). The position of the district, as expressed in its letter memorandum in opposition to this motion, is that:

> .... the student was not returned to his school of choice because of the legitimate fears that he instilled by the implicit threats in his story about killing the Principal of Ferris High School and his conduct, after his suspension, in being on the premises of the high school, in the area of the staff parking lot, the very place mentioned in his story as the site of the killing of the Principal. His return to a different high school allows him to complete his course work in a fresh environment and helps to subside the fears for the safety of the persons at Ferris High School.

Petitioner argues that in light of Dr. Qureshi's report, the district's position is arbitrary, capricious and unreasonable. I would find petitioner's argument compelling, perhaps, if after its receipt of the report, the district refused to permit R.M. to return to any school within the district. At this juncture, however, based on the record before me and the fact that the district has allowed R.M. to return to a district public school, I **CONCLUDE** that petitioner has not demonstrated a reasonable probability of showing that the district's decision was arbitrary, capricious and unreasonable.

With regard to the third prong of the *Crowe v. DeGioia* test, I **CONCLUDE** that the relative hardship to petitioner if R.M. is not immediately reinstated to Ferris High School does not outweigh the hardship to the district. The hardship to the district, based on the record before me, is that the Principal has a legitimate fear for her safety if R.M. is on the premises. Even if Dr. Quereshi reports that R.M. poses no threat to Principal Rey Fauta, in light of the lack of satisfactory proof as to why R.M. was in the very vicinity where the fictitious murder was to take place, it is not reasonable to expect that the Principal should be required to work in an environment of fear so that R.M. can complete his senior year studies with his fellow classmates.

I realize that the practical effect of this decision could preclude a full plenary hearing before the end of the school year unless petitioner has access to such a hearing quickly. Accordingly, by telephone, I invited petitioner's counsel to immediately contact the Clerk of the OAL so that one may be scheduled as soon as practicable.

ORDER

I **ORDER** that petitioner's Application for Emergent Relief be and hereby **DENIED.**

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

June 6, 2000
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

OAL DKT. NO. EDU 5212-00
AGENCY DKT. NO. 151-5/00

G.L., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on June 1, 2000, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Petitioner's exceptions were timely submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in rendering his determination herein.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. Petitioner's request for emergent relief is denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 13 2000

Date of Mailing: JUN 13 2000

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

181-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MORRIS KIMBLE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION
_____:		

June 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06227-99S

AGENCY DKT. NO. 174-6/99

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Petitioner,

v.

MORRIS KIMBLE,

Respondent.

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

Robert M. Schwartz, Esq., for respondent

Record Closed: April 24, 2000 Decided: April 28, 2000

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of tenure charges with the Commissioner of Education on June 30, 1999, by The Trenton Board of Education ("petitioner") against Morris Kimble ("respondent") alleging conduct unbecoming a tenured employee and other just cause. The allegations are contained in a Statement of Tenure Charges filed with the Commissioner of Education dated June 1, 1999. The matter was transmitted to the Office of Administrative Law on July 29, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement. Although this matter involves tenure, given the nature of the allegations, the concerns of the parties, and the strengths and weaknesses of the case, this resolution appears to be reasonable and properly balances the interests of all the parties.

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

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

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

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

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

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

4/28/00
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

5-7-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 2 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

Revised 3/8/2000

In the Matter of Tenure Charges Against Morris Kimble, School District of the City of Trenton, Mercer County	**BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY** **Agency Docket No.174-6/99** **SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT is made between the Petitioner, Board of Education of the City of Trenton, ((hereinafter referred to as the "Board"), and the Respondent, Morris Kimble, (hereinafter referred to as "Respondent").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, having Agency Docket No. 174-6/99, and OAL Docket No. EDU 6227-99S; and

WHEREAS, the tenure charges allege conduct unbecoming by the Respondent during the 1997-1998, 1998-1999 school terms, whose allegations include but are limited to:

1. The early release of a student during the 1997-1998 school term without proper authorization;
2. Failure to take steps to discipline the Holland Middle School disciplinarian for allowing the early release;
3. Failure to insure that Holland Middle School staff were adequately made aware of the Board's early dismissal policy;
4. Failure to meet with and respond to parental concerns as cited on February 18, 1998;

5. Failure to submit in a timely fashion the program proposal on two occasions for the Board meeting agenda items during the 1997-1998 school term;
6. Arriving to work late, as set forth in a memo dated October 31, 1997;
7. Failing to submit the Holland Middle School budget plan in the designated format on February 11, 1999;
8. Arriving late to two principal meetings on February 19, 1999 and March 5, 1999;
9. Failing to provide access to the Holland Middle School by a Trenton Times reporter in accordance with Board policy and administrative directives;
10. Failing to insure adequate instruction on March 3, 1999 when many members of the Holland Middle School staff attended the funeral of another Holland Middle School staff member;
11. More generally, failing to follow Board policies and administrative directives; and

WHEREAS, the Respondent has denied all of the aforementioned allegations; and

WHEREAS, the Respondent has been employed by the Board for a period of 29 years; and

WHEREAS, the Respondent has not until now had any tenure charges and or increment denials brought against him during his service of employment with the Board; and

WHEREAS, the Respondent intended to present credible evidence to refute the charges against him; and

WHEREAS, the parties recognize that there are strengths and weaknesses with respect to each of their positions; and

WHEREAS, litigating this matter would have been over a prolonged period of time causing great expense and disruption to the Board; and

WHEREAS, the outcome of this matter was uncertain; and

WHEREAS, the parties have agreed to an expeditious resolution of this matter intended to save both parties the cost and uncertainty of continued litigation and to avoid further disruption to the Trenton School District;

NOW, THEREFORE, in consideration of the forgoing, the parties agree to resolve the within matter based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against the Respondent.
2. The Respondent shall be returned to employment with all back pay and emoluments owed from June 28, 1999, when Respondent was suspended without pay as a result of the certification of these charges;
3. Upon his return to employment, the Respondent shall be compensated and receive all benefits he is entitled to as a principal, per the TASA Collective Bargaining Agreement with Board. As of July 1, 2000, Respondent shall be entitled to any increase in compensation and benefits which may be negotiated by TASA and the Board.

4. The Respondent agrees to submit a letter of retirement effective at the conclusion of the school day, June 30, 2001;
5. The parties agree and covenant that neither they, nor any person, organization, or other entity on their behalf will file any charge, claim, and/or lawsuit against the other based upon any facts set forth in the tenure charges or any facts arising from the tenure charges;
6. The Petitioner agrees to pay Respondent upon his retirement, for all accumulated sick days, vacation days and personal leave days in accordance with the Collective Bargaining Agreement between the Trenton Administrators and Supervisors Association (TASA) and the Board, as amended in or about June, 1999;
7. The Respondent agrees to accept payment for all his accumulated sick days, vacation days and personal leave days in six equal installments consisting of $35,000 each, with payment to be made on July 1, of each year with the first payment to be made on July 1, 2001 and the last payment to be made on July 1, 2006. In the event that Morris Kimble becomes deceased, then said payments shall be made payable to his estate;
8. The Petitioner and the Respondent agree that this Agreement resolves their entire dispute and that with this Agreement the Petitioner, including is agents, employees and officers, and the Respondent each shall refrain from making any comments about the other;

9. The Respondent and the Petitioner expressly acknowledge they they each have agreed to each and every term of this Agreement, that each of the terms and conditions of this Agreement have been fully explained and that the execution of this Agreement is being made voluntarily knowingly and with the advice of counsel.

10. As set forth above in paragraph 4, the Respondent and the Board have agreed to mutually release and forever discharge each other from any and all claims which was or could have been asserted which relate to the matter now pending before the Commissioner of Education, having OAL Docket No. EDU 6227-99S and Agency Docket No. 174-6/99.

11. All of the terms of this Agreement are deemed material.

12. The parties understand that this Agreement is contingent upon the approval of the Administrative Law Judge, Jeff S. Masin and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal administrative proceeding of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a manner which is satisfactory to the Commissioner of Education.

13. The parties request that the tenure hearing be held in abeyance in order to obtain the approval of this Settlement Agreement by Administrative Law Judge, Jeff S. Masin and the Commissioner of Education.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

DATED: 1/28/00

Abdul-Malik Ali
ABDUL-MALIK ALI, PRESIDENT
TRENTON BOARD OF EDUCATION

Angelia Ellis
ANGELIA ELLIS, SECRETARY
TRENTON BOARD OF EDUCATION

DATED: 3/17/00

Morris R. Kimble
MORRIS KIMBLE
RESPONDENT

Robert M. Schwartz
ROBERT M SCHWARTZ, ESQ.
ATTORNEY FOR RESPONDENT

OAL DKT. NO. EDU 6227-99
AGENCY DKT. NO. 174-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF MORRIS KIMBLE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION
	:	

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

Upon review of the proposed agreement reached by the parties and the nature and gravity of the tenure charges, and, notwithstanding the susceptibility of this matter to dismissal on procedural grounds, the Commissioner determines that he is unable to approve the settlement terms because there is insufficient information in the record to conclude, at this juncture, whether or not the terms of the settlement comport with the *Cardonick* standards for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a).

First, the record of the matter provides no information as to what position respondent will actually hold between his resuming employment with the Board and the effective date of his retirement on June 30, 2001. Second, the Commissioner is unable to ascertain from

the record precisely how the sum of $210,000[1] for payment of accumulated sick days, vacation days and personnel leave days was calculated vis-à-vis specific provision(s) of the collective bargaining agreement between the Board and the Trenton Administrators and Supervisors Association. Third, the payment of $210,000 appears, by the wording of the settlement term, to be a sum certain which does not contain a provision for any contingency arising during the 2000-2001 school year which could require respondent to draw on his accumulated leave.

Accordingly, the matter is hereby remanded to the OAL for supplementation of the record and modification of the settlement terms, as may be needed, to address the Commissioner's concerns expressed above, such that the record has sufficient information for him to reach a final determination with respect to the proposed Settlement Agreement in light of the *Cardonick* standards of review for the settlement of tenure matters.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 15 2000

Date of Mailing: JUN 15 2000

[1] Term 7 of the Settlement Agreement stipulates that respondent agrees to accept payment for all of his accumulated sick days, vacation days and personal leave days in six equal installments consisting of $35,000 each, on an annual basis commencing on July 1, 2001.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

182-00

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

June 15, 2000

OAL DKT. NO. EDU 11656-98
AGENCY DKT. NO. 496-11/98

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

The record of this matter, returned by the Office of Administrative Law, has been reviewed. While this matter was apparently returned pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the regulatory provisions which establish that when the agency head is a party to the matter the stipulation of settlement is deemed the final decision, the Commissioner notes that he is *not* a party to the within matter.

Further, since the record is devoid of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 15 2000

Date of Mailing: JUN 15 2000

IN THE MATTER OF FREDERICK :

CONFESSORE, BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

OF HARRISON, HUDSON COUNTY. : DECISION

:

SYNOPSIS

This matter arose from a complaint alleging that respondent Assistant Superintendent of Schools violated the School Ethics Act (Act) in connection with his part ownership of Study Hall, Inc., a daycare facility located in the District.

The Commission found that respondent violated *N.J.S.A.* 18A:12-24(b) of the Act: 1) when he set forth that the District would have to use all daycare centers in order to obtain an opinion to allow him to provide daycare to the District and then sent the letter to the New Jersey Department of Human Services to ensure that those facts would remain the same; 2) when he sent a May 18, 2000 correspondence to the residents of the District using his title; and 3) when, by doing so, he contravened the representations he made in a request for an advisory opinion from the Commission and violated the Commission's caution to him. Having considered any mitigating and aggravating factors, the Commission determined that the violation of section 24(b), the use of one's official position to secure unwarranted privileges for oneself, is a very serious offense for which reprimand or censure would not be appropriate unless there were mitigating circumstances. Respondent's requests for advisory opinion did not provide mitigating circumstances because he sought an advisory opinion and then acted contrary to its advice. The Commission recommended that the appropriate penalty for a school official's use of his position to secure unwarranted privileges or advantages for himself is a suspension for one month.

Initially, the Commissioner emphasized that the determination of the Commission as to violation of the Act is *not reviewable by the Commissioner.* The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of violation by the Commission. Upon independent review of the record, the Commissioner found and determined that the Commission's recommended penalty to suspend respondent for one month was an appropriate penalty. The fact that the suspension may be the harshest penalty thus far levied against a school administrator for a violation of *N.J.S.A.* 18A:12-24(b) in no way mitigates against application of such penalty as long as the penalty is deemed proportional to the violation. Further, the Commissioner concurred with the Commission that "[o]ne cannot seek an advisory opinion and then act contrary to its advice without consequences." The Commissioner determined that a one-month suspension, without pay, is neither "Draconian" nor contrary to legislative intent simply because it has punitive, as well as remedial/deterrent, effects. Thus, the Commissioner ordered respondent suspended for one month without pay from his position as Assistant Superintendent. However, in light of respondent's responsibilities as Assistant Superintendent in an *Abbott* District, implementation of the sanction is deferred pending appeal to the State Board of Education.

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C17-99**
FREDERICK CONFESSORE,	:	
Harrison Board of Education	:	**DECISION**
Hudson County	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Thomas Kinsella on July 30, 1999. Therein, he alleged that Harrison School District Assistant Superintendent Frederick Confessore violated the School Ethics Act in connection with his one-third ownership of Study Hall, Inc., which is a day care facility located in the Harrison. The complainant initially alleged that Mr. Confessore's conduct violated N.J.S.A. 18A:12-24(a), (b), (c), (d) and (f). However, at its meeting of January 25, 2000, the School Ethics Commission found probable cause to credit the allegation that Frederick Confessore violated N.J.S.A. 18A:12-24(b) of the School Ethics Act and dismissed charges that he violated N.J.S.A. 18A:12-24(a), (c), (d) and (f) of the Act. At its April 25, 2000 meeting, the Commission voted to find that Mr. Confessore violated N.J.S.A. 18A:12-24(b) and to recommend that the Commissioner of Education impose a penalty of a one-month suspension.

Mr. Confessore filed his answer to the complaint on September 10, 1999, pursuant to an extension, admitting his one-third ownership of the center, but denying any violation of the School Ethics Act by virtue of his ownership or his conduct in relation to his position with the district or his ownership of the center.

The parties were invited to testify at the Commission's October 26, 1999 meeting. Both parties appeared with counsel. Following the October meeting, respondent submitted supplemental affidavits in response to testimony presented at the meeting. At the Commission's next meeting on November 23, 1999, the Commission heard additional testimony from Gene Barisano of the ABC Learning Center who had previously submitted an affidavit in support of the complaint, but later asked the Commission to withdraw it. The parties also appeared at that time to hear and, if necessary, rebut the testimony of the witness.

When the Commission found probable cause to credit the allegations that Frederick Confessore violated N.J.S.A. 18A:12-24(b), it set forth its belief that no material facts were in dispute with regard to the charge. Therefore, the Commission asked the parties to file written submissions by February 29, 2000 setting forth whether the Commission should find Mr. Confessore in violation of the Act and, if he is found in violation, what the sanction should be. Mr. Confessore's attorney asked for an extension

to file, which was granted until March 10, 2000. The Commission received timely submissions from both parties.

For the reasons set forth below, the Commission now finds that Frederick Confessore violated N.J.S.A. 18A:12-24(b) of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of a one-month suspension.

FACTS

The Commission finds the following material facts to be undisputed. These facts were substantially set forth in the Commission's probable cause determination. The parties had the opportunity to indicate if they disagreed with any facts and why those facts were material to the case. These facts have been modified to reflect respondent's arguments.

At all times relevant to this complaint, respondent has served as Assistant Superintendent of Schools in the Harrison School District. As such, he oversees technology programs related to curriculum and instruction. The Harrison School District is an *Abbott*[1] district. Respondent was also, and continues to be the owner of one-third of Study Hall, Inc. Study Hall, Inc. is a day care facility located in Harrison, New Jersey. It was established in 1988 and licensed by the New Jersey Department of Human Services Bureau of Licensing. Mr. Confessore's ex-wife, Carmella Confessore, and Anita Natalini own the other two-thirds equally. In addition to Study Hall, the owners also operate The Tot Spot, which is located in Kearny, New Jersey.

Kidz Academy is a day care center owned by Mr. Kinsella that is also located in Harrison. The New Jersey Department of Human Services licensed it to provide day-care services in the summer of 1999.

On December 18, 1997, Mr. Confessore requested an advisory opinion from the Commission as to whether he would have a conflict of interest in bidding on a contract with the Board to provide private day care services to the children of Harrison. The request was specifically related to Harrison's designation as a special needs district under *Abbott* and the anticipated mandate to provide pre-kindergarten education to children in such districts. Mr. Confessore asked a separate question as to whether his center could contract with the district in the event that the other centers could not adequately provide pre-kindergarten services.

The Commission, in response, issued Advisory Opinion A30-97 on February 26, 1998 advising that Mr. Confessore's proposed action would violate the Act. The Commission found that if Mr. Confessore's center were to bid on the project, the public could reasonably perceive that any decisions or recommendations that he made that had any impact on the pre-kindergarten services to be provided were made in the interest of

[1] A reference to the New Jersey Supreme Court case, *Abbott v. Burke*, which designated 21 districts as special needs districts.

the center rather than the district. Thus, it concluded that he would violate N.J.S.A. 18A:12-24(a) if his center were to contract with the district to provide pre-kindergarten services. The Commission declined to answer the second question, as it was too speculative.

Mr. Confessore requested a second opinion from the Commission on February 11, 1999 setting forth a change in circumstances. He explained that the Harrison School District planned to contract with the Urban League of Hudson County, Inc./Hudson Cares for Kids, to independently coordinate the three and four year old program. In his request, he stressed that the Urban League would be responsible for all phases of the plan inclusive of the initial contact of families to the ultimate placement and payment for services, based upon the parents' choice. He indicated that there would be no contracts or payments between the district and any local provider for childcare services. Rather, the district would pay all early childhood funds to the Urban League, which in turn would contract with the local providers. Mr. Confessore also submitted a letter from the Superintendent enclosing the results of a Rutgers survey that he said showed that his day care center was needed in order to meet the demand for district pre-kindergarten services.

In response to Mr. Confessore's second request, the Commission issued Advisory Opinion A02-99 on March 24, 1999. This opinion advised that Mr. Confessore's day care center could contract with the Urban League to provide pre-kindergarten services noting that the day care center was not contracting with the district, but with the Urban League. In this way, the Commission reasoned, the district would not be involved in the process of choosing day care centers and Mr. Confessore would be kept out of the process in his capacity as a district administrator. The Commission also based its opinion on the fact that the district had no choice but to use every available licensed provider of childcare services and thus, the Commission believed that all centers would be filled to capacity. The Commission cautioned however, that Mr. Confessore should not involve himself in his role as an administrator in Harrison in matters affecting his day care center.

Mr. Confessore was not involved with the presentation of the district's plan for pre-kindergarten education. Supervisor Dr. Brian Duffy, Assistant Superintendent Anthony Comprelli, Board Secretary Peter Higgins and Superintendent John DiSalvo prepared the district's plan and submitted it to the State Department of Education. The Department of Education conditionally approved the plan, but asked for additional information regarding statistics concerning children to be serviced and available providers.

In order to comply with the Department's conditions, the district entered into a contract in September 1998 to pay Rutgers University $24,250 to analyze Harrison's child population. On September 8, 1998, the Office of the Superintendent in Harrison sent survey forms to the directors of the Children's Studio, Study Hall, Inc., the ABC School and Holy Cross School. The memorandum indicated that "[o]nly those programs who return the survey by the deadline can be considered for this collaboration." The district and Rutgers ultimately identified three childcare centers in Harrison that were eligible to accept children under the new early childhood program. These were the ones

to whom the surveys had been sent, except the Holy Cross School, which was not licensed.

On February 11, 1999, Superintendent DiSalvo provided the statistics on space availability to the Commission as part of Mr. Confessore's second request for an advisory opinion. The complainant's day care center was not licensed when the September 8, 1998 correspondence was sent and Rutgers performed its survey. Thus, it was not included in Rutgers' list of eligible facilities.

At a March 16, 1999 meeting of the Board, the Board voted to contract with the Urban League of Hudson County/Hudson Cares for Kids, to independently coordinate the three and four-year old pre-kindergarten program. However, no details of the contract were provided. The resolution stated in part, "Said Professional Services Contract is not available at this time but must be in place prior to the next scheduled meeting of this Board".

On April 20, 1999, Superintendent DiSalvo sent a letter to all parents of district students explaining that the Harrison School District was going to contract with the Urban League to provide a pre-kindergarten program. He listed the three providers identified by Rutgers. The program was described as a voucher subsidy program that the Urban League would coordinate for all three and four year olds who are legitimate residents of Harrison. He stated that the Urban League would make referrals of families to all local providers and would be responsible for placement and payment to providers for services, based on parental choice. The letter indicates that parents with questions should not hesitate to call Mr. DiSalvo.

The Urban League held a registration for the pre-school program at its facility from April 20-23. 1999. Mr. Confessore did not participate in the registration program.

On April 26, 1999, Mr. Confessore, in his capacity as a representative of Study Hall, Inc. wrote and signed a letter to an Assistant Commissioner in the New Jersey Department of Human Services. The letter indicated that he and the two other signatories, who were also representatives of day care centers, felt that the children of Harrison should only be referred to the centers that were part of the initial planning process, the Children's Studio, ABC Learning Center and The Study Hall. Therein, he states "We have spent time and money in order to service the district population. We can provide enough slots for the three and four-year old half-day programs." The signatories ask that the Assistant Commissioner send a copy of the response to Peter Higgins, the Board Secretary/School Business Administrator for the Harrison Board. The Director of the Office of Special Initiatives in the Department of Human Services responded to only Mr. Confessore, although there were two other signatories. She replied on April 28, 1999 that, "it is up to the school district to decide which child care centers it wants to contract with as long as sufficient space is available for all three and four-year olds who enroll." She copied only Mr. Higgins.

Each year, in or about the month of May, Study Hall holds an Open House and registers children for the coming Summer and regular year programs. Study Hall held this Open House on May 11, 1999. Study Hall registered students at that time.

On May 18, 1999, Mr. Confessore sent all residents of Harrison correspondence on behalf of Study Hall, Inc. that indicated that the Harrison Board of Education is contracting with the Urban League of Hudson County to run the preschool program for three and four year olds. Mr. Confessore obtained the names of the residents through a copy service, Sir Speedy. The letter provided in part, "...your child may be eligible for a full-day program at our center at **no cost to you.**" (emphasis supplied) The letter provided that Mr. Confessore was an owner and operator of the center and identified him as an Assistant Superintendent with over 25 years of public school experience as a teacher, elementary and middle school principal. It noted that "[a]ll three owners are certified by the New Jersey State Department of Education." The letter enclosed a brochure that discussed admissions criteria, philosophy, standards, and other information regarding the Study Hall. The cover letter indicates that parents can register at the Study Hall from Monday through Friday.

On or about June 1999, Mr. Confessore attended a meeting of the Hudson County Coalition of Day Care Directors. This included about 100 day care providers, including those who were servicing the Abbott districts.

On July 13, 1999, Mr. Confessore and Carmelia Confessore attended a meeting with representatives of the Urban League and other preschool owners and directors where the preschool program was discussed. At this meeting, Mrs. Confessore stated that the Study Hall had already registered children, in reference to the registrations at the open house. One of the other attendees who questioned Mrs. Confessore's statement was under the impression that no children were to have been enrolled at that time.

In August 1999, the Urban League sent all parents a flier indicating that four day care centers were available including Kidz Academy, which was then licensed. The flier indicated that parents should contact the Urban League of Hudson County for information.

On August 30, 1999, the Board signed the professional services contract with the Urban League.

Assistant Superintendent Comprelli now serves as the contact person in the Superintendent's office, while one of his principals, Robert Grajewski, serves as the Urban League's contact. Mr. Grajewski also runs the three and four year old program with assistance from Dr. Duffy. According to Superintendent DiSalvo, Mr. Confessore has no involvement with the program in the district and is instructed to leave the Board caucuses if there is any discussion of the program.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Confessore's conduct violated N.J.S.A. 18A:12-24(b). It provides:

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

The Commission now concludes that Mr. Confessore used or attempted to use his official position to secure unwarranted privileges or advantages for himself in violation N.J.S.A. 18A:12-24(b) in three ways: 1) when he requested an opinion from the Commission stating that his center would have to be used to meet the demand for services and then wrote a letter to the New Jersey Department of Human Services (NJDHS) to exclude other providers; 2) when he used his title in his correspondence of May 18, 1999 to the residents of Harrison promoting the day care center; and 3) when he acted contrary to the second advisory opinion by sending the May 18, 2000 letter. The Commission will discuss these in turn.

The first way in which the Commission finds that Mr. Confessore violated N.J.S.A. 18A:12-24(b) is encompassed in his second advisory opinion request. In that request, he states that his center must be used in order to meet the demand for pre-kindergarten services in the district. Based largely on his representation, along with his representation that the Board would not be administering the program, the Commission allowed him to contract with the Urban League to provide pre-kindergarten services to the district. However, after receiving the Commission's opinion, Mr. Confessore wrote a letter to an Assistant Commissioner in the NJDHS asking the department to restrict the number of providers to only those who were included in the original study of Harrison's day care needs. He said that the three existing licensed centers "can provide enough slots for the three and four-year old half-day programs." Mr. Confessore specifically asked that the children not be referred to the two new centers that "are frantically trying to open." In sum, he presented as fact to the Commission that every provider would be needed in order to meet the pre-kindergarten demand and then wrote a letter to try to ensure that his factual scenario would not change and interfere with the opinion he had received. The Commission finds that Mr. Confessore's representations in his second request for an advisory opinion and his subsequent letter to the Department of Human Services constituted an attempt to use his official position to secure unwarranted privileges or advantages for himself in violation of N.J.S.A. 18A:12-24(b).

The second way in which the Commission finds a violation of N.J.S.A. 18A:12-24(b) is in the May 18, 1999 letter that Mr. Confessore sent on behalf of Study Hall, Inc. to the residents of Harrison.

Mr. Confessore's letter must be placed in context. On March 16, 1999, the Board approved a contract with the Urban League to administer its early childhood program.

The Board did not approve a professional service contract, but authorized paying the Urban League a set amount to coordinate a pre-kindergarten program for a certain amount of time. On April 20, 1999, the Superintendent sent a letter to the parents of students in the district explaining the contract with the Urban League. The letter was sent on the letterhead of the Office of the Superintendent with Mr. Confessore's name on it as Assistant Superintendent of Schools describing the program. Mr. Confessore's letter signed "Study Hall, Inc." followed on May 18, 1999. It closely mirrored the wording of the Superintendent's letter regarding the description of the contract with the Urban League. Mr. Confessore's letter indicates in the second paragraph that "Your child may even be eligible for a full-day program at our center at **no cost to you.**" (emphasis supplied) The correspondence markets Study Hall directly to the residents of Harrison and invites them to register with Study Hall. However, according to what Mr. Confessore told the Commission in his second advisory opinion request, and what the Superintendent told parents in his letter, the Urban League was supposed to notify parents of their choices of providers and they would register through the Urban League. The actual details of the professional services agreement with the Urban League were revealed in a contract signed on August 30, 1999.

Mr. Confessore argues in his written submission that he did not use his official position to secure unwarranted privileges or advantages by sending the May 18, 1999 correspondence. He states that he has used the same wording in brochures for many years and always lists the educational backgrounds of the principals to show that the facility only uses certified career educators. He further argues that there is no evidence to support the implication that the other providers were at a disadvantage because the Urban League contract was not executed until August 1999. He argues that all information regarding the three and four year-old program was in the public domain. Last, he argues that he did not possess any information regarding who constituted the parents of three and four year olds in the district and only sent his mailing to residents whose names he obtained from Sir Speedy.

The Commission finds that when Mr. Confessore's letter is viewed in the context of the other information coming from the Superintendent's office, he used the letter to seek an unwarranted privilege or advantage. The Superintendent had written to district parents in April and advised them that the Urban League would be registering parents for daycare. District parents would already know Mr. Confessore as a district Assistant Superintendent and if they did not already know, his title was prominent on the Superintendent's letterhead. Mr. Confessore then sent his letter in May highlighting that he is an owner of Study Hall and also an Assistant Superintendent. In addition to connecting his position to the day care center, Mr. Confessore goes on to note in the letter that his center can provide full day childcare at no cost to the residents. By using this language, he gives the misleading impression that his center is the only center that can provide the free preschool services, particularly the full-day, at no cost to them. Even worse, his correspondence may have given the impression that his is the center that children in the school district should use. The Commission therefore concludes that Mr. Confessore used his position to gain an unwarranted privilege or advantage in violation of N.J.S.A. 18A:12-24(b) by using his title to try to get business and using wording that

misleads readers to believe that his is the only center that can provide free pre-kindergarten services.

The third way in which Mr. Confessore violated N.J.S.A. 18A:12-24(b) of the Act is by doing what he stated that he not would do in his advisory opinion request and also, doing what the Commission told him not to do in its opinion. Mr. Confessore represented to the Commission in his second advisory request that the Urban League would register parents and issue vouchers to parents to send their children where they wished. He said that the Board would not be involved. The Commission understood his statements mean that any opportunity for conflict would thereby be minimized. Mr. Confessore further represented that he would not have to be competing for business with the other centers because the great demand for services ensured that every center would be filled to capacity. Clearly, neither of these representations became the reality.

Mr. Confessore is an Assistant Superintendent in the Superintendent's office. From that office came a letter from the Superintendent in April to district parents explaining the Urban League contract and inviting them to call his office rather than the Urban League and providing its number. As a result of that letter, the Superintendent's office was placed in the position of receiving telephone calls from district parents who had questions about the pre-kindergarten program. In addition, the owner of a daycare center testified that he called Mr. Confessore at the Superintendent's office and discussed with him questions he had about the program, although he said he called Mr. Confessore in his role as daycare center owner. Thus, Mr. Confessore's role as an Assistant Superintendent became immediately entangled with his role as a daycare center owner because the program was not funneled exclusively through the Urban League as Mr. Confessore represented. Further, despite the representations that all the centers would be filled to capacity, the centers were indeed competing for business. Mr. Confessore was not to be soliciting pre-school children for his daycare center under the program as he described it to the Commission. Yet, this is exactly what he did by his May 18, 2000 letter in violation of the restraints he had placed on himself in seeking the second advisory opinion. Based on his May 18, 2000 letter and the other circumstances creating the appearance of impropriety, the Commission finds that Mr. Confessore used his position to secure unwarranted privileges or advantages for himself in violation of N.J.S.A. 18A:12-24(b).

Furthermore, in its second advisory opinion to Mr. Confessore, the Commission cautioned Mr. Confessore that he should not involve himself in his role as an administrator in the Harrison School District in matters affecting his childcare center. Mr. Confessore's use of his title in his correspondence to Harrison residents as a means to get business when he had represented that there would not be a need for such correspondence in the first instance, was a misuse of his position in violation of the Commission's caution to him. The Commission therefore concludes that by his May 18, 2000 correspondence, Mr. Confessore used his position to secure unwarranted privileges and advantages in violation of N.J.S.A. 18A:12-24(b).

DECISION

For the foregoing reasons, the Commission finds that Mr. Confessore violated N.J.S.A. 18A:12-24(b) of the School Ethics Act: 1) when he set forth that the district would have to use all daycare centers in order to obtain an opinion to allow him to provide daycare to the district and then sent the letter to the NJDHS to ensure that those facts would remain the same; 2) when he sent his May 18, 2000 correspondence to the residents of Harrison using his title; and 3) when, by doing so, he contravened the representations he made in his request for an opinion from the Commission and violated the Commission's caution to him.

PENALTY RECOMMENDATION

The Commission has carefully considered the conduct of Mr. Confessore and now believes that the appropriate penalty to recommend to the Commissioner of Education is a penalty of a one-month suspension.

In determining the appropriate penalty, the Commission considers both the conduct involved in the violation as well as any mitigating and aggravating factors. Mr. Confessore urges the Commission to find as a mitigating factor that Mr. Confessore sought an advisory opinion from the Commission in good faith and acted in accordance with the advisory opinion. Thus, he argues, if any violation is found, the violation should be deemed inconsequential or "de minimus." The Commission disagrees.

The violation of section 24(b), the use of one's official position to secure unwarranted privileges or advantages for himself, is a very serious offense for which reprimand or censure would not be appropriate unless there were mitigating circumstances. Mr. Confessore's requests for an advisory opinion do not provide those mitigating circumstances.

Mr. Confessore indeed sought an advisory opinion from the Commission, which initially said that he would be in violation of N.J.S.A. 18A:12-24(a) if he were to attempt to contract with the Board to provide day care services to the district. Mr. Confessore later requested a second opinion by setting forth a change in circumstances. The Commission's second advisory opinion said that he could contract with the Urban League to provide the daycare services, but based on the facts that no one in the Board offices would be involved with the program and that pre-kindergarten programs were in such short supply that there would be no competition for students. The evidence before the Commission has demonstrated that neither fact was correct. Moreover, the Commission found that he violated the caution it set forth at the conclusion of its advisory opinion. One cannot seek an advisory opinion and then act contrary to its advice without consequences. Therefore, the Commission does not find Mr. Confessore's requests for an advisory opinion to be mitigating circumstances.

The Commission believes that the appropriate penalty for a school official's use of his position to secure unwarranted privileges or advantages for himself is a suspension from his position. The Commission believes that a suspension length of one month will have the necessary punitive and deterrent effects.

Robert W. Bender

Robert W. Bender
Acting Chairperson

Resolution Adopting Decision -- C17-99

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

Whereas, the Commission found probable cause to credit the allegations in the complaint that respondent violated N.J.S.A. 18A:12-24(b) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission adopts the proposed decision referenced as its decision in this matter finding Mr. Confessore in violation of N.J.S.A. 18A:12-24(b) and recommending a penalty of a one-month suspension.

Robert W. Bender

Robert W. Bender, Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2000. Paul Garbarini abstained from this decision.

Lisa James-Beavers
Executive Director

[c1799dec/c:lisajb/decisions]

AGENCY DKT. NO. 150-5/00
SEC DKT. NO. C17-99

IN THE MATTER OF FREDERICK	:	
CONFESSORE, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF HARRISON, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and decision of the School Ethics Commission (Commission) have been reviewed. Respondent's exceptions were timely submitted pursuant to *N.J.A.C.* 1:6C-18.3. No response to respondent's exceptions was filed by the Commission.

In his exceptions, respondent requests that the Commissioner reject the sanction of a one-month suspension recommended by the School Ethics Commission and that he reduce the penalty to one which accomplishes the legislative mandate of the School Ethics Act (Act). Respondent also requests that the implementation of a sanction, if any, be stayed during the pendency of his exhaustion of all applicable administrative remedies and appeals.

Respondent avers, *inter alia*, that the Commission failed to consider adequately the mitigating circumstances proffered by him and alleges that the Commission committed a due process violation in its zeal to justify the sanction. He argues that the Commission has trivialized his proofs that he twice sought advisory opinions from it, and maintains that he has complied with the spirit and letter of the second advisory opinion by the Commission.

Further, it is respondent's position that the recommended sanction is violative of the statutory scheme, is inconsistent with the School Ethics Commission's prior rulings, and is punitive rather than remedial in nature. As to this point, respondent argues that the touchstone of

any sanction by the Commission is proportionality to the offense, stating, *inter alia*, that nowhere is legislative authorization bestowed upon the Commission to enact punitive, "Draconian," sanctions to effectuate its charge. Respondent asserts that the recommended one-month suspension would constitute the harshest sanction ever imposed by the Commission against a school administrator for violation of *N.J.S.A.* 18A:12-24(b), and perhaps even the harshest in the history of the Act for a violation of that particular subsection. As such, respondent maintains that he has been treated in a disparate fashion. (Respondent's Exceptions at 6) In support of his position, respondent essentially reiterates the legal arguments regarding penalty presented to the Commission in his March 8, 2000 letter brief, adding several other cases wherein the Commission determined a violation of subsection (b) occurred and recommended only a censure. *In the Matter of Raymond Bonker, Lenape Valley Regional Board of Education*, decided by the Commissioner May 22, 1998 and *In the Matter of Lawrence James, Chesilhurst Board of Education*, decided by the Commissioner February 9, 1999. (*Id.* at 7) Moreover, respondent avers that his conduct does not rise to the level of any of the violations in School Ethics cases; yet, in his estimation, he would be punished more severely, even than in those instances where a violation of *N.J.S.A.* 18A:12-24(c) was found by the Commission.

In his arguments relative to violations of *N.J.S.A.* 18A:12-24(c), respondent maintains that a strong inference may be drawn from the plain language of the Act that a violation of this subsection warrants a much greater sanction than a violation of subsection (b) because subsection (c) requires the school official to "act" in his/her official capacity. Respondent points out that those counts of the present matter filed against him relating to subsection (c) were dismissed by the Commission. (*Id.* at 8) In support of his position that prior School Ethics decisions dealing with subsection (c) violations militate against acceptance of the

Commission's recommended penalty, respondent cites *Irvington Municipal Council v. Steele*, 95 *N.J.A.R.*2d (EDU) 123, a matter wherein the functions and duties as school business administrator were found to be inherently antagonistic to functions and duties as Mayor, thus warranting a one-year suspension; *Scannella v. Scudillo*, 95 *N.J.A.R.*2d (EDU) 190, *rev'd and remanded* State Board 195, decided by the Commissioner June 10, 1997, wherein a Board member cast the deciding vote for her son-in-law as superintendent and sold gloves to district employees, which, after a tortuous administrative journey, ultimately resulted in a censure[1]; *In the Matter of John Harrison, Ewing Township Board of Education*, 96 *N.J.A.R.*2d (EDU) 553, wherein a board member whose firm did work for the board architect voted to extend the architect's contract at the request of the general contractor, which resulted in the Commissioner rejecting the Commission's recommended penalty of censure and imposition of a reprimand[2]; and *In the Matter of Kenneth Seppelt, Roselle Park Board of Education*, decided by the Commissioner July 1, 1996, wherein a Board member voted on a payment of a bill for a bakery in which he was a partner, a violation which eventually, by way of a consent order, resulted in a reprimand.

Respondent next avers that the recommended sanction of a one-month suspension would have a devastating effect on him, because, unlike when a board member is suspended, his suspension could be without pay. Respondent further argues with respect to his suspension that:

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[1] The Commissioner notes that at the time when the penalty for violation of the Act was ultimately determined in the *Scudillo* matter, Ms. Scudillo was no longer a member of the Board, so that the penalties of suspension or removal from office were recognized as being no longer possible as sanctions to be levied against her for violations of *N.J.S.A.* 18A:12-24(c).

[2] In the *John Harrison* case, the Commissioner levied the sanction of reprimand because respondent was a new board member who had not yet received the board member training course; he had sought and received a legal opinion with respect to the facts of the matter *before* the filing of the complaint; the board at a subsequent date unanimously approved the prior vote, absent participation by Harrison; and the record confirmed that there was an extremely remote connection between the interests of Harrison's company to the particular vote in dispute.

> In an *Abbott* district such as Harrison, the loss would be particularly acute. [Respondent] is an Assistant Superintendent, overseeing technology programs. This involves him with all technology-related curriculum and instruction, and the purchase, installation and networking of hardware and software. He is also responsible for the mandated Professional Development Program. Additionally, he writes the district's competitive grants, which has resulted in the awarding of almost $1,000,000.00 Ultimately the real cost of [respondent's] suspension would be paid by the students.
> ***
> Moreover, the penalty is harsh, punitive, and self-serving. This conclusion is supported by the Commission's own words. At page 9 of the April 25th decision, it states: "...one cannot seek an advisory opinion and then act contrary to its advice without consequences." At page 10, it goes on to say: "...The Commission believes that a suspension length of one month will have the necessary punitive and deterrent effects." (Respondent's Exceptions at 9-10)

Lastly, respondent contends that the desired deterrent effects have already occurred, avowing that all procedural safeguards have been put in place at the Study Hall by him following the filing of the complaint. Of this he states: "Suffice to say, the [Commission] has gotten Mr. Confessore's attention. The only effect of the recommended sanction will be to punish him more than any other school administrator since the inception of the Act, for a violation of *N.J.S.A.* 18A:12-24(b). Such a result is not supported by the legislative history of the Act, nor in keeping with the spirit or the letter of *N.J.S.A.* 18A:12-22." (*Id.* at 10)

COMMISSIONER'S DETERMINATION

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c), *N.J.A.C.* 6A:28-1.14 and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner** herein. Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation

by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

Upon independent review of the record in this matter, the Commissioner finds and determines that the Commission's recommended penalty to suspend respondent for a period of one month from his position as Assistant Superintendent for violation of *N.J.S.A.* 18A:12-24(b) is, under the factual circumstances presented herein, an appropriate penalty for his violation of the School Ethics Act.

It was well-established by the record that the Commission in its second advisory opinion to respondent on March 24, 1999 made it abundantly clear to respondent that the Urban League could contract with his daycare center to serve Harrison School District students *based solely* on the information that he set forth in his February 11, 1999 request for an advisory opinion. That information included, but was not limited to, representations that (1) the Urban League of Hudson County would be responsible for every phase of the early childhood plan, from the initial contact of families to the ultimate placement and payment of services, based on parental choice and (2) if his daycare center was ineligible to service Harrison's preschool students, it would be impossible for the District to serve its early childhood students locally because of insufficient space in the two other local daycare centers; *i.e.*, respondent would not have to compete for business with other centers because the great demand for services ensured that every center could be filled to capacity and *only* the Urban League would have *any* role or involvement in the placement process and payment of students in preschool programs, based on parental choice.

On April 26, 1999, a month following issuance of the Commission's advisory opinion, respondent wrote to the Department of Human Services seeking to foreclose the referral

of preschool students to two new centers trying to open in Harrison, and, in a letter dated May 18, 1999 sent to Harrison residents, he engaged in the direct marketing of his daycare program to parents of preschool students in a document which describes him as an "Assistant Superintendent of Schools with over 25 years of public school experience as a teacher, elementary and middle school principal." Consequently, on this basis, as well as for the other reasons delineated in the Commission's decision, the Commissioner finds and determines that such actions taken in contravention of the Commission's second advisory opinion and in violation of *N.J.S.A.* 18A: 12-24(b) warrant a one-month suspension.

The fact that the suspension may be the harshest penalty thus far levied against a school administrator for a violation of *N.J.S.A.* 18A: 12-24(b),[3] in no way mitigates against application of such a penalty in this matter, as long as the penalty is deemed proportional to the violation(s), as the Commissioner so finds herein. As such, the penalty does not constitute disparate treatment. Further, the Commissioner finds respondent's position to be without merit that the Commission failed to consider adequately the mitigating circumstances proffered by him or trivialized his proofs that he twice sought advisory opinions from the Commission. Upon review of the record, the Commissioner fully concurs with the Commission that "[o]ne cannot seek an advisory opinion and then act contrary to its advice without consequences." (Commission Decision at 9) The Commissioner further determines that a one-month suspension, without pay, is neither "Draconian" nor contrary to legislative intent simply because it has punitive, as well as remedial/deterrent, effects.

[3] It is noted by the Commissioner that there have been very few school ethics decisions involving the sanctioning of school administrators. As correctly noted by respondent at page 6 of his exceptions, the majority of the Commission's cases since inception of the Act pertain to school board members, not administrators. The Commissioner also agrees with respondent that the Act makes no distinction between these two categories of school

Accordingly, IT IS HEREBY ORDERED that Frederick Confessore be suspended for the period of one month, without pay, from his position as Assistant Superintendent in the Harrison School District based upon the findings of the Commission that he has violated the School Ethics Act. In so holding, however, the Commissioner determines that in light of the fact that respondent is an Assistant Superintendent who has responsibility for such critical areas as technology and professional development in a special needs *Abbott* district, respondent's request with respect to deferring implementation of the above sanction is HEREBY GRANTED during the pendency of an appeal to the State Board of Education.[4]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

officials with regard to sanctions; therefore, sanctions applied in previous Commission cases against board members are relevant to the instant matter.

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

184-00

SEC #C17-99
C #184-00SEC
SB # 37-00

IN THE MATTER OF FREDERICK :
CONFESSORE, BOARD OF EDUCATION :
OF HARRISON, HUDSON COUNTY. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the School Ethics Commission, April 25, 2000

Decided by the Commissioner of Education, June 16, 2000

For the Respondent-Appellant, Michael J. Pecklers, Esq.

For the Petitioner-Respondent, Thomas Russo, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

On July 15, 2000, Frederick Confessore (hereinafter "respondent"), an assistant superintendent of schools, filed an appeal to the State Board of Education from a determination by the School Ethics Commission that he had violated N.J.S.A. 18A:12-24(b) of the School Ethics Act in connection with his part ownership of Study Hall, Inc., a daycare facility located in the district, and from a determination by the Commissioner of Education that the appropriate penalty for such violation was a one-month suspension. The Ethics Commission concluded that the respondent had used or attempted to use his official position in the district to secure unwarranted privileges or advantages for himself.

On November 20, 2000, the respondent filed the instant motion to supplement the record on appeal, pursuant to N.J.A.C. 6A:4-1.9(b). The respondent seeks to

2/7/01

supplement the record with an executed copy of a provider agreement between Study Hall and the Urban League of Hudson County. The respondent also seeks access to a number of documents included in the statement of items comprising the record in this matter, which he claims were never provided to him. The respondent requests to supplement the record with his response to those documents.

The School Ethics Commission filed a brief in opposition to the respondent's motion, and the briefing schedule has been placed in abeyance pending our determination of this motion.

After a review of the parties' submissions, we grant the respondent's request to supplement the record with a copy of the provider agreement between Study Hall and the Urban League, finding such document to be material to the issues on appeal.

In addition, we direct that the Ethics Commission provide the respondent with a copy of the requested documents included in the statement of items, i.e., Items 3, 22, 25, 32 and 34, Statement of Items Comprising the Record on Appeal, dated October 20, 2000, prepared by Thomas Russo, Deputy Attorney General. In so doing, we reject the Ethics Commission's contention that the respondent had no entitlement to have received certain documents generated during the proceedings below. We are particularly troubled by the fact that the respondent was never provided with a copy of the "position paper," containing the complainant's arguments and allegations against him, which was submitted to the Ethics Commission by the counsel for the complainant in March 2000. Id., item 32.[1]

[1] We note in that regard that the Ethics Commission provided a copy of the respondent's letter brief to the complainant. Id., items 33 and 34.

Certainly, the right of a respondent to confront the accusations against him is basic, and although nothing requires the School Ethics Commission to accept submissions from complainants after it has determined that probable cause exists to credit the allegations in the complaint, see N.J.S.A. 18A:12-21 et seq.; In the Matter of Frank Pannucci, decided by the State Board of Education, March 1, 2000 (the Ethics Commission, rather than the complainant, is charged with acting as the guardian of the public interest), the requirements of due process mandate that respondents in proceedings before the Ethics Commission be provided with all materials relied upon by the Commission in deciding the case, including any documents filed by the complainant.

Under the circumstances, however, we deny the respondent's request to supplement the record on appeal with an additional submission responding to those documents. Respondent will have a full opportunity to address the complainant's arguments, including those contained in the complainant's March 8, 2000 "position paper," in his brief in support of the instant appeal.

We direct that the briefing schedule be reestablished and that the respondent file a brief in support of his appeal within 20 days after his receipt of the above-mentioned items from the School Ethics Commission.

February 7, 2001

Date of mailing FEB 09 2001

185-00

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

June 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11221-96*

AGENCY DKT. NO: 229-6/96

SANDRA SIINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: April 14, 2000 Decided: April 26, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 25, 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

---

* **consolidated with OAL cases bearing Docket Nos. EDU 11367-95, EDU 11368-95, EDU 7910-97 and EDU 9811-98**

Accordingly, I **CONCLUDE** that the attached letter and Stipulation of Settlement meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

4/26/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

5-2-00
DATE

Debbie Chutaro
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 04 2000
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

/g

KENNETH J. LINDENFELSER
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570 Kearny Avenue
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April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Iuculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
OAL Docket Nos. EDU 11221-96;
EDU 07910-97 and
EDU 09811-98

Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 changed by TEC - ALJ with authorization from 2 Attorneys on 4/12 & 4/18/ [redacted] STIPULATION OF SETTLEMENT (Tec)

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

13. Van Oostendorp has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 199^-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, Van Oostendorp has acquired 10.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 11221-96
AGENCY DKT. NO. 229-6/96

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

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

Upon review, the Commissioner approves the settlement terms, except as clarified herein, and adopts the settlement as the final decision in this matter.[2]

The settlement terms relevant to Petitioner Siino stipulate the number of years of seniority she has accrued for service in Kearny under her instructional certificate. However, because the record does not contain a precise employment history, the Commissioner is unable to verify the legal correctness of the seniority determination agreed to by the parties as part of this settlement. For example, term 3 indicates that petitioner has been employed by the Board under

[1] Consolidated with OAL Dkt. Nos. EDU 11367-95, EDU 11368-95, EDU 7910-97 and EDU 9811-98.

[2] Notwithstanding the caption of the Stipulation of Settlement, the decision in this matter does not apply to *Kearny Education Association v. Board of Education of the Town of Kearny* (OAL Dkt. No. EDU 11367-95); therefore, it is noted for the record that the approval of the settlement in the within matter does **not** in any way constitute review or approval of settlement terms 14-21 pertaining to Sally Ann Roessler, a petitioner in the *Kearny Education Association* matter. As such, the parties are reminded that, pursuant to *N.J.A.C.* 1:1-19.1, settlement terms may not effectuated until such time as they have been submitted to and approved by the Commissioner.

her elementary endorsement since September 16, 1987; yet, term 5 indicates that she has acquired 7.48 years of seniority as an elementary teacher through June 30, 1999. In the absence of information in the record to verify the accuracy of this seniority calculation agreed to by the parties in order to reach amicable resolution of the instant dispute, the Commissioner finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the applicable terms of the settlement as clarified by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

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

June 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 7910-97*

AGENCY DKT. NO: 227-6/97

SANDRA SIINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: April 14, 2000 Decided: April 26, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 28, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

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* **consolidated with OAL cases bearing Docket Nos. EDU 11367-95, EDU 11368-95, EDU 11221-96 and EDU 9811-98**

Accordingly, I **CONCLUDE** that the attached letter and Stipulation of Settlement meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED.**

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

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

4/26/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

5-2-00
DATE

DEPARTMENT OF EDUCATION

MAY 04 2000
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

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April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Iuculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
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Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly,

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 change by TEC-ALJ with authorization from 2 Attorneys on 4/12 & 4/18/00 Tec [redacted] STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

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14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

ZAZZALI, ZAZZALI,
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16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 7910-97
AGENCY DKT. NO. 227-6/97

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

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

Upon review, the Commissioner approves the settlement terms, except as clarified herein, and adopts the settlement as the final decision in this matter.[2]

The settlement terms relevant to Petitioner Siino stipulate the number of years of seniority she has accrued for service in Kearny under her instructional certificate. However, because the record does not contain a precise employment history, the Commissioner is unable to verify the legal correctness of the seniority determination agreed to by the parties as part of this settlement. For example, term 3 indicates that petitioner has been employed by the Board under

[1] Consolidated with OAL Dkt. Nos. EDU 11367-95, EDU 11368-95, EDU 11221-96 and EDU 9811-98.
[2] Notwithstanding the caption of the Stipulation of Settlement, the decision in this matter does not apply to *Kearny Education Association v. Board of Education of the Town of Kearny* (OAL Dkt. No. EDU 11367-95); therefore, it is noted for the record that the approval of the settlement in the within matter does **not** in any way constitute review or approval of settlement terms 14-21 pertaining to Sally Ann Roessler, a petitioner in the *Kearny Education Association* matter. As such, the parties are reminded that, pursuant to *N.J.A.C.* 1:1-19.1, settlement terms may not be effectuated until such time as they have been submitted to and approved by the Commissioner.

her elementary endorsement since September 16, 1987; yet, term 5 indicates that she has acquired 7.48 years of seniority as an elementary teacher through June 30, 1999. In the absence of information in the record to verify the accuracy of this seniority calculation agreed to by the parties in order to reach amicable resolution of the instant dispute, the Commissioner finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the applicable terms of the settlement as clarified by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

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

June 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 9811-98*

AGENCY DKT. NO: 335-7/98

SANDRA SIINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: April 14, 2000 Decided: April 26, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 29, 1998, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

---

* **consolidated with OAL cases bearing Docket Nos. EDU 11367-95, EDU 11368-95, EDU 11221-96 and EDU 7910-97**

Accordingly, I **CONCLUDE** that the attached letter and Stipulation of Settlement meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

4/26/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

5-2-00
DATE

Bobbie Antonantes/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 04 2000
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

/g

KENNETH J. LINDENFELSER
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570 Kearny Avenue
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Fax (201) 997-4557

April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Iuculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
OAL Docket Nos. EDU 11221-96;
EDU 07910-97 and
EDU 09811-98

Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 change by TEC - ALJ with authorization from 2 Attorneys on 4/12 & 4/18/00 (Tec) [redacted] STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

13. Van Oostendorp has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1999-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, Van Oostendorp has acquired 10.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 9811-98
AGENCY DKT. NO. 335-7/98

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

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

Upon review, the Commissioner approves the settlement terms, except as clarified herein, and adopts the settlement as the final decision in this matter.[2]

The settlement terms relevant to Petitioner Siino stipulate the number of years of seniority she has accrued for service in Kearny under her instructional certificate. However, because the record does not contain a precise employment history, the Commissioner is unable to verify the legal correctness of the seniority determination agreed to by the parties as part of this

[1] Consolidated with OAL Dkt. Nos. EDU 11367-95, EDU 11368-95, EDU 7910-97 and EDU 11221-96.
[2] Notwithstanding the caption of the Stipulation of Settlement, the decision in this matter does not apply to *Kearny Education Association v. Board of Education of the Town of Kearny* (OAL Dkt. No. EDU 11367-95); therefore, it is noted for the record that the approval of the settlement in the within matter does **not** in any way constitute review or approval of settlement terms 14-21 pertaining to Sally Ann Roessler, a petitioner in the *Kearny Education Association* matter. As such, the parties are reminded that, pursuant to *N.J.A.C.* 1:1-19.1, settlement terms may not be effectuated until such time as they have been submitted to and approved by the Commissioner.

settlement. For example, term 3 indicates that petitioner has been employed by the Board under her elementary endorsement since September 16, 1987; yet, term 5 indicates that she has acquired 7.48 years of seniority as an elementary teacher through June 30, 1999. In the absence of information in the record to verify the accuracy of this seniority calculation agreed to by the parties in order to reach amicable resolution of the instant dispute, the Commissioner finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the applicable terms of the settlement as clarified by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

188-00

PATRICIA L. WHITE AND JUDITH VAN OOSTENDORP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

june 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11368-95*

AGENCY DKT. NO: 310-7/95

PATRICIA L. WHITE and
JUDITH VAN OOSTENDORP,

Petitioners,

v.

BOARD OF EDUCATION OF THE
TOWN OF KEARNY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioners
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: April 14, 2000 Decided: April 26, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 5, 1995, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

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

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

---

* **consolidated with OAL cases bearing Docket Nos. EDU 11367-95, EDU 11221-96, EDU 7910-97 and EDU 9811-98**

New Jersey is an Equal Opportunity Employer

Accordingly, I **CONCLUDE** that the attached letter and Stipulation of Settlement meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

4/26/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

5-2-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 04 2000
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

KENNETH J. LINDENFELSER
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570 Kearny Avenue
KEARNY, NEW JERSEY 07032
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April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Juculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
OAL Docket Nos. EDU 11221-96;
EDU 07910-97 and
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Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
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Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 change by TEC-ALJ with authorization from 2 Attorneys on 4/12 & 4/18/00 (tec) [redacted] STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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A PROFESSIONAL CORPORATION
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of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

13. Van Oostendorp has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, Van Oostendorp has acquired 10.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 11368-95
AGENCY DKT. NO. 310-7/95

PATRICIA L. WHITE AND JUDITH VAN OOSTENDORP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms, except as clarified herein, and adopts the settlement as the final decision in this matter.[2]

The settlement terms relevant to petitioners stipulate the number of years of seniority they have accrued for service in Kearny under each of their endorsement(s) on their instructional certificates. However, because the record does not contain a precise employment history, the Commissioner is unable to verify the legal correctness of the seniority determination

[1] Consolidated with OAL Dkt. Nos. EDU 11367-95, EDU 11221-96, EDU 7910-97 and EDU 9811-98.
[2] Notwithstanding the caption of the Stipulation of Settlement, the decision in this matter does not apply to *Kearny Education Association v. Board of Education of the Town of Kearny* (OAL Dkt. No. EDU 11367-95); therefore, it is noted for the record that the approval of the settlement in the within matter does **not** in any way constitute review or approval of settlement terms 14-21 pertaining to Sally Ann Roessler, a petitioner in the *Kearny Education Association* matter. As such, the parties are reminded that, pursuant to *N.J.A.C.* 1:1-19.1, settlement terms may not be effectuated until such time as they have been submitted to and approved by the Commissioner.

agreed to by the parties as part of this settlement. For example, term 7 indicates that Petitioner White has been employed by the Board in a tenurable position since September 1, 1988; yet, term 9 indicates that as of June 30, 1999 she has acquired 9.0 years of seniority as an elementary teacher and 7.0 as a reading teacher. In the absence of information in the record to verify the accuracy of this seniority calculation agreed to by the parties in order to reach amicable resolution of the instant dispute, the Commissioner finds and determines that the seniority calculation cannot be deemed binding or precedent setting for any future reduction in force in the District because it could impact on other teaching staff members not party to this consolidated matter.

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the applicable terms of the settlement as clarified by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

189-00

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

June 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5614-99
AGENCY DKT. NO. 184-6/98

JOY RALSTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF NEWARK,
Respondent.

David Tykulsker, Esq. for petitioner
(David Tykulsker & Associates, attorneys)

Susan B. Farinella, Esq., for respondent
(Marshall, Dennehey, Warner, Colman & Goggin, attorneys)

Record Closed: April 28, 2000 Decided: April 28, 2000

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on June 4, 1999 for a hearing pursuant to *N.J.S.A.* 52:14B-13 *et seq.*

The parties have agreed to settle this mater and the respondent has prepared the attached letter memorializing the terms of settlement. At the hearing on April 28, 2000, Ms. Ralston testified that she understood and accepted the settlement terms.

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

1. The parties have voluntarily agreed to the settlement.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Therefore, I **ORDER** that respondent State-Operated School District of Newark reimburse Ms. Ralston for a total of **47.7 days** itemized as follows:

10 days pay for June 1998.
7 days pay for the pay period 9/28/98 – 10/9/98.
14 days pay for the period 10/10/98-10/29-98.
16.7 days pay for conversion of her accumulated sick leave on a 5 to 1 basis.

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

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

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

April 28, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5-2-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 04 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

al

THE NEWARK PUBLIC SCHOOLS
Office of Risk Management/Insurance
2 Cedar Street
Newark, New Jersey 07102-3091
Phone: 973-733-6836
Fax: 973-733-8446

Marion A. Bolden
State District Superintendent

David C. Hespe
Commissioner of Education

APR 20 10 26 AM

April 11, 2000

Mrs. Susan B. Farinella, Esq.
Marshall, Dennehey, Warner Coleman & Goggin
220 South Orange Avenue
Suite 202
Livingston, New Jersey 07039

Re: Ralston v. Newark Public Schools
C.P. No. 94-030083
Your File No. 14085.00316-SBF

Dear Susan:

Confirming our conversation, we have completed our in-depth review of Ms. Joy Ralston's time reports for the periods of February 10, 1998 through June 23, 1998 and September 8, 1998 through October 29, 1998.

On March 28, 2000, Ms. Ralston presented a prima facie case that as of February 19, 1998, she had at least 65.5 sick days left and two personal days left. Ms. Ralston produced a pay stub relative to this information. However, at that time the Newark Public Schools was having problems with its' new payroll system (PeopleSoft), and the Leave Accrual file was one of the District's major problems. Consequently, the data that appeared on employees pay stubs was not always accurate.

According to the Newark Public Schools time reports, Ms. Ralston had 58.5 sick days and no personal days as of February 19, 1998. **Please note** that although the Court Order says we must reinstate Ms. Ralston's sick time from February 20, 1998, we are restoring her sick time from **February 6, 1998 (additional seven days).** The following is a summary of the restoration of Ms. Ralston's sick time.

- February 6, 1998 through June 23, 1998, we are restoring **65.5 sick days to Ms. Ralston.**
- September 8, 1998 through October 29, 1998, we are restoring **15 sick days and 3 personal days to Ms. Ralston.**

In total, the Newark Public Schools is **restoring 83.5 sick days to Ms. Ralston.** As per the Agreement between the Newark Public Schools and The Newark Teachers Union (copy attached), Ms. Ralston will be able to convert her accumulated sick leave on a 5 to 1 basis. Under this scenario Ms. Ralston will be paid for **16.7 sick days.**

Please note, the Newark Public Schools owes Ms. Ralston 31 days pay, as per the following:

- **10 days pay** for June '98.
- **7 days pay** for the pay period 9/28/98 - 10/9/98.
- **14 days pay** for the pay period 10/10/98 - 10/29/98.

Today my office is processing the internal paperwork to pay Ms. Ralston. The Newark Public Schools will have a check for Ms. Ralston within thirty (30) days. Once the check is ready, we will contact your office for you to contact Ms. Ralston's attorney. Unfortunately, the check cannot be mailed due to District policy and practice. Ms. Ralston will have to personally pick up the check.

If you have any questions or wish to discuss this matter further, please do not hesitate in contacting my office.

Yours truly,

Ron Hale

Ron Hale
Risk Manager

Cc: David Tykulsker, Esq.
Newark Public Schools Payroll Department
J. Ralston Personnel File

conversion equaling one day's pay for each five (5) days accumulated, and such converted days shall be payable (compensable) at the end of the school year. The basis for converted days shall be 1/200th of an employee's salary for that year. A separate check shall be issued for said compensation.

J. CONVERSION OF SICK AND PERSONAL DAYS

Unit members who retire shall be able to convert accumulated sick leave on a basis as follows:

1. FIRST 50 DAYS

For the first fifty (50) days accumulated, one day's pay for each five days accumulated, said days pay compensable at the 1/200th daily rate of pay for said employees, then existing;

2. 51 - 100 DAYS

For a total number of sick days between fifty-one to one hundred (51-100) days, one day's pay for each five accumulated days said days compensable at the rate of seventy-five dollars ($75.00) each effective July 1, 1991;

3. OVER 100 DAYS

For all accumulated sick days in excess of one hundred days, one days pay for each five accumulated days, said days pay to be compensable at the rate of fifty-five ($55.00) per day, effective July 1, 1991. All converted sick leave shall be deducted from the total number subject to be converted at (a) the end of the school year, or (b) upon retirement.

K. EFFECTIVE MARCH 1, 2000 - CONVERSION OF SICK DAYS

Employees who retire on or after March 1, 2000, shall be paid the following amount for each accumulated sick leave day:

1. FIRST 90 DAYS

Teachers - one hundred and ten dollars ($110)
Secretaries - sixty-five dollars ($65)
Aides - fifty dollars ($50)

2. 91 - 150 DAYS

For the next sixty (60) days accumulated, one day's pay for each four (4) days accumulated, said days pay compensable at the 1/200th daily rate of pay for said employees, then existing;

3. 151 - 250 DAYS

For a total number of sick days between one hundred fifty-one (151) to two hundred fifty (250) days, one day's pay for each five accumulated days said days compensable at the rate of one hundred dollars ($100) each;

4. OVER 250 DAYS

For all accumulated sick days in excess of two hundred fifty days, one days pay for each five accumulated days, said days pay to be compensable at the rate of seventy-five ($75) per day.

5. REQUIREMENT

All converted sick leave shall be deducted from the total number subject to be converted at (a) the end of the school year, or (b) upon retirement.

DIV EXEC CONTROLLER ID:201-733-8446 APR 12'00 14:30 No.004 P.05

DIV EXEC CONTROLLER ID:201-733-8446 APR 12'00 14:30 No.004 P.06

AGREEMENT

between

THE NEWARK PUBLIC SCHOOLS

and

THE NEWARK TEACHERS UNION

LOCAL 481

A.F.T./AFL-CIO

N.T.U.

TEACHER - CLERK

July 1, 1997 - June 30, 2000

OAL DKT. NO. EDU 5614-99
AGENCY DKT. NO. 184-6/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 16 2000

Date of Mailing: JUN 16 2000

191-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELLE KIDD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

Date Of Mailing: June 19, 2000

AGENCY DKT NO. 166-5/00

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELLE KIDD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

For The Board, George G. Frino, Esq.

This matter having been opened before the Commissioner of Education on May 18, 2000 through the certification of tenure charges by the Board of Education of the City of Atlantic City against respondent for excessive absenteeism, abandonment of position, unbecoming conduct and insubordination; and

The respondent, having been served, via regular and certified mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on May 16, 2000; and

The Commissioner, having directed respondent, via both regular and certified mail on May 19, 2000, to file an Answer to the tenure charges certified against her; and

Whereas, there is no indication that respondent did not receive such communications which clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges,"* and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted; and

Whereas, no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the tenure charges and the statement of evidence in support of those charges indicate that respondent has (a) been excessively absent and/or late from her position as custodian in the Atlantic City School District since November 1998, (b) left her work post, been late or not reported to work on numerous occasions without following proper procedures for informing a supervisor, thus, continually demonstrating

a habit of failing to follow any chain of command when reporting lateness or absence from work, (c) received an evaluation of "unsatisfactory" for attendance and punctuality for the past two years and has been the subject of repeated disciplinary warnings, a suspension and disciplinary hearings due to behavior related to her poor attendance and failure to follow procedures; and

Deeming such tenure charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute excessive absenteeism, abandonment of position, unbecoming conduct and insubordination, warranting dismissal from her tenured position as custodian; now, therefore

IT IS SO ORDERED this 19th day of June that summary judgment shall be granted to the Board, and Michelle Kidd shall be dismissed from her tenured position as custodian in the Board's employ as of the date of this order. *

COMMISSIONER OF EDUCATION

Date of Decision: JUN 19 2000

Date of Mailing: JUN 19 2000

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

192-00

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

June 19,2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11829-98

AGENCY DKT. NO: 515-11/98

PAUL LASSITER,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT - CITY OF NEWARK,

Respondent.

Eugene G. Liss, Esq., for petitioner

Joseph Verga, Esq., for respondent

Record Closed: April 28, 2000 Decided: May 1, 2000

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 28, 1998, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

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

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED.**

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

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

5/1/00
DATE

JEFFREY A. GERSON
Administrative Law Judge

Receipt Acknowledged:

5-5-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 8 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

EUGENE G. LISS

Attorney at Law
94 Main Street
1st Floor
Little Falls, New Jersey 07424
Phone: (973) 890-1819
Fax: (973) 785-4053

(Please Note New Address)

April 26, 2000

Honorable Jeffrey Gerson, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: *PAUL LASSITER V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY*
OAL DKT. NO.: EDUOR 11829-98N
AGENCY REF. NO.: 515-11/98

Dear Judge Gerson:

Enclosed please find a fully executed Settlement Agreement in connection with the above-referenced matter.

Thank you.

Very truly yours,

EUGENE G. LISS

EGL/dh
Enclosure
cc: Joseph Verga, Associate Counsel
Mr. Paul Lassiter

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Respondent

PAUL LASSITER, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR-11829-98N SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, his appeal and request for a hearing, filed under OAL Docket No. EDUOR 11829-98N, and agrees to retire from his former position as a teacher, effective July 1, 2000.

2. Petitioner agrees that his retirement is irrevocable and further agrees not to reapply for future employment with Respondent.

3. Respondent agrees to restore Petitioner's previously withheld salary increment for the 1998-99 school year, and to place Petitioner on the appropriate step or degree level of the salary guide prior to July 1, 2000. Petitioner's previously withheld salary increment for the 1999-2000 school year will not be restored.

4. This agreement shall not constitute a precedent in any matters involving other employees.

5. This Agreement will only become effective upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

6. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief.

7. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything that has happened up to now. It specifically includes, without limitation, all claims that Mr. Lassiter may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, with the exception of any claims pursuant to Workers' Compensation.

Dated: 4-8-00

PAUL LASSITER, Petitioner

Dated: 4-14-2000

EUGENE LISS
Attorney for Petitioner

Dated: 4/17/2000

MARION BOLDEN
State District Superintendent

Dated: 4/17/00

JOSEPH VERGA
Associate Counsel
Newark Public Schools

OAL DKT. NO. EDU 11829-98
AGENCY DKT. NO. 515-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 19 2000

Date of Mailing: JUN 19 2000

193-00

IN THE MATTER OF THE TENURE	:	
HEARING OF LENORE M. ALLEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION
_____	:	

June 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 897-00

AGENCY DKT. NO. 59-2/00

IN THE MATTER OF THE TENURE HEARING OF LENORE M. ALLEN, SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY

James S. Rothschild, Jr., Esq., for the petitioner, School District of Old Bridge (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Michael T. Barrett, Esq., for the respondent, Lenore M. Allen, (Bergman & Barrett, attorneys)

Record Closed: April 28, 2000 Decided: May 2, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges filed against the petitioner, Lenore M. Allen. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on March 3, 2000, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for a prehearing telephone conference on March 27, 2000. On that date, the parties indicated that they had agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

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

May 2, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

May 4, 2000
DATE

D.N Cantanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made on this day of April, 2000, by and between the Board of Education of the Township of Old Bridge ("Board"), and tenured employee, Lenore Allen ("Allen").

WHEREAS the Board initiated a tenure proceeding against Allen on or about February 17, 2000 entitled Old Bridge Township Board of Education v. Allen, charging Allen with Conduct Unbecoming a Board employee (hereinafter the "Petition"); and

WHEREAS Allen denied said charges, and filed an Answer to the Petition on or about February 25, 2000;

WHEREAS the matter was transmitted to the Office of Administrative Law as a contested case under Agency Docket No. 52-2/99;

WHEREAS, in light of the nature of the charges and potential for protracted litigation, it is in the best interest of the parties and the public to resolve the charges before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, in consideration of the mutual covenants and promises set forth below, the Board and Allen agree and stipulate as follows:

1. Allen agrees to resign her position with the Old Bridge Township Public School District ("District"), and submit a written resignation to the Board which will be effective sixty (60) days from the date of approval of this Agreement. Allen further agrees not to seek employment with the District in the future.

2. In light of Allen's resignation, the Board agrees to withdraw the tenure charges.

3. Following receipt and acceptance of Allen's resignation, Allen will be compensated by the Board in an amount equal to sixty (60) days' salary (the amount shall be

based upon the extant salary schedule minus those deductions mandated by federal and state law). The Board further agrees to make appropriate pension contributions to the Division of Pension based upon that sixty (60) days' salary.

4. Allen specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6(a)(1) and In Re Cardonick, concerning referral to the State Board of Examiners for possible action regarding Allen's teaching certification.

The parties respectively acknowledge that each has had ample opportunity to review this Agreement and seek independent legal counsel, financial or other advice regarding the terms of this Agreement. The parties further respectively acknowledge that they are entering into this Agreement voluntarily, without coercion, duress or pressure, and with a full understanding of its meaning.

By entering into this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims resulting from events occurring to date, and specifically includes, without limitation, all claims which Allen may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.

This Settlement Agreement constitutes the full and complete Agreement of the parties. This Agreement shall be governed by and construed in accordance with New Jersey law, and is subject to approval by the Office of Administrative Law and Commissioner of Education.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

For the Old Bridge Township Public School District:

By:_____

Date: April ,2000

Dr. Daniel M. Rodriguez
Superintendent of Schools

By:_____

Date: April , 2000

James S. Rothschild, Jr., Esq.
Counsel for the Old Bridge Township
Board of Education

For the Employee:

By:_____

Date: April , 2000

Lenore Allen

By:_____

Date: April , 2000

Michael T. Barrett, Esq.
Counsel for Lenore Allen

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

For the Old Bridge Township Public School District:

Date: April ,2000

By:_____
Dr. Daniel M. Rodriguez
Superintendent of Schools

Date: April , 2000

By:_____
James S. Rothschild, Jr., Esq.
Counsel for the Old Bridge Township
Board of Education

For the Employee:

Date: April 20 , 2000

By: Lenore Allen
Lenore Allen

Date: April , 2000

By:_____
Michael T. Barrett, Esq.
Counsel for Lenore Allen

2874108

4/6/00

4d

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

For the Old Bridge Township Public School District:

Date: April ,2000

By:_____
Dr. Daniel M. Rodriguez
Superintendent of Schools

Date: April , 2000

By:_____
James S. Rothschild, Jr., Esq.
Counsel for the Old Bridge Township
Board of Education

For the Employee:

Date: April 20 , 2000

By: Lenore Allen
Lenore Allen

Date: April 26 , 2000

By:_____
Michael T. Barrett, Esq.
Counsel for Lenore Allen

2874106

4/6/00

4e

OAL DKT. NO. EDU 897-00
AGENCY DKT. NO. 59-2/00

IN THE MATTER OF THE TENURE	:	
HEARING OF LENORE M. ALLEN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION
	:	

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

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *affirmed* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

Here, respondent, a school librarian, is charged with unbecoming conduct by virtue of (1) her alleged use of corporal punishment, and her response to student behavioral issues with violence, and (2) her alleged failure to adopt recommendations for reducing stress at work, together with her inability to cope with personal conflicts, creating a volatile classroom environment. The District now affirms that:

> in light of the nature of the charges and potential for protracted litigation, it is in the best interest of the parties and the public to resolve the charges before the Commissioner of Education. (Settlement at 1)

The agreement provides, in relevant part, that respondent shall resign from employment in the District within 60 days from the date of the approval of this Agreement, and the District will withdraw its charges against her.

It is clear that where charges are made against any tenured employee of a District, the Commissioner anticipates that the charges are fully investigated and evaluated, vis-a-vis the evidence thereto, prior to the District bringing the weight of the legal process down on the teaching staff member:

> Certification of tenure charges by a [district] is predicated on the [district's] belief that the charges *** and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. *N.J.S.A.* 18A:6-11.
>
> On the basis that the board believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide [district] personnel, and hire legal counsel to obtain relief; *i.e.*, dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. *Where it is in the public interest to fully determine the issues, a plenary hearing is required.* (emphasis added) (*Cardonick* at 850)

Notwithstanding the parties' bare assertion that the instant settlement protects the public's interest, the Commissioner disagrees. In tenure matters such as this, where a teaching staff member loses tenure and/or is dismissed for inefficiency, incapacity, conduct unbecoming or other just cause, the case is forwarded to the State Board of Examiners for a determination as to possible revocation or suspension of the teaching staff member's certificate. Upon such referral, and after review of the record, the State Board of Examiners "shall determine by public vote whether or not the offense *[as] proven* is of such a nature as to warrant revocation or suspension consideration, or dismissal of the case." (emphasis added) (*N.J.A.C.* 6:11-3.6)

Therefore, although the within agreement acknowledges respondent's awareness of the Commissioner's duty to refer this matter to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6, absent any factual findings on the record with respect to the specific allegations, and noting that respondent does not admit to the charges, it is unlikely that the Board of Examiners would have any basis for meaningful review and determination. Thus, the Commissioner cannot find that the public good is served by the within agreement. In this connection, the Commissioner underscores that:

> the mere fact that one of the terms of a proposed settlement *** calls for the teaching staff member's resignation does not in and of itself assure [the Commissioner] that the *Cardonick* standards have been met because concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.*** (*In re Robert Barnes Driscoll, Board of Education of Cape May County Vocational-Technical School District, Cape May County*, decided November 10, 1999, Slip Opinion at 5)

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of the settlement documents consistent with the decision, which revisions shall specify that respondent *will not oppose* proceedings before the State Board of Examiners to suspend or revoke her certificate(s) pursuant to *N.J.A.C.* 6:11-3.6. However, if the parties are unwilling or unable to reach accord on an agreement modified in this fashion for submission to the Commissioner, the matter shall proceed to a hearing on the merits so that charges may either be proven, or respondent vindicated.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

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

Date of Decision: June 19, 2000
Date of Mailing: June 19, 2000

193-00

EDU # 897-00
C #193-00
SB # 38-00

IN THE MATTER OF THE TENURE	:	
HEARING OF LENORE M. ALLEN,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, June 19, 2000

For the Petitioner-Appellant, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Jr., Esq., of Counsel)

For the Respondent-Respondent, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

This matter involves a proposed settlement of tenure charges that had been certified against Lenore Allen (hereinafter "respondent") by the Board of Education of the Township of Old Bridge (hereinafter "Board"). The charges of unbecoming conduct alleged that respondent had engaged in a pattern of threatening and violent behavior toward students during the 1999-2000 school year. The charges also alleged that, despite interventions and counseling efforts, respondent continued to exhibit signs of anger and frustration.

The matter was transmitted to the Office of Administrative Law ("OAL") for hearing. However, before such hearing occurred, the parties agreed to a settlement, which was reviewed by the Administrative Law Judge ("ALJ") pursuant to N.J.A.C. 1:1-19.1. Finding that the parties had voluntarily agreed to the settlement and that the

Nov. 1, 2000

settlement both disposed of all issues in controversy and was consistent with the law, the ALJ concluded that the settlement met the requirements of N.J.A.C. 1:1-19.1 and should be approved.

The Commissioner rejected the ALJ's recommendation, stating that he was compelled to do so because he was not satisfied that the settlement met the standards set forth in In re Cardonick, decided by the Commissioner of Education, April 7, 1982, aff'd by the State Board of Education, April 6, 1983. The Commissioner remanded the matter to OAL for revision of the settlement, indicating that the matter need not proceed to a hearing on the merits if respondent agreed that she "will not oppose proceedings before the State Board of Examiners to suspend or revoke her certificate(s) pursuant to N.J.A.C. 6:11-3.6." Commissioner's Decision, slip op. at 7 (emphasis in original).

The Board appealed, arguing that there is no authority for the Commissioner to require respondent to relinquish her certificate as part of a settlement of tenure proceedings. The Board further argues that the decision will tax district boards with the responsibility of undertaking the risk and expense of litigating tenure disputes that they believe should be settled in the public interest.

We have reviewed the terms of the settlement proposed in this matter by the parties and find that it meets the standards established in Cardonick, supra. In Cardonick, a teacher filed a petition to the Commissioner challenging the withholding of his increment. In a separate action subsequent to the filing of that petition, the district board certified tenure charges against the teacher. The charges were transmitted to OAL with recommendations for consolidation.

While the matter was pending before OAL, the parties reached an agreement under which the teacher would resign but would receive a lump sum payment. The agreement was approved by the ALJ, and the parties executed it before approval was granted by the Commissioner. Stressing that the Tenure Employees Hearing Act had removed from district boards all power to impose a penalty in cases of tenure charges, the Commissioner found that the agreement in Cardonick was ultra vires because it had been executed without his approval.

The parties jointly appealed to the State Board. In its decision, the State Board observed that it was precluded from specific review of the terms of the settlement because the Commissioner's objections had been set forth in general terms. However, the State Board took the opportunity presented by the appeal to articulate the criteria that it considered important in reviewing tenure settlements. The State Board found that a proposed tenure settlement should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent by the district board and teacher to the agreement, and the ALJ's findings that the agreement is consistent with the public interest and was entered into by the teacher with a full understanding of his or her rights, including the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certification. Since it was not disclosed whether the teacher had received full salary during the suspension period or had other employment during that period, the State Board concluded that the ALJ should have rejected the proposed agreement and inquired into those matters. The State Board therefore affirmed the Commissioner's determination to remand in that case.

Review of the proposed settlement in the case now before us indicates that the criteria set forth in Cardonick have been met. All the required documentation has been submitted, and the parties have agreed that the lump sum payment made under the agreement will be limited to a sum representing salary for a sixty-day period between approval of the agreement and the effective date of respondent's resignation. This payment is reasonable under the circumstances and the amount is consistent with the public interest.

Most significantly, the proposed agreement provides that respondent acknowledges that she has been advised of the Commissioner's duty to refer the matter to the State Board of Examiners for possible action regarding her certification. In this respect, we recognize that the parties have interpreted the Commissioner's decision to require respondent to agree not to defend herself in proceedings before the Board of Examiners. After carefully reading the Commissioner's decision, we conclude that he did not mean to eliminate due process by barring respondent from defending herself and intended only to require respondent's express agreement not to oppose referral to the State Board of Examiners. Commissioner's Decision, slip op. at 7. To the extent that the Commissioner's decision is ambiguous, we now modify it.

However, we find that it is not necessary for the proposed settlement in this case to include an express agreement by respondent not to oppose referral to the State Board of Examiners. Rather, we conclude that the acknowledgement of the Commissioner's duty to make the referral already included in the proposal is sufficient to insure that, as required by Cardonick, respondent understands that one of the

implications of the settlement is referral to the Board of Examiners and, consequently, the potential for that board to initiate proceedings to revoke or suspend her certification.

We agree with the Commissioner that the public interest extends beyond the boundries of the particular district certifying tenure charges. Commissioner's Decision, slip op. at 7. We also concur with him that the nature of the charges in this instance is such that the public interest dictates that the matter receive more than a cursory review by the State Board of Examiners. At the same time, we stress that dismissal from a tenured position and revocation of certification serve different purposes and that the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. E.g., In the Matter of the Revocation of the Teaching Certificates of John Ahern, rev'd and remanded by the State Board of Education, August 5, 1987 (subsequent history omitted).

N.J.S.A. 18A:6-38 confers original jurisdiction on the State Board of Examiners to act under rules prescribed by the State Board of Education to revoke the certificates that it issues. Consequently, it is the determination by the State Board of Examiners that may preclude a teacher who has been dismissed from tenured employment from future employment in any school district in New Jersey. Accordingly, the pertinent regulations set forth procedures under which cases involving offenses of such nature as to warrant suspension or revocation of certification may be decided by the State Board of Examiners following an appropriate hearing. N.J.A.C. 6:11-3.6. Those procedures include transmittal to the Office of Administrative Law, thereby enabling the State Board of Examiners to resolve cases involving disputes as to the material facts. Id. Such disputes may involve, where appropriate, facts relating to the conduct

underlying the tenure charges. Id. Given the statutory authority possessed by the State Board of Examiners and the regulations we have adopted to implement that authority, we are confident that upon referral of this matter to the State Board of Examiners, that board will insure that the interests of the public are protected.

For the reasons set forth herein, we approve the settlement proposed by the parties in this case and direct that the matter now be transmitted to the State Board of Examiners. In view of our determination, we deny the motions made by the New Jersey School Boards Association and the New Jersey Education Association to appear as amicus curiae.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 03 2000

194-00

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

June 19, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU11827-98
AGENCY DKT. NO. 508-11/98

CARL JANSEN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, ESSEX COUNTY

Respondent.

Eugene G. Liss, Esq., for Petitioner

Joseph Verga, Esq., for Respondent

Record Closed: April 28, 2000 Decided: May 1, 2000

BEFORE **THOMAS R. VENA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 28, 1998 for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for January 18, 2000, which was adjourned.

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

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

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

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

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

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

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

May 1, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

5-5-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 8 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

EUGENE G. LISS

Attorney at Law
94 Main Street
1st Floor
Little Falls, New Jersey 07424
Phone: (973) 890-1819
Fax: (973) 785-4053

(Please Note New Address)

APR 28 10 44 AM '00

Via Federal Express

April 26, 2000

Honorable Thomas R. Vena, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: *CARL JANSEN V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY*
OAL DKT. NO.: EDUOR 11827-98N
AGENCY REF. NO.: 508-11/98

Dear Judge Vena:

Enclosed please find a fully executed Settlement Agreement in connection with the above-referenced matter.

Thank you.

Very truly yours,

EUGENE G. LISS

EGL/dh
Enclosure
cc: Joseph Verga, Associate Counsel
Mr. Carl Jansen

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Respondent

APR 28 10 54 AM '00

CARL JANSEN, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR-11827-98N SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, his appeal and request for a hearing, filed under OAL Docket No. EDUOR 11825-98N, and agrees to retire from his former position as a teacher, effective July 1, 2000.

2. Petitioner agrees that his retirement is irrevocable and further agrees not to reapply for future employment with Respondent.

3. Respondent agrees to restore Petitioner's previously withheld salary increment for the 1998-99 school year, and to place Petitioner on the appropriate step or degree level of the salary guide prior to ~~July 1~~, 2000. June 1

4. This agreement shall not constitute a precedent in any matters involving other employees.

5. This Agreement will only become effective upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

6. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief.

7. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other with the exception of any unsettled claims pursuant to worker's compensation and the disability resulting from worker's compensation, inclusive of a permanency hearing and final worker's compensation settlement and a related contractual grievance for restoration of yearly salary for the 1998-1999 school year and lost sick time and personal days for this same time period which has arisen as a result of a worker's compensation claim. After these claims have been satisfied all other claims of which either party is not aware and those not mentioned release each party to any other claims resulting from anything that has happened up to now. It specifically includes, without limitation, all claims either party may have respecting tenure, discrimination on any basis, or any other matter pertaining to his employment.

Dated: 4/12/00

CARL JANSEN, Petioner

Dated: 4-14-2000

EUGENE LISS
Attorney for the Petioner

Dated: 4/17/2000

MARION BOLDEN
State District Superintendent

Dated: 4/17/00

JOSEPH VERGA
Associate Counsel
Newark Public Schools

EUGENE G. LISS

Attorney at Law
94 Main Street
1st Floor
Little Falls, New Jersey 07424
Phone: (973) 890-1819
Fax: (973) 785-4053

(Please Note New Address)

Via Fax &Regular Mail

April 6, 2000

Honorable Thomas R. Vena, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: CARL JANSEN V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK
OAL DKT. NO.: EDUOR 11827-98N
AGENCY REF. NO.: 508-11/98

Dear Judge Vena:

Please be advised that I represent Carl Jansen, Petitioner, in connection with the above-referenced matter. The above matter is currently scheduled for Plenary Hearing before Your Honor on Monday, April 10, 2000. I respectfully request that the above matter be adjourned. A Stipulation of Settlement is being transmitted for purpose of settlement. I do not know if it will be executed by Monday.

Joseph Verga, Associate Counsel, has consented to this adjournment request.

Very truly yours,

EUGENE G. LISS

EGL/dh
cc: Joseph Verga, Associate Counsel (via fax & regular mail)
Mr. Carl Jansen

OAL DKT. NO. EDU 11827-98
AGENCY DKT. NO. 508-11/98

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 19 2000

Date of Mailing: JUN 19 2000

AGENCY DKT. NO. 69-2/00

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
ROSALIND McFADDEN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF CHERRY HILL, CAMDEN	:	DECISION
COUNTY.	:	

For Petitioner, Nicholas Celso, III, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

For Respondent, Rosalind McFadden, *Pro Se*

On February 8, 2000, the Cherry Hill Board of Education filed before the Commissioner of Education a Certification of Service, said certification confirming that Rosalind McFadden had been served with an Order to Show Cause, signed by the Commissioner on January 20, 2000, and an accompanying affidavit. The Order notified respondent that she had 20 days to submit a written answer addressing why an Order should not be entered suspending her certificate for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10. On February 24, 2000, respondent filed a Certification in Opposition to the Board's Order to Show Cause. By letter of February 29, 2000, the parties were advised that it appeared that the material facts in this matter were not in dispute, thus rendering the matter ripe for summary judgment. Therefore, a briefing schedule was established, permitting the parties to submit briefs addressing the appropriateness of summary judgment and any additional information and/or legal arguments

which the parties wanted to be considered by the Commissioner in rendering the within decision. On March 13, 2000, respondent filed a letter, dated March 10, 2000, which stated in its entirety:

> In response to your letter dated February 29, 2000, I can only say that I resigned "with cause," having made the decision not to pursue charges—that is why I resigned. As an employer, the Cherry Hill District has an obligation to its employees, the same as I had an obligation to them while they employed me. They had not fulfilled their responsibilities to me, therefore, I chose not to fulfill my responsibilities to them. I do not wish to take this any further. The decision is yours.[1]

By letter of March 21, 2000, respondent was asked to clarify her intent, *specifically,* whether she objected to the matter being decided on the papers filed (the Order to Show Cause and her reply thereto), or whether she believed that a hearing and/or further argument was needed for a fair determination in this matter. Respondent was further advised that if she wished to submit additional arguments, she must do so within 20 days of the letter's receipt, and that if no additional arguments were received by that date, her letter of March 10, 2000 would be considered as the entirety of the additional arguments submitted for the Commissioner's consideration. Respondent was also informed that she must properly serve the Board's attorney with both her March 10 letter and any additional submissions.

Respondent, however, submitted no further arguments nor did she provide the required proof of service of her March 10 letter.

BACKGOUND FACTS

The following facts are found to be true, based on the record. On June 30, 1999,

[1] In response to an acknowledgement of the receipt of this letter to the parties, the Board notified the Director of the Bureau of Controversies and Disputes by letter of March 17, 2000 that it had not been served with respondent's submission.

respondent signed a contract accepting employment with the Cherry Hill Board of Education as a Language Arts Teacher for the contract year of 9/01/99-6/30/00. The contract states in pertinent part:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party given to the other 60 days notice, in writing, of intention to terminate the same, but that in the absence of any provision herein for a definite number of days notice the contract shall run for the full term named above. (Board's Affidavit in Support of Application for Order to Show Cause, Exhibit A)

On or about December 10, 1999, respondent requested a three-week leave of absence, without pay, to take a trip to South Africa from February 7, 2000 through February 25, 2000. (*Id.*, Exhibit B)

By memo of December 14, 1999, Thomas P. Christensen, Acting Assistant Superintendent, denied respondent's request for a leave of absence, stating:

> I have received your request for unpaid three week leave of absence from February 7 to 25, 2000. I cannot recommend the approval of this request due to the impact on the learning situation for the youngsters you teach at Beck. (*Id.*, Exhibit C)

By memo of December 15, 1999, respondent tendered her resignation from her teaching position. Respondent's memo states, in full:

> This memo constitutes my 30 days notice of resignation from my position as English teacher at the Beck Middle School. I will be using up my sick days and personal days within this amount of time.
>
> A quick study, open-minded team player, who is willing to learn and try new teaching methods, I have never before been so harshly viewed and undervalued by an immediate supervisor as I have this year.
>
> Thank you for the opportunity to work with your most talented and interesting public that I have so

> conscientiously worked with, trying to boost support for Beck with my 8-2 superior teaching team. (*Id.*, Exhibit D)

By memo of December 16, 1999, the Acting Assistant Superintendent informed respondent that her letter of resignation violated the terms of the contract. That memo stated:

> I received your letter of resignation dated 12/15/99. I am writing to clarify some items mentioned in your letter. For all teachers, the contract calls for 60 days notice in resigning from a position not 30 days. Also, you are not entitled to "use up" your sick days and personal days once you give notice of your resignation. Personal days must be approved by your supervisor/principal/assistant principal. Sick days can only be used if you are sick and extended illnesses or an inconsistent attendance pattern could require a doctor's note.
>
> If you have any questions, regarding this memo, please contact me. (*Id.*, Exhibit E)

By memo of December 19, 1999, respondent answered the Acting Assistant Superintendent's memo, as follows:

> In response to your letter dated 12/16/99 which stated your expectation that I provide 60 days notice, this correspondence is to inform you that I will work until the end of the school day on 12/23/99. This resignation is predicated on cause and is outside of the scope of the employment contract. I believe an expedient disengagement of our professional relationship is in the best interest of all.
>
> Thank you for your understanding and cooperation on this matter. (*Id.*, Exhibit F)

At its meeting on December 21, 1999, the Board accepted respondent's resignation effective December 23, 1999, without prejudice to the Board's right to pursue legal action for respondent's failure to provide adequate notice of the resignation. (*Id.* at 2)

RESPONDENT'S POSITION

In her Certification in Response to Order to Show Cause, respondent claims that she had first inquired about the possibility of a leave of absence, without pay, three days into the school year and not receiving a response, confirmed that request in writing on or about November 10, 1999[2]. Respondent avers her December 10, 1999 request for the leave of absence was made at the behest of the building principal so he could have something to take to the Board office. Respondent claims that she never received a response to her requests until the December 14 memo from Thomas Christensen. Although dated December 14, 1999, respondent notes that she did not receive the denial of her request for a leave of absence until December 16, 1999, the day after she submitted her resignation. (Respondent's Certification at 1)

Respondent avers that the reasons for her resignation go beyond the denial of her request for a leave of absence. She asserts that when the Board failed to respond to her requests for a leave of absence, she notified the building principal by letter of November 15, 1999[3] that she was interpreting the District's lack of response as approval of her request for a leave of absence. Respondent claims that:

> It was only after my notice that they finally began to take any action on the matter. That action, was to pursue a deceptive strategy to deflect the focus from the real deficiency in this matter, the lack of attention and regard to my request by the Cherry Hill School Administration. (*Id.* at 2)

Without providing specifics, despite being provided the opportunity to do so, respondent claims that she resigned "with cause," having made the decision not to pursue

[2] This letter is not a part of the record.

[3] It appears that this is the same letter referred to as the November 10, 1999 letter above. However, this cannot be confirmed since respondent did not provide copies of the letter(s) referenced.

charges. She also claims that the Board had not fulfilled its responsibility to her, therefore, she chose not to fulfill her responsibilities to the Board. (Respondent's Letter of March 10, 2000)

BOARD'S POSITION

The Board asks the Commissioner to suspend respondent's teaching certificate for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10, averring that respondent showed a blatant disregard for her contractual obligations and ignored the detrimental impact on her students' educational program by resigning abruptly. The Board states that it is having difficulty locating a suitable permanent replacement for respondent and has been compelled to assign a substitute teacher to cover the class at a time when the District is experiencing a shortage of substitute teachers. (Board's Affidavit in Support of Application for Order to Show Cause at 2, 3)

DISCUSSION

The Commissioner finds that the relevant and material facts in this matter are those stated, *ante,* as Background Facts. (*See Collingswood Borough Board of Education v. Edward J. Cashel*, 1988 *S.L.D.*1898.) These facts are not disputed. That respondent asserts that the District did not fulfill its responsibilities to her and that she resigned "with cause" is not determinative, *even assuming* it played a part in her decision to resign from the District.[4] In *Penns Grove-Carneys Point Board of Education v. Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, a learning disabilities teacher consultant urged that her certificate should not be suspended when she failed

[4]Respondent's resignation memo refers to "never having been so harshly viewed and undervalued by an immediate supervisor***." Despite being provided two opportunities to further explain her reasons for resigning, however, respondent did not cease the opportunity to do so.

to provide notice, because she claimed, *inter alia*, that her physical working conditions were "abhorrent" and caused her medical problems. (*Penns Grove-Carneys Point, supra,* at 406) Citing *In re Cronmiller*, 1970 *S.L.D.* 149, the ALJ underscored that if respondent's allegations were true, she had avenues of appeal which she failed to employ, such as contacting her union. Similarly, in the instant matter, even assuming, *arguendo*, that respondent's assertions that the Board did not fulfill its responsibilities to her to be true, respondent had other avenues of appeal to pursue. The Commissioner therefore finds those assertions irrelevant.

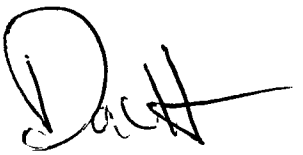
There is no dispute that respondent resigned without proper notice to the Board. Neither does respondent defend her actions by claiming that she was unaware of her contractual obligations. Respondent was specifically advised of her contractual obligation to provide a 60-day notice by the Acting Assistant Superintendent in his memo of December 16, 1999. Rather than changing her letter of resignation to reflect the 60-day requirement, respondent reacted by shortening her notice from 30 days to 8 days.

Pursuant to *N.J.S.A.* 18A:26-10, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for ceasing to perform her duties before the expiration of her employment. The Commissioner recognizes that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students.***" (*Penns Grove, supra,* at 407, citations omitted) In the instant matter, the Board claims that respondent's lack of adequate notice has negatively affected her students because the Board has had difficulty finding a permanent replacement for respondent and there is a shortage of substitute teachers. However, even if the Board were able to find a replacement quickly, such replacement would not negate respondent's unprofessional conduct. (*See In the Matter of the Suspension of the Teaching*

Certificate of Patricia Aiken, School District of the Township of East Amwell, Hunterdon County, 1986 *S.L.D.* 2816, 2821.) "The sudden departure of a teacher who has been working with a group of pupils for four months results in a disruption to the educational program to those pupils, if only because of a sudden change in teachers." (*In the Matter of the Suspension of the Teaching Certificate of David T. Drake, School District of the Borough of Dunellen, Middlesex Co.*, 1987 *S.L.D.* 2016, 2019)

The Commissioner agrees with the Board that in resigning abruptly, respondent put her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board. Accordingly, summary decision is granted to the Board in this matter. Pursuant to *N.J.S.A.* 18A:26-10, respondent is deemed guilty of unprofessional conduct. The Commissioner determines to suspend the teaching certificate of Rosalind McFadden for a period of one year, which period shall commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: JUN 19 2000

Date of Mailing: JUN 19 2000

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

197-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT I. GRUNDFEST,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF MADISON, MORRIS COUNTY.	:	DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent tenured basic skills instructor for allegedly using a school computer to access and view pornography on the Internet during school hours. Respondent denied the charges, claiming that he accessed illicit material on the computer in question on only one occasion and that such access was inadvertent.

The ALJ credited the testimony of J.M., the student who made the allegations underlying the charges, and found that respondent's testimony was not credible. In light of the testimony centering on the computer and its contents presented at hearing, the ALJ relied on the Board's computer expert in determining that the Board had proven by a preponderance of credible evidence that respondent committed conduct unbecoming a teacher by using a school computer to intentionally access and view pornography on the Internet during school hours. The ALJ determined that because 1) the acts took place in school during school hours using school equipment, 2) respondent was willing to discredit a student, 3) respondent was unwilling to admit his conduct and 4) respondent attempted to erase his tracks on the computer, respondent's actions were sufficiently flagrant to justify his dismissal.

Upon an exhaustive review of the record, including the transcripts, the computer experts' reports and other evidentiary documents, the Commissioner determined to reject the recommended decision of the ALJ. Central to the Board's case were 1) the accusations of student J.M. and 2) the computer data evidence. The ALJ found J.M.'s testimony to be "somewhat inconsistent," yet he concluded the testimony was credible. The Commissioner, however, found J.M.'s overall testimony troubling. Not only was he unsure of the month(s) he observed respondent viewing sexually explicit material, but he was also inconsistent in recounting dates, times and number of instances. Moreover, he was the only one to accuse respondent of viewing the material. The three teachers who shared classroom 6A with respondent testified that they never saw him do anything inappropriate on the computer, nor did their students report seeing respondent do anything inappropriate on the computer. Furthermore, the Commissioner found incredible that although J.M. claimed to have observed respondent viewing the material over a three-month period, he did not confide in anyone – not a fellow student, a teacher, his principal, counselor or his parents that this was occurring until the end of the third month. Thus, after a review of J.M.'s testimony with due consideration to the ALJ's observations, and in light of the fact that there was no witness testimony to corroborate J.M.'s accusations, the Commissioner found that J.M.'s testimony lacked credibility. Moreover, the Commissioner determined that the contamination of the computer data evidence caused by the Board's handling of the computer in question (numerous individuals booted the computer, backdated it, etc., looking for evidence) and its failure to limit access to the computer both before the alleged incidents (the computer had no password or log-in procedure and the room was open to teachers, students, janitors and community groups) and after J.M.'s accusations were reported, were fatal to the Board's case. The Commissioner concluded that although there was evidence that pornographic sites were accessed on the computer, it was impossible to conclude with any degree of certainty from the computer data evidence whether the amount of pornography was consistent with any computer that has accessed the Internet, whether someone intentionally accessed the sites or whether any access was inadvertent. In addition, the Board was unable to identify a single specific date on which it was alleged that respondent accessed pornographic sites. Thus, the Commissioner determined that the Board failed to meet its burden of proof substantiating the charges of misconduct by respondent by a preponderance of credible evidence. The Commissioner dismissed the tenure charges and directed respondent's reinstatement with back pay for the period of his suspension at the level of pay that he would have received had the charges not been brought against him.

June 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5326-98

AGENCY DKT. NO. 101-4/98

BOARD OF EDUCATION OF THE BOROUGH OF MADISON,

Petitioner,

v.

ROBERT I. GRUNDFEST,

Respondent.

David B. Rand, Esq., represented petitioner
(Rand Algeier Tosti & Woodruff, P.C., attorneys)

Steven P. Goodell, Esq., represented respondent
(Herbert Van Ness, Cayci & Goodell, attorneys)

Record Closed: January 18, 2000 Decided: March 29, 2000

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

STATEMENT OF CASE

Respondent, Robert I. Grundfest, a tenured basic skills instructor at the Kings Road School in Madison, was charged by petitioner, Board of Education of the Borough of Madison ("Board"), with conduct unbecoming a teaching staff member for using a school computer to access and view pornography on the Internet during school hours. Grundfest denies the charges and claims that any access to illicit material was inadvertent. The hearing was nine days, held on August 26, October 4, 5, 7, 12, November 15, 16, 17, and 18, 1999.

BACKGROUND

Grundfest was licensed in 1984. His career with the Madison School District started in September 1989 as a history teacher. In 1995, Grundfest was transferred to the district's elementary school, the Kings Road School. He continued to coach soccer and lacrosse at the high school and serve as faculty advisor to one of its student clubs.

During his first year at the Kings Road School, Grundfest was assigned to teach the third grade. One of his students was J.M. It would be J.M.'s accusation which would lead to this proceeding. According to Grundfest, J.M. had behavioral and academic difficulties. Grundfest requested a child study team evaluation of J.M. J.M. was evaluated and diagnosed with Attention Deficit Hyperactivity Disorder. He began receiving basic skills instruction the following school year.

Coincidentally, in 1996-97, Grundfest became a basic skills instructor and was assigned to Room 6A, a supplemental instruction room. He shared the room assignment with three other teachers: Nancy Croessmann, Marilyn D'Amelio, and Deborah L. Neely. The room was divided into four workspaces, one for each teacher. Grundfest's workspace was to the left of the room entrance, and consisted of a rectangular table and space for five chairs.[1] A Macintosh computer was against the wall adjacent to Grundfest's workspace. There were windows along the opposite wall. The Macintosh was visible through windows from outside the room. The Macintosh was also visible from Nancy Croessmann's workspace.[2]

During the 1996-97 school year, Grundfest tutored J.M. in basic math and language arts eight times a week.[3] According to Grundfest, J.M. began exhibiting increasingly insolent behavior, lashing out by throwing a pencil or slamming a book on occasion.[4] Grundfest testified that at some point in April or early May of 1997, during a one-on-one tutoring session (presumably), J.M. said, "I can get you fired, you know."[5] J.M. admitted in his testimony that

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[1] *Ex.* M2, M3, M4, M5, M6, M7.
[2] *Croessmann* ¶ 156, 10/5/99.
[3] *Grundfest* ¶ 75, 11/16/99.
[4] *Grundfest* ¶ 77, 11/16/99.
[5] *Grundfest* ¶ 77-78, 11/16/99.

he may have threatened Grundfest, although he had no recollection of it.[6]

In 1997-98, Grundfest returned as a basic skills instructor, and continued to tutor J.M. in basic math and language arts. Specifically, Grundfest tutored J.M. and a group of other students in basic math four days a week, and tutored J.M. and one other student in language arts three days a week: Mondays and Thursdays from 2 p.m. to 2:30 p.m., and Fridays from 11:30 a.m. to 12 p.m. Nancy Croessmann had a similar schedule, and tutored students in her workspace on Mondays and Thursdays from 2 p.m. to 2:30 p.m., and Fridays from 11:15 a.m. to 11:45 a.m.[7] Marilyn D'Amelio also met with students in her workspace on Fridays from 11:30 a.m. to 12 p.m.[8] Thus, Grundfest and J.M. were rarely (if ever) alone in Room 6A. Their language arts schedule always overlapped with either Ms. Croessmann's or Ms. D'Amelio's schedules.

In early December 1997, until February 27, 1998, Grundfest met with J.M. alone during the language arts periods. J.M. claims that it was during these periods that he saw Grundfest viewing images of naked women on the Macintosh.

J.M.'s testimony at the hearing was somewhat inconsistent. He testified on direct that Grundfest began viewing sexually explicit content ("porno stuff" and "naked people") "early in the year. . . . September. Like December. November. One of those."[9] With prompting by counsel for the petitioner, he clarified his testimony and stated that Grundfest began viewing pornographic sites after the other student transferred out of language arts in December 1997.[10] J.M. testified that he saw Grundfest viewing pornographic content almost "every time" he was in Room 6A between December 1997 and February 1998.[11] It is undisputed that Grundfest met with J.M. for language arts 11 times between December 1997 and February 27, 1998.[12]

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[6] *J.M.* ¶ 76, 10/12/99.
[7] *Croessmann* ¶ 150-154, 10/5/99.
[8] *D'Amelio* ¶ 207-208, 10/5/99.
[9] *J.M.* ¶ 71, 10/12/99.
[10] *J.M.* ¶ 72, 10/12/99.
[11] *J.M.* ¶ 74-75, 10/12/99.
[12] *Goodell* ¶ 109-111, 11/16/99.

During this time, J.M. was receiving psychological counseling after school to help him cope with an acrimonious custody battle between his divorced parents. According to J.M's father, M.M., they were sitting in a car after a counseling session in February 1998 when J.M. said that he was afraid of his mother in the same way he was afraid of Grundfest.[13] According to M.M., J.M. said he saw Grundfest viewing the Playboy Channel with naked people touching each other.[14]

Less than a week later, on Thursday, February 26, 1998, J.M.'s father met with Barbara Lippiett, principal of the Kings Road School, and told her of J.M.'s accusation. Principal Lippiett contacted Dr. Lawrence Feinsod, superintendent of the district, and told him about the conversation. They arranged for the director of special services, William Moesch, to observe a tutoring session with J.M. and Grundfest which was scheduled for that afternoon. At the end of the school day, Principal Lippiett and Mr. Moesch booted (i.e., turned on) the Macintosh and searched for incriminating files. They found none.[15]

Principal Lippiett also had a conference call with Dr. Feinsod and the board's attorney, David B. Rand, Esq., in which they decided that Grundfest should be questioned the following morning, February 27, 1998.[16]

In order to analyze the evidence subsequently recovered from the Macintosh, a timeline of Grundfest's activities on February 27, 1998 is helpful.

At approximately 9 a.m. February 27, 1998, Principal Lippiett called Grundfest to her office. After concluding a scheduled tutoring period, he arrived there at about 9:30 a.m. Principal Lippiett told him a "very serious" accusation had been made against him by "someone" who allegedly observed him viewing naked pictures on the computer. She did not reveal the identity of the "someone", anticipating that Grundfest would deny any accusation by a student. She subsequently was proven correct.[17] According to Grundfest, "the first thing out of my mouth was no. And then I said, the only thing that I could think of was – was

[13] *M.M.* ¶ 32, 10/12/99.
[14] *M.M.* ¶ 33, 10/12/99.
[15] *Lippiett* ¶ 22, 10/4/99.
[16] *Lippiett* ¶ 23, 10/4/99
[17] *Lippiett* ¶ 169, 10/4/99.

[swimsuit issue] banner ads that I had seen . . . from the Sports Illustrated site or . . . little tiny swimsuit models."[18] Principal Lippiett testified that as soon as she informed Grundfest of the accusation, "his face got very red and he was quiet for a few moments, and then he said that, yes, it was true, but he had done it inadvertently, that sometimes when searching for other items an inappropriate image could come up on the screen".[19] He told her, by way of example, that he was conducting a search on the Internet, using the search term "Donner Party" and inadvertently pulled up an image for "party girls".[20]

Immediately after his conversation with Principal Lipiett, Grundfest returned to Room 6A and attempted to "gain some control, clear my head a little bit."[21] He then recalled an earlier incident when he used the Macintosh to search the Internet for "newsgroups" on amniocentesis:

> I clicked on the first header and it started at the bottom to unscroll . . . the head of a woman that maybe I assumed was a pregnant woman. I don't know. Or an ad for something. And as it got to about the top of the shoulder it didn't really look like she was going to have anything on. Then I said, I don't want to be here. I clicked on the next header, the next news header. And a different woman again started to unscroll. And we got to about here . . . . "Here" being the top of the shoulders. And it didn't look like there was going to be anything there. And I said, no, I don't want this." [*Grundfest* ¶ 144-146, 11/16/99.]

Grundfest sat at the computer table and attempted to reconstruct the amniocentesis search on the Macintosh. He then returned to Principal Lippiett's office and asked her to accompany him to Room 6A where he would demonstrate how sexually explicit content could be accessed inadvertently.

Principal Lippiett and Grundfest disagree over the time the demonstration began: she testified it began about 10 a.m.; he testified it began after 10:45 a.m.[22] At some point, either during the demonstration or at the earlier meeting in Principal Lippiett's office, Grundfest

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[18] *Grundfest* ¶ 153, 11/16/99.
[19] *Lippiett* ¶ 25, 10/4/99

[20] The Donner Party was a group of California-bound migrants whose survivors practiced cannibalism after being trapped in a snowstorm in October 1846. *American Heritage Dictionary* 551 (3rd ed. 1996). Grundfest taught about the Donner Party when he was a teacher at Madison High School. *Grundfest* ¶ 148, 11/16/99.

[21] *Grundfest* ¶ 154, 11/16/99.

[22] *Lippiett* ¶ 29, 10/4/99; *Grundfest* ¶ 156, 11/16/99.

described a second incident when he used the school library computer to conduct an Internet search on the Donner Party:

> I went to a search engine, I believe it was Yahoo, and I typed in Donner Party in the little box where you can search. . . . And I got a whole listing of Donner Party. . . . And then there were some things on Richard Donner who was a film director. And then after it dropped Donner then it went to party. And I did see a listing, words on the page, for party girls. And under party girls it said, you know, XXX. [*Grundfest* ¶ 147-149, 11/16/99.]

Grundfest's attempt at demonstrating how sexually explicit content might be pulled up inadvertently during an innocuous Internet search was a failure. According to Principal Lippiett, Grundfest became distraught, almost to the point of tears, repeating that he knew how serious the accusation was and would never intentionally access pornography.[23] She told him she believed him and left the room.

Principal Lippiett left Room 6A and returned to her office between 10:15 to 10:30 a.m. She called Dr. Feinsod and followed up with a memorandum of the morning's events.[24] According to Grundfest, she left the room at about 11:15 a.m.[25] As discussed in more detail, *infra*, certain data files on the Macintosh containing evidence of Internet sessions were deleted at about 11:17 a.m. Grundfest remained in the room until about 11:45 a.m., then left the building and took a walk.[26]

Grundfest returned to the school and stayed in the teacher's lounge until about 1 p.m. when Principal Lippiett called him back to her office. When he arrived, she handed him a letter from Dr. Feinsod, requesting a meeting at 3 p.m. The letter advised Grundfest that his classes were canceled for the rest of the day.

Grundfest returned to Room 6A and remained there until 2:30 p.m., when the custodian turned off and unplugged the Macintosh, and brought it to Principal Lippiett's office.[27] That was the last time Grundfest had access to the Macintosh. He met with Dr.

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[23] *Lippiett* ¶ 28, 10/4/99.
[24] *Lippiett* ¶ 26-32, 10/4/99; *Ex.* M8.
[25] *Grundfest* ¶ 160, 11/16/99.
[26] *Grundfest* ¶ 136, 11/17/99.
[27] *Lippiett* ¶ 34, 10/4/99; *Grundfest* ¶ 163, 11/16/99.

Feinsod at 3 p.m. and was informed that he was suspended with pay, pending a decision by the Board.[28] He has remained on suspension ever since.

On March 2, 1998, Principal Lippiett filed tenure charges against Grundfest for conduct unbecoming a tenured teacher. The first charge alleged that Grundfest "inappropriately and unprofessionally utilized a computer during the course of his employment and accessed sexually oriented Internet sites for the purpose of viewing naked female images." The second charge, alleged that Grundfest failed to "attend to his instructional responsibilities by abusing access to the school computer and Internet during assigned instructional periods and by using such facilities for personal and inappropriate purposes not related to his school district duties."

On March 2, 1998, at Dr. Feinsod's request, Bruce Padian, principal of Madison High School, examined the Macintosh. He plugged it in and booted it up but did not connect the modem. Padian changed the computer clock from March 2, 1998, to February 27, 1998, the last date Grundfest had access to the Macintosh.[29] He searched the files on the hard drive, but found no sexually explicit content. He reset the computer clock and then shut it down.

The next day, March 3, 1998, School Business Administrator Michael Hayser took custody of the Macintosh and transported it to his office.[30] Two days later, March 5, 1998, at Mr. Hayser's request, Michael A. Ricciardi, a computer consultant for the Board, inspected the Macintosh. Mr. Ricciardi booted up the Macintosh and examined the files, but found no sexually explicit content. At Mr. Hayser's request, Mr. Ricciardi connected the modem to the Macintosh and accessed the Internet.[31] He then conducted a search on the Donner Party in an attempt to determine whether any sexually explicit content would emerge in the search

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[28] *Grundfest* ¶ 167, 11/16/99.

[29] *Padian* ¶ 206-208, 10/4/99. Padian explained his rationale for backdating the computer clock: "[I]f I were to use the same date, which was March 2nd, . . . there's a chance if the parameters were right, that I would wipe out the History file. So, I wouldn't be able to use it. I wouldn't be able to see it." *Padian* ¶ 206, 10/4/99. As a technical matter, Padian was wrong; the data would not be "wiped out" unless he manipulated the data. More importantly, by backdating the Macintosh, he contaminated the integrity of the evidence, as it is now impossible to determine with independent certainty whether a time-stamp on a file in the Macintosh reading February 27, 1998, is the true date or the false date.

[30] *Hayser* ¶ 36, 10/5/99.

[31] *Ricciardi* ¶ 85, 10/5/99.

results.[32] According to Mr. Ricciardi, at least one listing in the search results was of a "sexual nature".[33]

Three weeks later, on March 23, 1998, Robert Hinchcliffe, a senior technical analyst with Fleet Securities and part-time computer consultant, inspected the Macintosh.[34] He booted up the Macintosh but did not connect the modem. As discussed in more detail, *infra*, Hinchcliffe found the "MagicCookie" file, which contained a partial listing of Internet Web sites previously accessed.[35] Respondent stipulates that six of the "domain names" listed in the MagicCookie file were pornographic in nature. The MagicCookie file was time-stamped with a creation date of February 27, 1998 at 1:57 p.m. Hinchcliffe connected the Macintosh to a printer, printed out the MagicCookie file, and advised counsel for the Board to send the Macintosh to Ontrack Data International, Inc. ("Ontrack"), a company specializing in data recovery.[36]

On March 25, 1998, the Macintosh was shipped to Ontrack. By stipulation of the parties, Victoria McNary, a computer evidence engineer for Ontrack, testified by telephone about the process used to recover deleted data on the Macintosh. Ontrack received the Macintosh on March 27, 1998 and started the recovery process on April 1, 1998. The hard drive was removed and copied on a sector-by-sector basis, resulting in a "mirror copy" of the hard drive.[37] A mirror copy is an exact duplicate of the hard drive, "down to the last byte," whether visible and accessible or not, as distinguished from a "cloned copy", which is a duplicate of accessible files only. Thus, whatever residue of deleted data that existed on the Macintosh's hard drive was copied onto the mirror copy.

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[32] *Ricciardi* ¶ 86, 101-104, 10/5/99.

[33] *Ricciardi* ¶ 86, 103, 10/5/99. By conducting an Internet search on the Macintosh, the petitioner further contaminated the integrity of the evidence. Nevertheless, as discussed in further detail, *infra*, Mr. Ricciardi's brief Internet search is useful in assessing the quantity of pornographic data on the Macintosh.

[34] Hinchcliffe testified as a fact witness, not an expert witness.

[35] *Ex.* M11; *Hinchcliffe* ¶ 12-13, 10/5/99.

[36] *Hinchcliffe* ¶ 17, 32, 10/5/99.

[37] According to an Ontrack technical report prepared by Ms. McNary, dated October 4, 1999, the Macintosh was not booted in order to retrieve the hard drive data, as booting can "change the evidence, including the file count." *Ex.* R24. Ms. McNary testified that when a computer is booted, certain files and corresponding dates may be altered, although this alteration is usually limited to operating system files. The last date Grundfest had access to the Macintosh was February 27, 1998. It was booted at least three times before Ontrack recovered the deleted files.

Deleted data was recovered from the mirror copy by Ontrack. When a computer file is deleted, the operating system permits the disk space formerly occupied by the deleted file to be overwritten. Thus, the data in the file will continue to exist until it is overwritten. The Board's expert, Stanley H. Kremen, offered this example during the hearing: the deletion of a computer file is analogous to the removal of an index card from a library catalogue; even though the card has been removed, the book remains in the library.[38]

Ontrack recovered the deleted data in separate files and copied it onto CDs (compact disks), one in the Macintosh format, one in the PC format.[39] The hard drive was reinstalled and the Macintosh was shipped back to the Board on April 9, 1998.

On April 13, 1998, Grundfest submitted a 12-page certified statement to the Board. He contended that he "never intentionally accessed an inappropriate [Web] page." He recounted his version of the events on February 27, 1998:

> Barbara called me into her office at 9:30am, closed the door and said, "Someone has made a serious allegation against you. They say you were looking at pictures of naked women on the Internet." Well, I was shocked. I finally said, "No." [*sic*] but then added, "Unless it was a banner ad on a page. But that wouldn't be naked. Sometimes a site has a banner ad like Sports Illustrated, which might include a swimsuit model. But they would only be a quarter inch high." You must understand that when Barbara said "Someone," I was being asked to respond to a very general charge, I was never told who made the allegation or when it supposedly took place. It was inconceivable to me that it would be a student making this allegation. I could only assume that it was a colleague who may have seen something while I was doing research, and since people's views of appropriate images differ, I was willing to accept that someone might be offended by a quarter inch high swimsuit model or a similar banner. I then left Barbara's office and went back to my room, stunned and shocked. . . .
>
> At no time did I know who was making the allegation. At no time did I know it was a student. Had Barbara told me it was one of my students, or any student for that matter, I would have unequivocally told her it was untrue. Instead, I thought it might have been a colleague who found

[38] Ontrack defines "deleted" data as data "that is no longer accessible to the computer operator. It may have been deleted by moving a file or directory to the recycle bin, highlighting the item and selecting the delete key, or removed with a utility or uninstall program. The file or directory may or may not be recoverable." *Ex.* R24.

[39] *Ex.* M12 (PC-formatted CD), *Ex.* M13 (Macintosh-formatted CD).

> something offensive, even though I never accessed a site which portrayed naked women.... [*emphasis added.*]
>
> I've taught teachers about the Internet and I know how inappropriate sites can come up. That's what I told Barbara. I did not admit guilt since I didn't even know the circumstances. Nor did I say that I ever accessed these sites. I discussed with her that these are possibilities, the theoretical way you could get lost on the Internet. But absent a specific charge by a specific person, I could not, and was not, admitting to anything. . . .

On April 14, 1998, the Board certified the tenure charges against Grundfest to the Commissioner of Education. Through counsel, Grundfest filed an answer, denying the charges. The Commissioner transmitted the matter to the Office of Administrative Law as a contested case.

In May 1998, the Board hired Stanley H. Kremen, president of Data Processing Litigation Consultants, Inc., to conduct a forensic examination of the Macintosh and the Ontrack CDs. A year later, Kremen produced a report, explaining his examination methodology and detailing his findings and conclusions. According to the report, Kremen concluded the following: (1) "During the time period that GRUNDFEST had access to the COMPUTER, and only during that time, someone extensively accessed the internet for the purpose of searching for and viewing adult pornographic materials"; (2) between November 1997 and February 27, 1998, "someone using the COMPUTER accessed the internet for the purpose of searching for and viewing adult pornographic materials"; (3) in Kremen's opinion, "from the nature of the websites where visits were recorded, it is obvious that only a very small percentage of internet access on the COMPUTER by all who employed it was used for school related work"; (4) on February 27, 1998, after Grundfest was confronted by Principal Lippiett, potentially incriminating Internet-related data files were deleted on the Macintosh; (5) the MagicCookie file showed a creation date of 1:57 p.m., February 27, 1998, indicating that someone attempted (unsuccessfully) to delete the file prior to 1:57 p.m.; (6) the MagicCookie file contained pornographic Web sites accessed by the Macintosh; and (7) someone had conducted a search on the Internet using the search term "Donner Party" and accessed pornographic content during the "same continuous session".[40]

[40] Kremen also issued a supplemental technical report, dated September 21, 1999, narrating his examination of the Macintosh itself. *Ex.* M17.

On June 23, 1999, Dr. Serge J. Goldstein, computer consultant and director for academic services at Princeton University, examined the Macintosh on behalf of Grundfest. According to his report, when Dr. Goldstein booted up the Macintosh, he was greeted with a message on the screen reading, "Your clock is not set to the current time. Please set it."[41] He concluded that the battery backing up the Macintosh's clock was dead, or else the clock had been improperly reset.[42]

During the hearing, most of the testimony centered around the Macintosh and its contents. Kremen testified on six separate hearing dates, and reiterated the findings and conclusions from his treport. Dr. Goldstein testified on the last hearing date. In summary, and discussed in detail, *infra*, Kremen found that certain data files had been deleted on February 27, 1998, indicating that someone attempted to purge all residual evidence of past Internet sessions from the Macintosh. He opined that the data files recovered by Ontrack (as well as data files recovered during his own examination) contained extensive pornographic content—too extensive to have been accessed inadvertently. Dr. Goldstein testified that the data relied upon by Kremen to form his conclusions was unreliable, and several of Kremen's conclusions were erroneous.[43]

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[41] *Ex.* R23.

[42] A computer "time-stamps" a data file with a creation date and a last-modification date. For example, one of the data files in this case, the "MagicCookie" file, shows a creation date of February 27, 1998 at 1:57 p.m. and a last-modification date of March 5, 1998 at 9:52 a.m. The accuracy of the time-stamps is critical to the Board's case. When Dr. Goldstein booted up the Macintosh, its clock read August 27, 1956 at 8:36 p.m. He admitted in his report that it is not possible to state with certainty that the Macintosh's clock was improperly set during the critical dates and times in this case. In all likelihood, the Macintosh's clock was disabled after it was shipped to Ontrack, perhaps due to Ontrack's removal and reinstallation of the hard drive.

[43] Dr. Goldstein also testified that the file count on the Macintosh's hard drive (2,425) was different from the file count on the Ontrack CDs (2,386), suggesting the CDs were imperfect mirror copies of the hard drive. Assuming *arguendo* the Ontrack CDs are imperfect mirror-image copies, the burden of proof in this matter is preponderance of the evidence, not beyond a reasonable doubt, and so the file count need not match exactly. The mere act of booting up a computer alters the file count, as does an operating system crash. A difference of 39 files out of 2,425 files is not significant. Even the respondent's myriad mistakes in preserving the integrity of the evidence on the Macintosh does not defeat its case. There is no allegation the Board doctored or fabricated the evidence against Grundfest. Therefore, instead of compounding the technical complexities in this case by analyzing the file count issue, the Ontrack CDs are assumed to be less-than-perfect copies of the Macintosh's contents (an assumption the respondent would challenge, no doubt).

As discussed in more detail, *infra*, Grundfest's testimony was consistent with his certified statement to the Board. Although he admitted to accessing pornography inadvertently on other computers, he claimed there was only one incident involving the Macintosh: his Internet search for amniocentesis-related newsgroups. He testified that J.M. was a belligerent, easily frustrated child with emotional issues. He recounted the incident in April or May of 1997, when he was admonishing J.M. for failing to complete assignments. According to Grundfest, J.M. lashed out by saying, "I could get you fired, you know." On direct, Grundfest adamantly denied deleting the data files that contained residual evidence of past Internet sessions on February 27, 1998.[44] On cross-examination, however, he equivocated somewhat, testifying that he did not "recall" deleting those files on that date.[45]

After the hearing, both parties submitted briefs and proposed findings of fact.

ANALYSIS

Tenure is intended to protect teachers from dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982) (*quoting Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause," only after a hearing in compliance with the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -30.1. *N.J.S.A.* 18A:6-10. In order to dismiss a tenured teacher, the underlying charges must be filed with the local board of education. *N.J.S.A.* 18A:6-11. The teacher is given an opportunity to submit a written statement in defense. *Ibid.* After the board considers the charges, it must determine by majority vote whether there is probable cause to believe the charges are true. If so, the Board must decide whether the charges warrant dismissal or a reduction in salary. *Ibid.* If the board determines the charges warrant either of those penalties, it must certify and forward the charges to the Commissioner of Education for a hearing. *Ibid.*

[44] *Grundfest* ¶ 167-171, 11/16/99.
[45] *Grundfest* ¶ 133-134, 11/17/99.

If the Commissioner determines the charges are sufficient to warrant dismissal or reduction in salary, he or she will forward the case to the Office of Administrative Law for disposition. *N.J.S.A.* 18A:6-16. The State Board of Education makes the final decision. *In re Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989), *certif. denied*, 121 *N.J.* 615 (1990). The burden is on the board to prove the charges by a preponderance of the credible evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982).

An analysis of the evidence in this matter must include a basic primer on Internet technology.

As Dr. Goldstein testified, it is not possible to conclude with certainty from the evidence whether someone intentionally accessed pornographic Web sites on the Macintosh, or whether the access was inadvertent.[46] Although Kremen opined that the quantity of pornographic data found in the Macintosh was too voluminous to have been accessed inadvertently, he offered no objective basis for his opinion.[47]

When a browser accesses a Web page, the servers housing the Web page transmit the text, images, sounds and HTML that compose the page over the Internet in "packets" of data. As the different packets arrive, the browser stores (i.e., downloads) and reassembles the packets in the "cache", a temporary storage and staging area in the memory of the computer. The cache enables the browser to switch back and forth between stored Web pages without having to reload the pages. The computer also saves the cache data under a cache directory in its hard drive.

Netscape Navigator for the Macintosh saves its cache data in separate files under a cache folder (i.e., directory). For example, on March 5, 1998, computer consultant Michael Ricciardi conducted an Internet search using the Macintosh. As a result of this brief Internet

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[46] *Goldstein* ¶ 130-131, 11/18/99.

[47] On cross-examination, Kremen admitted that he did not compare the Macintosh's contents with the contents of other computers in the school district. *Kremen* ¶ 10, 11/16/99. He also did not provide any evidence that someone used sexually explicit search terms to pull up pornography.

session, 51 separate cache files were generated and saved under the cache folder. These cache files contain the packets of data that composed the Web pages accessed by Mr. Ricciardi.

As demonstrated by Mr. Ricciardi's Internet session, cache files accumulate quickly. These files can be deleted manually (i.e., dragging the files to the Macintosh trash can or Microsoft Windows deletion bin), or as a menu option in Navigator that allows the user to "clear the cache" with a click of a button.[48]

When a browser connects with a Web site, the site's servers may send a "cookie"—a string of text characters—to the browser, which in turn stores it in a cookie file on the hard drive.[49] For example, if a browser accessed the Web site of Business Week magazine, the following cookie would be sent back to the browser's cookie file:

www.businessweek.com FALSE / FALSE 942189160 NGUserID cc9737b0-11099-885995505-1

The text characters following the domain name "businessweek.com" denote various information about the cookie, such as access privileges and the expiration date, but not the date, length of time, or sequential order the Web site was accessed by the browser.[50] A cookie file contains a list of cookies out of chronological order; in other words, the sequence of Web sites accessed cannot be ascertained by examining the cookie file. When a browser reconnects with the Business Week Web site, the server retrieves its previously deposited cookie. Cookies are used primarily for information-tracking purposes, and are unnecessary to the transmission of a Web page, so a cookie file identifies only those Web sites accessed by the browser which use cookies.

As Dr. Goldstein testified, one Web page can generate more than one cookie.[51] For example, the home page of the Business Week Web site might contain a banner ad from DoubleClick, a company specializing in Web site banner advertising. As a technical matter, it

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[48] According to Dr. Goldstein, Navigator automatically purges accumulated cache at certain intervals as part of its self-maintenance.

[49] Similar to cache data, the browser stores the cookie in the computer's memory during the Web session. When the session is ended, all cookie data is stored in a cookie data file in the computer's hard drive.

[50] This cookie is taken from Exhibit M11, the "MagicCookie" file.

[51] *Goldstein* ¶ 46-52, 11/18/99.

is unnecessary to select (i.e., click on) the banner ad in order to receive a cookie from the banner ad's server.

The Navigator browser for Macintosh stores its cookie data in a "MagicCookie" file. As a general rule, a MagicCookie file should register the same creation date as the date Navigator was installed in the Macintosh. If a person quits Navigator and then deletes the MagicCookie file, the browser will create a new MagicCookie file the next time Navigator is launched. If a person deletes the MagicCookie file while Navigator is still operating, however, the browser will restore the deleted MagicCookie file with a new creation date as soon as the file is needed.

B. The Evidence

The computer data evidence offered by the Board can be divided broadly into two categories: data files which were deleted and restored by the Macintosh on February 27, 1998; and data files which were deleted and recovered by Ontrack. This evidence is offered to prove the following: (1) after he was confronted by Principal Lippiett on February 27, 1998, Grundfest deleted all of the files that contained residual evidence of past Internet sessions; and (2) Grundfest intentionally accessed pornography on the Internet using the Macintosh. Each of these arguments will be addressed in order.

On March 23, 1998, during an examination of the Macintosh, computer consultant Robert Hinchcliffe accessed the MagicCookie file. The parties stipulate that the MagicCookie file contained six pornographic domain names: "www.private.sex.se"; "www.sex.se"; "www.lesbianlove.com"; "www.bollo.com"; "www.winset.com"; and "www.videosex-live.com". According to its time-stamp, the MagicCookie file was created on February 27, 1998 at 1:57 p.m.

The creation date of a cookie file corresponds to the date that Netscape Navigator was installed in the computer. Mr. Kremen testified that the cookie file is an integral part of the Netscape Navigator browser. If a cookie file is deleted while Navigator is open, the browser will restore the deleted cookie file with all of its cookie data intact. This restoration process will occur as soon as the cookie file is needed (i.e., someone is using Navigator to access the

Internet), or when Navigator is exited.[52] The MagicCookie file must have existed when Grundfest conducted his failed Internet demonstration on the morning of February 27, 1998. Therefore, since the MagicCookie file is time-stamped with a creation date of February 27, 1998 at 1:57 p.m., someone must have deleted the file on that date, and Navigator subsequently restored it at 1:57 p.m.

It is evident that Grundfest deliberately deleted the MagicCookie file on February 27, 1998. At around 9:30 a.m. that day, Principal Lippiett confronted Grundfest with the accusation that "someone" saw him viewing naked pictures on the computer in Room 6A. He denied the accusation and proffered a weak explanation (the Sports Illustrated swimsuit issue banner ad). He was stunned by the accusation. When he returned to Room 6A, after his conversation with Principal Lippiett, he sat down at the Macintosh and attempted to reconstruct an earlier Internet search on amniocentesis.[53] Several minutes later, he returned to Principal Lippiett's office and brought her back to Room 6A to demonstrate how sexually explicit content might be displayed inadvertently using innocuous search terms such as amniocentesis or Donner Party.[54] The demonstration was unsuccessful, and Grundfest became distraught. He denied the accusation again. The gravity of the dilemma he faced was apparent to him. He said to Principal Lippiett, "I know what this accusation – just the accusation can mean. . . . I'm scared."[55] When she left the room, Grundfest again turned his attention back to the Macintosh, exiting the Internet, putting the Macintosh into sleep mode, and leaving Room 6A at about 11:45 a.m., according to his testimony. The Macintosh's trash can was last modified at 11:17 a.m.[56] In other words, a file or files were dragged into the trash can or "emptied" at a time when Grundfest was using the Macintosh. At the hearing, on direct examination, Grundfest adamantly denied deleting any files that morning. On cross-examination, however, he testified that he did not "recall" deleting any files that morning.

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[52] When Navigator is exited, the software will restore the cookie file as a final "housekeeping" function. If the cookie file is deleted while Navigator is closed, it will create a new cookie file the next time it is launched.
[53] *Grundfest* ¶ 155, 11/16/99.
[54] *Grundfest* ¶ 147-149, 11/16/99.
[55] *Grundfest* ¶ 160, 11/16/99.
[56] *Ex.* M17.

Grundfest was computer-literate. He took a course on the Internet in the summer of 1996. He gained a level of proficiency sufficient enough to instruct other teachers about the Internet in 1997.[57] He knew how to "clear the cache" in Netscape Navigator in order to save disk space, and in fact, cleared the cache on February 13, 1998. Presumably, he also knew about cookies and the residual data generated in a cookie file during an Internet session.

Based on his education and experience, I find that Grundfest not only knew how to delete the telltale files, he in fact had motive and opportunity to do so. The circumstantial evidence, the testimony of the witnesses, and the absence of any other evidence to explain the creation date of the MagicCookie file compel the conclusion that Grundfest deliberately deleted the MagicCookie file on February 27, 1998.

This conclusion is supported by the fact that two other Netscape Navigator files are also time-stamped with creation dates of February 27, 1998: the "CCache log" file at 1:22 p.m., and the "AddressBook" file at 2:20 p.m.[58] Apparently, these files were also deleted and subsequently restored by Navigator.[59] Equally incriminating is the absence of cache files in the cache folder of the Macintosh with creation dates of February 27, 1998. Grundfest's failed Internet demonstration should have generated at least one cache file. By way of comparison, the brief Internet session conducted by Mr. Ricciardi on March 5, 1998 generated 51 cache files. It is evident that Grundfest deleted the cache files, either manually or by "clearing the cache" in Navigator.

Accordingly, I find that on February 27, 1998, Grundfest deliberately deleted files in the Macintosh that contained residual evidence of past Internet sessions; sessions which he knew would reveal pornographic content. By deleting these files, he committed spoliation, the intentional destruction of evidence from which a fact finder may draw an unfavorable inference. *Black's Law Dictionary* 975 (6th ed. 1991); *see also State v. Lizotte*, 272 *N.J.*

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[57] *Ex.* M26 at 10; *Grundfest* ¶ 111-112, 11/17/99.

[58] According to Kremen's testimony and his technical report, the "Netscape News" folder (i.e., directory) also shows a creation date of February 27, 1998. However, this folder could not be located on the Ontrack CD.

[59] Unlike the MagicCookie file, neither the CCache-log file nor the AddressBook file was restored with its original content intact.

Super. 568, 571 (Law Div. 1993). Grundfest's deleting of the files, together with the pornographic content found in the files, compels the finding that he deleted the files to erase all forensic evidence of sessions in which he accessed and viewed pornography.

Grundfest's response to the accusation made by Lippiett on February 27, 1998 was at the very minimum suspicious. When Principal Lippiett confronted him with the accusation that "someone" observed him viewing naked pictures on the Macintosh, he claimed there must have been a misunderstanding: the individual must have misinterpreted the Sports Illustrated swimsuit issue banner ad he was viewing. He then proffered a second possible explanation: nude images were accessed inadvertently while he was searching the Internet for newsgroups on amniocentesis. Given these explanations, the identity of his accuser should have been irrelevant. As the Board asserts in its post-hearing brief, "the identity or status of the accuser should have no effect on Grundfest's candor or obligation to tell the truth." Yet in his certified statement to the Board on April 13, 1998, he stated that if Principal Lippiett told him the accuser "was one of my students, or any student for that matter, I would have unequivocally told her it was untrue. Instead, I thought it might have been a colleague who found something offensive, even though I never accessed a site which portrayed naked women." In other words, Grundfest would have denied the accusation unequivocally and discredited his accuser had he known his accuser was a student. Instead, assuming his accuser was a colleague, Grundfest proffered two alternative explanations that allowed for the possibility of a misinterpretation. His response to the accusation does not indicate candor and truthfulness.

Grundfest's testimony regarding inadvertent access was disingenuous. Although he testified to accessing pornographic materials on the Internet inadvertently on more than one occasion, he claimed that it happened to him only once on the Macintosh:

> [M]y sister-in-law was pregnant at the time. And my wife and I had been discussing amniocentesis as a--you know, as a relevant current events issue. And so I clicked to enter that newsgroup site. And what happens on the Netscape screen . . . is you get basically a three-pained window. . . . I clicked on the first header [of a newsgroup list] and it started at the bottom to unscroll . . . the head of a woman that maybe I assumed was a pregnant woman. I don't know. . . . And as it got to about the top of the shoulder it didn't really look like she was going to have anything on. Then I said, I don't want to be here. I clicked on the next header, the next news header. And a different woman again

> started to unscroll. And we got to about here . . . . Here being the top of the shoulders. And it didn't look like there was going to be anything there. And I said, no, I don't want this. [*Grundfest* ¶ 145-146, 11/16/99.]

On cross-examination, he testified that the absence of bra straps led him to believe the image was nude, which is why he scrolled no further down than the shoulders.[60] Such prudishness indicates to me a lack of candor in Grundfest's testimony. An image of a woman's bare shoulders would not be an alert to questionable content. In addition, more often than not, the header of a newsgroup defines its contents. For example, Exhibit M19, discussed, *infra*, contains many pornographic newsgroup headers, such as "alt.binaries.pictures.erotica". Grundfest's carefully constructed testimony that his access was "inadvertent" and "accidental" was not credible.

Accordingly, I find that Grundfest committed conduct unbecoming a teacher by using the Macintosh to access and view pornography on school time.

Unbecoming conduct—the lack of fitness to discharge the duties of a position—is grounds for dismissal of a tenured teacher. *N.J.S.A.* 18A:6-10; *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974) (*citing Laba v. Newark Board of Education*, 23 *N.J.* 364 (1957)). "[U]nfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967) (citation omitted); *Pietrunti Bd. of Educ. of Brick Tp.*, 128 *N.J. Super.* 149 (App. Div. 1974), *certif. denied*, 65 *N.J.* 573 (1974) (inflammatory orientation speech by tenured teacher attacking school administration warranted her dismissal).

The recent emergence of the Internet precludes on-point precedent. The closest analogous case law is public lewdness. *Compare Town of West Orange Bd. of Educ. v. Lieb*, 1985 *S.L.D.* 933 (teacher's conviction for public lewdness constituted conduct unbecoming); *Bd. of Educ. Township of Old Bridge v. Pappa*, 1988 *S.L.D.* 542 (teacher's flagrantly lewd act at a rest area along the Garden State Parkway constituted conduct unbecoming). Grundfest's conduct was not the criminal equivalent of public lewdness, *N.J.S.A.* 2C:14-4(a) (a flagrantly offensive act which is likely to be observed by nonconsenting persons), but it was the

[60] *Grundfest* ¶ 170, 11/17/99.

functional equivalent. By misusing a school computer during school hours to access and view pornography on the Internet, he committed a flagrantly lewd act which he should have known might be observed by a student. In fact, his lewd actions were observed at least once by J.M., an 11-year-old boy who was made to suffer the subsequent anxiety of revealing the incident and the trauma of testifying at the hearing. Furthermore, Grundfest's intentional access of pornography at the school created an offensive working environment. *Compare Olivant v. Dep't of Envtl. Protection*, Initial Decision, (April 12, 1999), *modified*, Merit System Bd. (September 9, 1999))<http://lawlibrary.rutgers.edu/oal/> (appellants' distribution of sexist humor over electronic-mail system constituted sexual harassment and misuse of public property). His misconduct is even more aggregious than the misconduct penalized in *Bd. of Educ. v. Pappa* and *Bd. of Educ. v. Lieb* because it took place in school during school hours using school equipment. His misconduct should also be assessed in light of the fact that he was the part-time coach of the girl's junior varsity lacrosse team at Madison High School. His willingness to discredit a student (actually *any* student) as a liar, his unwillingness to admit to what appears obvious from the evidence, and his attempts at erasing his tracks on the Macintosh mandate a harsh penalty. Teachers have been entrusted with the care and custody of children, and so their duties require "a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *In re Tenure Hearing of Lucarelli*, 97 *N.J.A.R.*2d (EDU) 537, 541, *quoting In the Matter of Tenure Hearing of Sammons*, 1972 *S.L.D.* 302, 321. In this matter, Grundfest demonstrated an alarming lack of self-restraint and judgment.

Grundfest has been a teacher for 14 years. His teaching ability is unquestioned and his disciplinary record is clean. Nevertheless, his intentional access of pornography at the Kings Road School using a school computer, his unwillingness to admit to his conduct, his willingness to discredit a student, and his attempts at erasing his tracks on the Macintosh are all sufficiently flagrant to justify his dismissal.

CONCLUSION

The Board has proven by a preponderance of the credible evidence that Grundfest committed conduct unbecoming a teacher by using a school computer to intentionally access and view pornography on the Internet during school hours. His actions are sufficiently flagrant to justify his dismissal.

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

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

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

March 29 00
DATE

JEFFREY A. GERSON, ALJ

3/31/00
DATE

Receipt Acknowledged:
N. M. Critchley /fc
DEPARTMENT OF EDUCATION

APR 3 2000
DATE

Mailed to Parties:
Barbara A Hannah
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 5326-98
AGENCY DKT NO. 101-4/98

IN THE MATTER OF THE TENURE :
HEARING OF ROBERT I. GRUNDFEST, :
SCHOOL DISTRICT OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF MADISON, MORRIS COUNTY. : DECISION

The record of this matter, including hearing transcripts, and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions, respondent's exceptions and the Board's reply thereto were considered by the Commissioner in rendering his decision herein.

In its exceptions, the Board urges the Commissioner to adopt the recommended decision of the Administrative Law Judge (ALJ), emphasizing that the ALJ's decision was predicated on an assessment of the credibility of witnesses which was supported by the evidence adduced at hearing. (Board's Exceptions at 1)

Respondent presents his exceptions in two parts. Section I sets forth Proposed Findings of Fact and Conclusions, and Section II contains specific exceptions to the Initial Decision. In his introductory statement, respondent asserts that the student's (J.M.'s) testimony was so incredible that the ALJ could not rely on critical portions of that testimony, and that the Board so mishandled the computer in evidence that respondent was denied a fair hearing. Respondent argues that, in the place of reliable evidence, the ALJ relied on what he saw as respondent's insufficient responses to the allegations. (Respondent's Exceptions, at Introduction)

Respondent's Proposed Findings of Fact and Conclusions contains a summary of his teaching background, an explanation of his transfer to the Kings Road School in 1995 and the details of his teaching assignment for the 1997-98 school year. He also explains his disputes with the principal with respect to his teaching evaluations, his coaching responsibilities, and his assignment as

substitute teacher when the classroom teachers were absent. (*Id.* at 1-3)

Respondent claims that J.M., while in his classes, had behavioral problems which necessitated disciplinary measures, such as "time outs," in-school suspensions and visits to the principal's office. (*Id.* at 3-4) Respondent also claims that J.M. had threatened him with respect to his continued employment, as reflected in testimony at hearing:

> The student had many behavioral problems at the school. Most critically, one day while in 4th grade, the student lashed out at Bob Grundfest, saying, "I can get you fired, you know." He said this after Mr. Grundfest had been strict with him for failing to do his homework. (11/16/99, p. 77-1 to 78-22)
>
> The student admitted on direct examination that he "may have" threatened Mr. Grundfest and "could have" told him he wanted to see him fired. (10/12/99, p. 76-14 to 22) (*Id.* at 3)

Continuing his Proposed Findings of Facts and Conclusions, respondent explains that his classroom, Room 6A, was a small classroom that had windows to the outside and windows in the door and had been converted for use by four instructors by the addition of low dividers. Besides the four teachers assigned to the room, two other teachers used the room on a regular basis. He argues that despite the fact that staff, students and faculty frequently walked in and out of the room, no one except J.M. testified to seeing respondent do anything inappropriate with the computer, including fellow teacher, Nancy Croessmann, who was scheduled for classes in the room at the times when respondent taught J.M. and had a direct view of the computer screen from her work area. Likewise, the computer was shared by the six teachers who regularly used the room, plus it was available to any additional teachers and students who wanted to use it. The computer was not password-protected and had no log-in procedure to identify the user, and there was open access to the room in which the computer was located not only for staff and students, but also for community groups who used the school evenings

and weekends.[1] Thus, respondent concludes, anyone could access the Internet who wanted to do so. (*Id.* at 4-7)

Citing extensively to testimony, respondent explains in detail the events of February 26 and February 27, 1998 surrounding the allegations made by J.M. and his meeting with the principal wherein he was confronted with the charges. Respondent takes issue with the fact that the principal did not identify his accuser and disputes the principal's contention that he admitted viewing pornographic pictures. Respondent emphasizes that in that conversation, he admitted only that he had *inadvertently* pulled up material, words not images, that someone might deem inappropriate. (*Id.* at 8, 9)

Respondent argues that the Board has never been specific about when the alleged inappropriate conduct occurred. J.M. and the Board's attorney gave contradictory versions of the times and dates, he contends, claiming at various times that the inappropriate computer access occurred in both the afternoon and morning sessions with the student and in other instances indicating that it was solely during the afternoon sessions. Further, at hearing, the student couldn't identify even the month in which the alleged inappropriate Internet access began to occur or the number of times it had occurred. Respondent maintains that J.M.'s inability to identify the dates/times of the alleged inappropriate usage, plus the fact that the student's accusations contradicted other witnesses' testimony, renders J.M.'s testimony unreliable. (*Id.* at 10-15)

Respondent maintains that he did not delete any files from the computer and suggests that when Bob Padian, principal of Madison High School, changed the date on the computer from March 2, 1998 to February 27, 1998, any files accessed during that time would have a false February 27, 1998 date. Respondent also suggests that if the Cache and History files had been deleted as alleged, those files should have been empty when Michael Ricciardi, a computer consultant for the

[1] The record reflects that Room 6A was unlocked before school and was locked after the room was cleaned by the custodians on the night shift.

Board, opened them on March 5, 1998, but they were not. Respondent further explains that this computer was particularly prone to freezes and crashes. (*Id.* at 17)

Additionally, respondent argues that it is impossible to determine whether the pornographic cookies on the computer were purposely downloaded and if so, when and by whom, whether they were the result of an access that occurred in the course of a Netscape browser entering a Web page which had references pointing to these sites, or whether the cookies on the computer could have all come from Mr. Ricciardi's Internet search on March 5, 1998. He further explains that, on the one date that it *is* possible to infer that the computer was accessed for pornographic purposes, December 30, 1997, the school was closed for winter break and respondent was home recuperating from hernia surgery. (*Id.* at 20)

In Section II of his exceptions, respondent argues that, despite the ALJ's finding J.M.'s testimony inconsistent and his finding that it was impossible to conclude from the evidence whether someone intentionally accessed pornographic websites, the ALJ concluded that respondent was guilty of conduct unbecoming a teacher. The effect of the Initial Decision, therefore, was to shift the burden of proof from the Board to respondent. As stated in respondent's exceptions:

> In place of these affirmative proofs, the ALJ relied on the fact that, in his opinion, Respondent could not come up with a suitable explanation for files that appeared to be deleted or with a suitable response to the student's accusations. He wrote that, among other things, it was "*the absence of any other evidence to explain the creation date* of the MagicCookie file" that compelled the conclusion that Grundfest deliberately deleted the MagicCookie file on February 27, 1998. (ID 17) Requiring Respondent to produce such information shifted the burden of proof from the Board to the Respondent, standing the tenure statutes on their head. [footnote omitted] Instead of relying on the Board's inadequate proofs that Grundfest deleted files on February 27, the ALJ relied on his own view that Grundfest was unable to prove that the files were not deleted.
>
> Similarly, the ALJ shifted the burden when it came to Grundfest's denial of the charges. The ALJ concluded that "Grundfest's carefully constructed testimony that his access was 'inadvertent' and 'accidental' was not credible." (ID 19) Again, the ALJ relied on the absence of an explanation by Respondent to

> prove that the alleged acts occurred, reversing the burden from the Board to Grundfest. Instead of considering the failure of the Board to prove that Grundfest admitted inappropriately using the computer, the ALJ instead relied on his disbelief of Grundfest's response to the charges. (emphasis in text) (Respondent's Exceptions, Section 2, at 2)

Citing *In re Wolf*, 231 *N.J. Super.* 365, 370 (App. Div. 1989), "[c]hildren's testimony, especially when it contradicts previous statements, 'must be used with great caution...particularly where, as here, such use requires a final adjudication grounded primarily on the basis of the testimony,'" respondent reiterates his argument that J.M.'s testimony was not credible, arguing that in a room where three other teachers worked, J.M. and J.M. alone said that he had witnessed respondent accessing pornography, yet J.M. could not identify when this access allegedly occurred, rendering J.M.'s testimony more than just "somewhat inconsistent" as the ALJ found, and not the kind of testimony on which a man's career should be destroyed. Respondent challenges the believability of J.M., saying that "[i]t defies imagination that a fifth grade boy could see his teacher looking at pictures of naked ladies on the computer every day for three months and not a tell a soul." Respondent also takes issue with the fact that the Board paid for J.M.'s attorney. (Respondent's Exceptions, Section 2, at 4-7)

Citing *Wakefield v. Pinchak,* 289 *N.J. Super.* 566, 573-74 (App. Div. 1996), respondent maintains that due process requires that the accused be provided with specific dates when the alleged acts are alleged to have occurred. Because it is undisputed that the computer in question was freely available to all students and staff, respondent argues, the Board's failure to identify specific dates and times of the alleged impermissible access was unfairly prejudicial to respondent, since it made him responsible for explaining all pornography linked to the computer. (Respondent's Exceptions, Section 2, at 9, 10)

Respondent avers that the Board's failure to state who had made the charges against him, and its failure to identify dates/times the alleged acts occurred, violated his right to be informed of the charges and his accuser. He claims that he responded to the principal as he did since he knew

that a student couldn't have seen anything inappropriate because nothing had occurred when students were present. However, since he did surf the net after school hours, he thought it possible he could have offended a fellow teacher who might have seen a swimsuit banner ad. This lack of information, respondent argues, compromised his ability to defend himself accurately and with precision. (*Id.* at 11, 12)

The computer evidence was contaminated by Board employees, respondent maintains, and thus should be discounted. Further, the computer evidence could not prove who accessed the computer, or when it was accessed, since there was no log-in procedure or password protection. Since both experts agreed that pornography could be found on any computer that surfed the Web, the ALJ concluded it is impossible to determine whether someone intentionally accessed pornographic sites or whether the access was inadvertent. The ALJ also specifically found that the Board contaminated the integrity of the evidence. (*Id.* at 13, 14)

Respondent disputes the ALJ's conclusion that respondent deleted files, stating that that conclusion is flawed because the February 27, 1998 date is unreliable. Not only is it impossible to verify that the clock was either functioning or reliable at the time in question, but the ALJ himself concluded that the Board personnel had contaminated the evidence:

> **"it is now impossible to determine with independent certainty whether a time stamp on a file in the Macintosh reading February 27, 1998, is the true date or the false date."** (ID 7, *n.* 29). Despite making this finding, **the ALJ nevertheless based his conclusion that Respondent deleted files on February 27, 1998 on a time stamp on a Macintosh file reading February 27, 1998** (ID16), a conclusion that is directly controverted by the finding that any February 27, 1998 date on a file on the Macintosh is unreliable. (emphasis in text) (*Id.* at 17)

Further, respondent claims his due process rights were violated because he had no opportunity to examine the computer for evidence before it was contaminated by Board employees, and also because he was denied discovery of J.M.'s student records which could have provided

evidence of emotional and family problems that existed at the time the student made the allegations. (*Id.* at 19, 23-26)

Finally, citing *In re Fulcomer,* 93 *N.J. Super.* 404, 420 (App. Div. 1967) (where extraneous considerations impact penalty decisions, the rights of the accused can be seriously prejudiced), respondent argues that the ALJ's reliance on respondent's "*unwillingness to admit his conduct*, his *willingness to discredit a student*, and his attempts at erasing his tracks" were improper considerations when determining penalty. Respondent maintains that the right to deny charges and to confront his accuser is a fundamental aspect of due process and that it is improper to penalize him for exercising his rights. (emphasis in text) (Respondent's Exceptions, Section 2, at 21)

In its reply exceptions, the Board disputes respondent's argument that the ALJ shifted the burden of proof from the Board to respondent. The Board insists that the ALJ's decision was based first and foremost upon credibility findings and that the ALJ simply believed the Board's witnesses and did not believe respondent. (Board's Reply Exceptions at 2, 3)

The Board urges the Commissioner to adopt the ALJ's credibility determinations, stating that the ALJ found J.M.'s testimony credible, that it was consistent with what the child had reported a year and a half earlier and that the supervisor of the one teacher assigned to the classroom during J.M.'s afternoon tutoring sessions testified that the teacher was frequently out of the room. The Board avers that there is no evidence to support the allegation that J.M. threatened respondent and that J.M. had, in fact, testified that he liked respondent. The Board argues that its underwriting of a portion of J.M.'s legal costs in this proceeding should not be taken as evidence of an effort to "subvert" or "suborn" the testimony of J.M. (*Id.* at 4-6)

The Board argues that J.M.'s testimony is buttressed by clear evidence because the computer was "rife" with pornographic content, including a large amount of access to pornographic "news groups," which, the Board maintains, cannot be inadvertently accessed but must be accessed

through subscriptions. Further, given his knowledge of "news groups," the preponderance of credible evidence points to respondent. (*Id.* at 6-8)

Respondent's assertion that his rights were violated when the principal confronting him did not inform him of the identity of his accuser or the specifics of the allegation against him is without merit, the Board contends, because respondent should have been truthful regardless of the identity of his accuser. The Board states that the adverse inference the ALJ drew from respondent's evasive and suspicious responses when he was confronted with the accusations was appropriate. (*Id.* at 8)

The Board further argues that the computer provides ample evidence in support of the findings of the ALJ, citing the fact that a number of files, such as the MagicCookie File, the Cache log, the Address Book and other Netscape files were deleted by "someone" on February 27, 1998 and that respondent was the only person with the motive and opportunity to do so. The Board also argues that the Board's witnesses established proof as to the chain of custody and that those witnesses testified as to the computer clock's accuracy up until the date it was sent to Ontrack for data retrieval. (*Id.* at 9, 10)

The Board challenges the testimony of respondent's expert, Mr. Goldstein, which concluded that files could have been deleted through a computer crash or through inadvertence, saying that he lacked credibility. (*Id.* at 11) Defending its conduct on the handling of the evidence, the Board asserts that there is no evidence that the computer evidence was contaminated and that a chain of evidence was presented which explained minute-by-minute, day-by-day what actions the Board took and what effect such actions had on the data on the computer files. Further, witnesses independently verified that they had turned on the computer on certain days and the functions performed. (*Id.* at 12)

Finally, the Board urges the Commissioner to adopt the ALJ's recommended penalty, stating that termination of respondent's tenure is entirely appropriate and fully supported by the evidence. The Board avers that the ALJ acted properly in excluding the use of the student's records

and that respondent's attempt to bring extraneous material into the matter was nothing less than a "red herring," which was properly rejected. (*Id.* at 13, 14)

Initially, the Commissioner notes his agreement with Dr. Feinsod, Madison Superintendent of Schools, that the charge of accessing pornographic materials on a school computer is reprehensible and, if proven true, violates a sacred trust between the teacher and his students. (Tr. 10/5/99, at 66-67)

Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderence of credible evidence that 1) pornographic materials were intentionally accessed on the school computer in question, and that 2) respondent was the one who accessed those materials.

Upon an exhaustive review of the record, including transcripts of the nine days of hearings, the computer experts' reports and other evidentiary documents, the Commissioner cannot accept the recommended decision of the ALJ because the record does not support his conclusions. Central to the Board's case in this matter are (1) the accusations of an 11-year-old boy, J.M., who testified that he saw respondent view "like porno stuff; naked people" (Tr. 10/12/99, at 70), and (2) the computer data evidence.

Like the ALJ, the Commissioner finds J.M.'s testimony "somewhat inconsistent" because J.M. testified that respondent began viewing pornographic material on the computer in "September. Like December. November. One of those," (Tr. 10/12/99, at 71), and that, after prompting by petitioner's counsel, J.M. testified that he saw his teacher viewing pornographic sites only after another student transferred out of his language class in December 1997. (Initial Decision at 3) Although some variance is expected in the testimony of minors, it has long been established that

student testimony must be examined with great caution, *e.g., In the Matter of the Tenure Hearing of Barry Deetz*, decided by the State Board November 7, 1984, *aff'd* Docket No. A-1264-84T5 (App. Div. 1985), *certif. denied*, 101 *N.J.* 321 (1985). Although not necessarily required in evaluating student testimony, it is noted that there is no witness testimony corroborating J.M.'s accusations.[2]

Despite finding his testimony "somewhat inconsistent," the ALJ credited J.M.'s testimony, concluding that "[respondent's] lewd actions were observed at least once by J.M., an 11-year-old boy who was made to suffer the subsequent anxiety of revealing the incident***." (*Id.* at 20) Notwithstanding his obligation to accord due consideration to the ALJ's opportunity to observe witnesses to assess their credibility, the Commissioner's primary responsibility in this matter is to adduce whether the evidence produced at hearing supports the charges against respondent by a preponderence of credible evidence. In this instance, the Commissioner finds that the record does not support reliance on J.M.'s testimony. *See Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super.* 40, 42, 50-54 (App. Div. 1962) and *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

Not only was J.M. unsure which month(s) he observed respondent viewing sexually explicit material as indicated above, but he was also inconsistent in recounting which days of the week, the time of day and the number of instances.[3] J.M. also testified that the alleged incidents occurred when he was in respondent's class for writing.[4] (Tr. 10/12/99, at 70) Although J.M. had writing only three days a week, he testified that he saw respondent accessing pornographic material every time he went into the classroom and that he went there every day. (Tr. 10/12/99, at 74) Upon further

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[2] The Commissioner does not concur with the Board that respondent's statement to Principal Lippiett, "and then he said that, yes, it was true, but he had done it inadvertently, that sometimes when searching for other items an inappropriate image could come up on the screen, and then he gave me an example***," constitutes an admission of guilt by respondent. (Tr. 10/4/99, at 25)

[3] The Board establishes the dates that respondent is accused of accessing sexual material on the Internet between December 1, 1997 and February 27, 1998 based on J.M.'s testimony that the access occurred in his writing classes when he was the only student assigned to respondent, but the Board admits that there is no evidence that respondent looked at sexual material on any specific day between December 1 and February 27. (Tr. 11/16/99, at 120)

[4] It is undisputed that J.M.'s writing classes with respondent were Monday and Thursday afternoons from 2:00 to 2:30 p.m. and Friday mornings from 11:30 a.m. to 12 noon.

clarification by the Board's attorney, J.M. testified that he witnessed the inappropriate behavior "five or seven times" and "Way more than once." (Tr. 10/12/99, at 75)

Further, the Board was unable to corroborate J.M.'s accusations with witness accounts. Counsel for the Board acknowledged that he had interviewed the teachers and none of them ever saw respondent put anything on the screen of a sexual nature, nor did any students, other than J.M., complain of seeing anything of a sexual nature.[5] (Tr. 10/5/99, at 211, 212) Likewise, the school's principal, Barbara Lippiett, who testified on behalf of the Board, did not provide any testimony of observing respondent access inappropriate material, although the *possibility* existed for her to observe such activity, if it were occurring during class times, in that it was her stated practice to visit room 6A frequently and always unannounced. (Tr. 8/26/99, at 64 and 10/4/99, at 55-56) It is also noted that J.M. accuses respondent of viewing pornographic material in classroom 6A, which is separated by low dividers and assigned for use by four teachers, Nancy Croessmann, Marilyn D'Amelio, Debra Neeley and Respondent Robert Grundfest, and their students. Teachers Marie McGuire, John Connolly, Barbara Koes and Joan Hart periodically used the room and the computer in question. Nancy Croessmann, Marilyn D'Amelio and Debra Neeley, the three teachers assigned to room 6A with respondent, testified on his behalf. They were unanimous in stating that room 6A was very active with students and teachers constantly going in and out of the room,[6] and that they had never seen respondent do anything inappropriate on the computer. (Tr. 10/5/99, at 158, 206 and 223) Marilyn D'Amelio, who tutored a student in the classroom at the same time on Friday mornings that J.M. had his writing sessions with respondent, and Nancy Croessmann, who tutored students with schedules that mirrored both J.M.'s morning and afternoon writing sessions,[7] testified that they could see the computer screen

[5] The Commissioner notes that J.M. reported to Ms. Lippiett that another student, K.S., may have seen inappropriate materials, but when questioned by Ms. Lippiett, K.S. said she had never seen respondent use the computer at all when she was with him. (R-9, in evidence)

[6] J.M. testified that Ms. D'Amelio and Ms. Croessmann and some students were in and out of the classroom during his classes. (Tr. 10/12/99, at 105-107)

[7] Ms. Croessmann testified that she rarely left room 6A. (Tr. 10/5/99, at 200, 201)

from their work areas and that they did not seen anything inappropriate, nor did their students report seeing respondent do anything inappropriate on the computer. (Tr. 10/5/99, at 156-159, 205, 206)

J.M.'s uncorroborated testimony must, therefore, be evaluated in light of its inconsistencies regarding the dates and times of the alleged activities, and in conjunction with other statements J.M. made on the record. J.M. admitted that he sometimes lied about whether or not his homework was done and sometimes made up things about what happened on the playground to avoid getting into trouble. (Tr. 10/12/99, at 84) Respondent claims that J.M. threatened him, claiming that J.M. told him that he could get him fired, which J.M. was unable to deny, testifying that he "may have but I don't recall," and upon additional questioning explained further:

> As I said before, I don't recall doing it but I may have 'cause--I mean I don't remember doing it in the fifth grade or anything but I could have said it in like third grade 'cause I had him in my class, too.
> (Tr. 10/12/99, at 76)

Finally, based on the Board's timeline that J.M. observed respondent viewing sexually explicit material between December 1, 1997 and February 27, 1998, it is important to note that J.M. did not confide in anyone--not a fellow student, a teacher, his principal, his counselor or his parents, that this was occurring until the end of the third month. (Tr. 10/12/99, at 94, 97, 107-109)

Accordingly, after a thorough review of J.M.'s testimony with due consideration to the ALJ's observations, noting the tender age of the student, and in light of the fact that there is no witness testimony to corroborate J.M.'s accusations, the Commissioner must reject the ALJ's reliance on J.M.'s testimony.

The Commissioner, therefore, turns to an assessment of the validity of the computer evidence, which must be viewed 1) in light of the lack of Board policy regarding the use of school computers and the lack of security for the computer in question prior to J.M.'s accusations, and 2) whether the computer evidence was compromised by Board employees investigating J.M.'s allegations.

First, as specified in the record, the Board did not have a policy in place governing the use of school computers prior to J.M.'s accusations. (Tr. 10/4/99, at 78-81) Further, the computer in question was not password-protected and there was no log-in procedure. Respondent's classroom, Room 6A, where the computer was located, was unlocked by a custodian before school and locked again by the custodian on the evening shift after the room was cleaned. The room and computer were available to the four teachers and their students assigned to the room, as well as at least three other teachers who periodically used the computer and the classroom. *Anyone* could have used the computer after school and into the evening before the room was locked, including someone affiliated with a community group in conjunction with events scheduled at the school. (Tr. 10/4/99, at 62-65, 77, 78 and Tr. 11/16/99, at 134, 135)

Since there were no security measures in place in regard to the use of the computer, the Board admits that it cannot identify a single specific date on which it is alleging respondent accessed pornography. Both the Board's expert and respondent's expert agree that there is no way to determine when a particular web site was accessed or who accessed it since there was no password or log-in procedure, and the Macintosh didn't track the accessed sites by recording the time and/or date.[8] (Tr. 11/15/99, at 111, 216 and 11/18/99, at 127) The only date the Board was able to link with respondent was February 27, 1998.[9] By relying on the creation dates and last-modification dates in the data files records, the Board concluded that respondent had deleted files on February 27, 1998 shortly after he was confronted with J.M.'s accusations against him. The Board reasons that this circumstantial evidence points to respondent as he was the only person with the motive and opportunity to delete files on that date. However, the deletions on February 27 cannot be read to point solely to respondent because the record reflects that the computer evidence was compromised when

[8] Noticeably absent from the Board's investigation into this matter is a request to the Internet service provider for a listing of websites accessed with the dates and times.

[9] The only date that the Board was able to infer from the data on the computer that the computer was accessed for pornographic purposes was on December 30, 1997. (Exhibit M21) Respondent testified that December 30, 1997 was a day during which the school was closed for winter vacation, and that he was at home recuperating from hernia surgery on that date. (Tr. 11/18/99, at 4, 5)

one of the Board employees, Bruce Padian, in the course of his investigation into this matter on March 2, backdated the computer to February 27, 1998. Respondent's expert, Dr. Goldstein, testified that resetting a date backwards would mean that the computer would have found some files that had a date later than the computer date, which is not a good condition to have on the computer, and could possibly lead to failures or crashes on the machine. (Tr. 11/18/99, at 114) On cross-examination, the Board's expert, Mr. Kremen, was questioned about the effect of this backdating, as follows:

> Q And on your web site, you publish a -- an on line forensic publication. Is that right?
>
> A Yes.
>
> Q You're familiar with Mark Friedman (phonetic) and Chicara Boon (phonetic)
>
> A Yes.
>
> Q Do they write for your web publication?
>
> A Yes.
>
> Q I'm going to -- is one of the articles they wrote, *Old Rules for New Stuff, Pretrial Discovery and Seizure of Computer Based Evidence*?
>
> A Yes.
>
> Q Did you have any role in writing that?
>
> A No.
>
> Q Have you reviewed it?
>
> A I've read it. Yes.
>
> Q It -- it says in here, most files also contain a date and time stamp of when the file was last changed. If, for example, the date and time are later than the date of a letter or memorandum, that may mean that the memorandum may have been written after the fact. Of course, the memorandum may just as easily have been accessed and rewritten, with no changes at a later date. The date and time stamp is not infallible. In fact, it is very easy to manipulate, with the proper software tools. Accordingly, just because the date and time stamp appears to be a certain

date, do not believe that date to be an absolute fact. Now, do you recall that being published in your journal?

A Yes.

***

Q Is that statement true?

A Yes.

Q A few -- a sentence later, it says, like any other digital data, the date and time stamp is highly manipulative. Do you agree with that statement?

A Yes.

Q Now, when Mr. Padian changed the date, any file that was created at the time he was looking at the computer would be dated February 27th. Correct?

A That's correct.

Q Any file that was accessed when he was looking at the computer would have an access date of February 27th. Correct?

A Correct.

Q Any file that was deleted would have a deletion date of February 27th. Is that correct?

A That -- a file doesn't -- a file would never have a deletion date.

Q It was -- if it was created, it would have a February 27th date. Right?

A Right.

Q And a modification date of February 27th. Correct?

A Correct.

Q It's those three. Creation, access and modification. Right?

A Correct.

Q And you don't know any particular -- when any particular file was deleted, because there is no deletion date that's available. Correct?

A Well, there's also -- right. You would not find a deletion date or time.

Q Okay. Now, as a forensic computer consultant, would you ever advise a client to change the date on a computer before you'd had a chance to make a mirror image copy of the data on that computer?

A No. I would not.
(Tr. 11/15/99, at 128-132)

The ALJ also noted that by backdating the Macintosh, Padian contaminated the integrity of the evidence, making it impossible to determine with independent certainty whether a time-stamp on a file reading February 27, 1998 is a true or false date. (Initial Decision at 7, footnote 29)

Second, the Commissioner turns to the Board's process of investigating the computer evidence following J.M.'s accusations. On February 26, 1998, the day before respondent was confronted with J.M.'s accusations, Bill Moesch, the director of Special Services, was the first of four Board employees to inspect the computer prior to its being forwarded to Ontrack for data retrieval. Mr. Moesch turned on the computer, looked at some of the most recent files for sexual content and found nothing that gave him any concern, so he turned the computer off. (Tr. 10/4/99, at 188, 189) On March 2, 1998, Bruce Padian, principal of Madison High School, examined the Macintosh. He plugged it in and booted it up, but did not connect the modem. Padian then changed the computer's clock from March 2, 1998 to February 27, 1998, the last date that respondent had access to the computer, then he searched the files on the hard drive. Finding no sexually explicit content, he reset the clock back to March 2 and shut the computer down. (Tr. 10/4/99, at 205-208)

On March 3, 1998, School Business Administrator Michael Hayser took custody of the Macintosh and transported it to his office. (Tr. 10/5/99, at 36) On March 5, 1998, Michael Ricciardi, booted up the Macintosh and examined the files. Finding no sexually explicit content in the files, Mr. Ricciardi further contaminated the evidence when he connected the modem and accessed the

Internet and proceeded to conduct a search on the Donner Party to investigate respondent's explanation that he had inadvertently accessed a pornography site when he had searched for the Donner Party as part of his research for a school project. Mr. Ricciardi testified that some of the listings he retrieved in the search were of a sexual nature. (Tr. 10/5/99, at 86, 101-104)

On March 23, 1998, Robert Hinchcliffe, a senior technical analyst with Fleet Securities, booted up the computer, but did not connect the modem. Mr. Hinchcliffe found the "MagicCookie" file, which was time-stamped with a creation date of February 27, 1998 at 1:57 p.m. and contained six domain names that were pornographic in nature. He then printed out the MagicCookie file. (Initial Decision at 8)

On March 25, 1998, the computer was sent to Ontrack Data Recovery for retrieval of the hard drive data. As noted by the ALJ in a footnote:

> According to an Ontrack technical report prepared by Ms. McNary, dated October 4, 1999, the Macintosh was not booted in order to retrieve the hard drive data, *as booting can "change the evidence, including the file count."* [R-24, in evidence] Ms. McNary testified that *when a computer is booted, certain files and corresponding dates may be altered,* although this alteration is usually limited to operating system files. The last date Grundfest had access to the Macintosh was February 27, 1998. *It was booted at least three times before Ontrack recovered the deleted files.* (emphasis added) (Initial Decision at 8, footnote 37)

Thus, the Commissioner finds that the contamination of the computer data evidence caused by the Board's mishandling of the Macintosh computer in question is inexcusable and fatal to its case. It is undisputed that the computer in this matter was in an unlocked room for most of the day and evening where it was available for use by a significant number of people. It is also uncontested that the computer was neither password protected nor log-in protected. Although there is some evidence that pornographic sites were accessed on the Macintosh computer in question, the Board has failed to provide the information necessary to conclude with any degree of certainty from the computer data evidence whether the amount of pornography is consistent with any computer that has accessed

the Internet, whether someone intentionally accessed pornographic sites, or whether any access was inadvertent. [10] Further, because Board employees contaminated the computer evidence, it is also not possible to determine who accessed the pornographic sites or on what dates(s) the access occurred. Such contamination also precludes a determination on whether files were deleted by respondent on February 27, 1998 as charged, or whether they were deleted inadvertently by Mr. Padian when he backdated the computer on March 2 in the process of his investigation, or by an unknown person at some other time.

For the reasons set forth above, the Commissioner determines that the Board has failed to meet its burden of proof substantiating the charges of misconduct by respondent by a preponderence of credible evidence.

Accordingly, the Commissioner dismisses the tenure charges against respondent and directs his reinstatement with back pay for the period of his suspension at the level of pay that he would have received had the charges not been brought against him.

IT IS SO ORDERED.[11]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 20 2000

Date of Mailing: JUN 20 2000

[10] Respondent's expert, Dr. Goldstein, testified that anyone innocently surfing the worldwide web can very often encounter pornographic sites. (Tr. 11/18/99, at 128) The Board's expert, Mr. Kremen, opines that the volume of pornographic data was too voluminous to have been accessed inadvertently, but he offered no comparative evidence to substantiate his statement, and did not provide any evidence that someone used sexually explicit search terms to pull up pornography. (Tr. 11/16/99, at 14, 15 and Initial Decision at 13)

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

197-00

EDU #5326-98
C # 197-00
SB # 39-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT I. GRUNDFEST,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF MADISON, MORRIS COUNTY.	:	

Decided by the Commissioner of Education, June 20, 2000

For the Petitioner-Appellant, Rand, Algeier, Tosti & Woodruff (David B. Rand, Esq., of Counsel)

For the Respondent-Respondent, Herbert, Van Ness, Cayci & Goodell (Steven P. Goodell, Esq., of Counsel)

After an exhaustive review of the record in this matter, including the transcripts of the hearing held in the Office of Administrative Law, we affirm the decision of the Commissioner of Education to dismiss the tenure charges certified against the respondent for the reasons expressed therein. Even giving "due weight to the ALJ's unique position and ability to make demeanor based judgments," Whasun Lee v. Board of Education of the Township of Holmdel, Docket #A-5978-98T2 (App. Div. 2000), slip op. at 14, we conclude that the Madison Board failed to demonstrate the truthfulness of the charges–which alleged that the respondent had accessed pornographic web sites on his classroom computer during school hours–by a preponderance of the credible evidence.

Nov. 1, 2000

The Board in this case presented only one witness who claimed to have seen the respondent viewing pornographic material on the computer: J.M., an 11-year-old fifth-grade student in the district at the time of the alleged incidents. J.M.'s testimony is particularly critical to this case since we agree with the Commissioner that the Board is unable to establish from the computer evidence when pornographic web sites might have been accessed, which sites if any were actually accessed, and by whom. We stress in that regard that the computer was not password-protected, did not have a log-in procedure and, indeed, was used by a number of other teachers. Indeed, the classroom was not locked until after it was cleaned at night by the custodial staff. Moreover, as found by the Commissioner, the subsequent attempt by other individuals to review the computer's files, including backdating the computer clock, seriously compromised the integrity of the evidence.

Although the ALJ did not make a specific finding that J.M. was credible or otherwise comment on his demeanor, he did credit J.M.'s testimony enough to find that the respondent's actions "were observed at least once by J.M." Initial Decision, slip op. at 20. In so doing, however, the ALJ also acknowledged that J.M.'s testimony was "somewhat inconsistent." Id. at 3.

As pointed out by the Commissioner, corroboration of student testimony is not necessarily required, but it has long been established that student testimony must be examined with great caution. E.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board of Education, November 7, 1984, aff'd, Docket #A-1264-84T5 (App. Div. 1985), cert. denied, 101 N.J. 321 (1986). Moreover, we are cognizant of our obligation to "recognize and give due weight to the ALJ's unique

position and ability to make demeanor based judgments." Whasun Lee, supra, slip op. at 14. See Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (App. Div. 1962). However, we are equally aware that we are not bound by the ALJ's assessments of the substance of the testimony of his evaluation of the factors which bear upon credibility. Deetz, supra. "The law does not require that the State Board automatically accept any ALJ's credibility determination, even if the ALJ's determination is based on sufficient evidence." Whasun Lee, supra, slip op. at 13-14.

In this instance, J.M. testified that he saw the respondent viewing "like porno stuff; naked people," on the computer. Tr. 10/12/99, at 70. J.M. indicated that the respondent was sitting in front of the computer viewing the images and that he could see nearly the entire screen from his seat, which was on an angle towards the computer. Id. at 72-74. He further testified that the other teachers who shared the classroom with the respondent would be going in and out of the room while he was there. Id. at 71. J.M., who was being tutored by the respondent three days a week, stated that he saw the respondent viewing these images "every time I would go to the classroom." Id. at 74.

Three other teachers were assigned to the room with the respondent. Each had a separate work station separated from the others by low partitions. As more fully detailed in the Commissioner's decision, the other teachers testified that teachers, students and staff were constantly going in and out of the room and that they had never observed the respondent viewing anything inappropriate on the computer. Nancy Croessmann, one of the teachers who shared the room with the respondent, testified that she could easily see the respondent's computer from her work station, that she was

with students in the room while J.M. was with the respondent, that she also used the computer, and that she had never seen the respondent use the computer for any inappropriate purposes. Tr. 10/5/99, at 150-158.

We agree with the Commissioner's well-reasoned analysis rejecting the ALJ's reliance on J.M.'s testimony. See Commissioner's Decision, slip op. at 30-33. In light of J.M.'s tender age; the inconsistencies in his testimony; J.M.'s acknowledgement that he had lied on occasion to the respondent about having done his homework and about incidents that had occurred on the playground; the fact that J.M. had apparently threatened the respondent prior to the alleged computer incidents that he could get him fired; and the lack of witnesses who could provide any corroboration for J.M.'s allegations–despite his acknowledgement that other teachers were in the classroom while he was there–we conclude that the testimony of J.M. cannot be credited so as to substantiate the charges.

Given the problems inherent in a case of this nature, prudence dictates that district boards establish procedures that would protect the integrity of evidence when an accusation alleging improper use of a school computer is made. Such procedures should be designed with due consideration for the problems that can arise when the individual against whom such allegations have been made is permitted to have continued access to the computer, including the opportunity to delete damaging evidence, and when district staff with no technological expertise access the computer in an attempt to verify such allegations. Such measures would not only protect an individual against whom false allegations have been made, but would also preserve evidence of improper computer use.

Therefore, for the reasons expressed by the Commissioner as expounded herein, we agree that the Board failed to demonstrate the charges against the respondent by a preponderance of the credible evidence.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 03 2000

198-00E

G.L, on behalf of minor child, D.L.,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

June 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENT ORDER

OAL DKT. NO. EDU 4559-00

AGENCY DKT. NO. 200-6/00

G.L. o/b/o D.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,

Respondent.

G.L., on behalf of petitioner **D.L.**, *pro se*

Russell Paul, Esq., for respondent

Record Closed: June 19, 2000 Decided: June 19, 2000

BEFORE **JOSEPH LAVERY**, ALJ:

THE MOTION

Petitioner, G.L., on behalf of her daughter, D.L., moves for emergent relief. She asks that D.L. be permitted to march in procession with her class at graduation, to be held tomorrow, Tuesday, June 20, 2000.

Respondent, Millville Board of Education contests the motion, and grounds its refusal on a policy prohibiting participation in graduation ceremonies by any student not certified as having completed the requirements for graduation: successful completion of 110 credits worth of course work.

Today's Order affirms the refusal of the Board of Education to permit D.L. to take part in graduation ceremonies.

ANALYSIS OF THE RECORD

Background:

D.L. is a 19-year old student at Millville High School. She is also classified as having a specific learning disability. She has been on home instruction since May. Prior to that, she was schooled with other students in a resource room setting.

It was D.L.'s intent, as well as that of her mother, G.L., that she graduate this year. However, the respondent Millville Board of Education (the Board) declared that D.L. had not completed the required 110 credits for graduation, and for that reason she could not be permitted to graduate. The Board maintained that this was consistent with a policy in existence for over 30 years. Her remedy, in the Board's view, is to successfully complete the remaining course work during summer school, and then to receive the requisite certification.

Petitioner does not object to the requirement of further course work, but does appeal from the bar to participation in the imminent graduation ceremonies.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

D.L. notes that in her courses in Science, History, Physical Education and Health, as well as in Culinary Arts and Sewing, she was not administered final examinations by the home instructors assigned to her since last May. Petitioner concedes that she did take the English examination.

Recalling that, during the previous summer school, she had been removed from Physical Education and Health because of an altercation; D.L. complained that another girl, also removed, was allowed to return to the class, while she was not. This removal was appealed to the Board's Affirmative Action Officer, but D.L.'s appeal was ultimately denied as being without foundation.

Addressing her courses, D.L. maintains that she was given too short notice to take three examinations in one day, as scheduled by the school. Additionally, one of the teachers who was her home instructor arrived at 2:30 p.m., well before her mother's return from work at approximately 4 p.m. D.L. recalled that she called the school twice: that day and the next in an attempt to reach the teacher, but the calls were not returned.

D.L.'s mother, G.L., contends that insufficient attention was paid to the disability under which D.L. labors, and consequently this has placed D.L. in the present dilemma.

Argument of the Board:

The Board argues that, as noted above, the policy of prohibiting marching in the ceremonies without a certification to graduate has been a matter of long-standing. However, it points out that, in this case, the Board otherwise has gone out of its way to accommodate D.L. It observes that last summer, when petitioner had been ejected from the Physical Education and Health Class, and after she had dropped from the Science class of her own volition without returning, losing (10) credits, the Board sought to assist. It advised both G.L. and D.L. that if her

performance improved during the school year 1999-2000, these two courses would be waived and sufficient credits would be recorded to permit graduation.

Nevertheless, the Board stresses, petitioner failed her English examination and accumulated failing grades in the other courses cited by D.L.: Science, History, Physical Education and Health. Her grades in those courses would have assured failure even if she had received a grade of "A" in each and every associated final examination. Additionally, the Board avers it is prepared to show that on all the disputed occasions when the school representatives came to administer the final examinations, no one was home.

The Board insists that the present dispute, based on its facts, is outside the jurisdiction of special education law, and only the Commissioner may make the final administrative decision on this motion. In its view, D.L.'s classified status is irrelevant as a matter of law, because of factual underpinning to which only education law may be applied.

CONCLUSION OF LAW

I **CONCLUDE** that petitioner has not carried the burden of showing that the Board has acted arbitrarily, capriciously, or unreasonably, which is the standard for relief before the Commissioner of Education, *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). On appeal, the administrative law judge and the Commissioner may not substitute their own assessments of what Board response should have occurred, unless the Board's decision is rendered invalid by falling under the foregoing prohibiting standard.

The rule governing emergent relief applications before the Commissioner of Education is:

> (b) Where a motion for a stay or emergent relief is filed, it shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to *Crowe v. De Gioia*, 90 *N.J.* 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interest of the parties are balanced, the petitioner will suffer greater harm that the respondent will suffer if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6 [*See also, Crowe v. De Gioia*, 90 *N.J.* 126, 132-34 (1982).

Here, both D.L. and G.L. acknowledge that D.L., from last summer alone, falls short 10 credits from the minimum 110 needed to graduate. Further, D.L. concedes that she lacks 5 more credits for English, a subject on which she was examined finally, yet failed the course. Moreover, the Board credibly relates that final exams in D.L.'s remaining courses (for which she was not tested finally) would have left her without overall passing grades, even if she had received A's in the tests (Exhibit R-1). Consequently, accepting *arguendo* petitioner's version of the reasons some final examinations were not administered, the impact of those reasons on this appeal would be mooted by the still-lacking 15 credits.

As to D.L.'s educational disability, G.L. brought this appeal through the Commissioner of Education on the facts related at hearing. *N.J.A.C.* 6A:3-1.3. Nothing of record indicates that the IEP [Exh. P-1] was challenged under the law or rules governing special education cases. Neither do the facts, when considered against the existing IEP (Exhibit P-1), show a credible connection, established by preponderating evidence, between the complaint and shortcomings in the application of that IEP, which would warrant a special education appeal.

All that is at issue here is (a) whether D.L. has earned the appropriate number of credits to be certified for graduation, and (b) whether the policy barring her (and other similarly situated students) for not doing so is arbitrary, capricious or unreasonable. On the face of this record, D.L. has not, and the policy is not. For these reasons, the refusal of the Board of Education to allow D.L. to take part in the graduation ceremonies tomorrow must be affirmed.

ORDER

I, **ORDER,** therefore, based on the above rationale, that the appeal by G.L. on behalf of D.L., be **DENIED.**

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

June 19, 2000
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

OAL DKT. NO. EDU 4559-00
AGENCY DKT. NO. 200-6/00

G.L., on behalf of minor child, D.L.,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The recommended Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed by the Assistant Commissioner to whom it has been delegated for hearing pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner concurs with the ALJ that petitioner has failed to meet the requisite standards for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the recommended Order of the ALJ denying petitioner's Motion for Emergent Relief is adopted for the reasons well expressed therein. This matter is being returned to the Office of Administrative Law for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

Ellen Schechter
ASSISTANT COMMISSIONER

Date of Decision: JUN 20 2000

Date of Mailing: JUN 20 2000

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

VERNELLE HARRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

June 23, 2000

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7374-99
Agency Docket No. 123-5/99

VERNELLE HARRIS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Wayne J. Oppito, Esq., New Jersey Principals and Supervisors Association, for petitioner

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: April 21, 2000 Decided: May 4, 2000

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE

Petitioner appeals the failure of the *State-Operated School District, City of Jersey City, Hudson County,* to pay her for use of her sick days.

This matter was transmitted to the Office of Administrative Law on July 9, 1999 for determination as a contested case, pursuant to *N.J.S.A.* 52:41B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* This matter was set down for a hearing on February 22, 2000 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Prior to the scheduled hearing date, the parties entered into settlement negotiations and have amicably agreed to settle the matter. The parties have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

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

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

May 4, 2000
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

5-9-00
DATE

Debbie Abramowitz /bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

VERNELLE HARRIS, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 123-5/99 OAL Dkt. No. EDUOR 7374-99 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding petitioner's claims of wrongful withholding of pay checks during the 1999-2000 school year. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

1. The parties agree that this Stipulation of Settlement represents the compromise of disputed claims and is not an admission of liability or wrongdoing by either party.

2. The petitioner withdraws her petition in the within matter.

3. The respondent Jersey City School District agrees to pay the petitioner Vernelle Harris the amount of the salary payment that was withheld for the pay period of February 17, 1999 to March 1, 1999, amounting to three thousand five hundred seventy-five dollars ($3575.00) gross. In addition, the District shall pay the petitioner Vernelle Harris the

equivalent of one day's salary from the salary payment that was withheld for the pay period of March 2, 1999 to March 17, 1999. The District shall make deductions for taxes, Social Security and other standard items from the gross total amount payable to the petitioner.

5. The petitioner hereby releases and discharges the respondent Jersey City School District, its officers, employees and agents, from all pending and future claims and causes of action against the District relating to the docking or withholding of her salary during the 1999-2000 school year.

6. The petitioner Vernelle Harris acknowledges that she has had the right and opportunity to discuss all aspects of this Stipulation with her attorney prior to signing it, that she has read and fully understands all of the terms of this Stipulation, and that she had entered into this Stipulation knowingly and voluntarily, without coercion or duress.

7. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

Vernelle Harris
VERNELLE HARRIS
Petitioner
DATED: 4/17/2000

Wayne J. Oppito
WAYNE J. OPPITO, Esq.
Attorney for Petitioner
DATED: 4/26/2000

Charlotte Kitler
CHARLOTTE KITLER, Esq.
Attorney for Respondent
DATED: 4/27/00

OAL DKT. NO. EDU 7374-99
AGENCY DKT. NO. 123-5/99

VERNELLE HARRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 28 2000

Date of Mailing: JUN 28 2000

202-00

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

June 23, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11825-98
AGENCY DKT. NO. 502-11/98

ROBIN HAWKINS,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eugene G. Liss, Esq. for petitioner

Joseph Verga, Associate Counsel, for respondent
(Hope R. Blackburn, Interim General Counsel, attorney)

Record Closed: April 28, 2000 Decided: May 3, 2000

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

On November 12, 1998, petitioner, Robin Hawkins, filed a petition of appeal with the Commissioner of Education, alleging that respondent's determination to withhold petitioner's increment for the 1998-99 academic school year was arbitrary, capricious and unreasonable. On December 2, 1998, respondent filed an answer to the petition claiming that its actions were not unreasonable and that the withholding of petitioner's salary increment was justified. On December 28, 1998, the Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of

Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on February 11, 1999, and a telephone prehearing conference scheduled for April 14, 1999. The telephone prehearing conference was held on April 14, 1999, at which time the issues were isolated, and a hearing scheduled for September 22, 1999, at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. At the request of counsel for petitioner, the hearing was rescheduled to February 10, 2000. The hearing was adjourned to September 25 and 26, 2000 at the request of counsel for respondent. As the result of settlement conferences held between the parties, a settlement was reached and the hearing was adjourned.

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

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

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

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

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

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

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

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

May 3, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5-9-00
DATE

Robbie Antonacci
DEPARTMENT OF EDUCATION

Mailed to Parties:

Jeff S. Mikan
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 11 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

al

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Respondent

ROBIN HAWKINS, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR-11825-98N SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, his appeal and request for a hearing, filed under OAL Docket No. EDUOR 11825-98N, and agrees to retire from his former position as a teacher, effective July 1, 2000.

2. Petitioner agrees that his retirement is irrevocable and further agrees not to reapply for future employment with Respondent.

3. Respondent agrees to restore Petitioner's previously withheld salary increment for the 1998-99 school year, and to place Petitioner on the appropriate step or degree level of the salary guide prior to July 1, 2000.

4. This agreement shall not constitute a precedent in any matters involving other employees.

5. This Agreement will only become effective upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

6. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief.

7. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything that has happened up to now. It specifically includes, without limitation, all claims that Ms. Hawkins may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, with the exception of any claims pursuant to Workers' Compensation.

Dated: 4/8/'00

Robin Hawkins
ROBIN HAWKINS, Petitioner

Dated: 4-14-2000

EUGENE LISS
Attorney for Petitioner

Dated: 4/17/2000

MARION BOLDEN
State District Superintendent

Dated: 4/17/00

JOSEPH VERGA
Associate Counsel
Newark Public Schools

OAL DKT. NO. EDU 11825-98
AGENCY DKT. NO. 502-11/98

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 23 2000

Date of Mailing: JUN 23 2000

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
H.L. AND D.L.,		
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought calculation of pre-judgment interest in matter wherein petitioner was entitled to tuition in the amount of $5,614.03 for the attendance of H.L. and D.L.'s two children in the Livingston schools when respondents were not domiciled in the District (October 1, 1990 until January 22, 1991). The Board calculated the pre-judgment interest for the period from January 22, 1991 through the date of the Commissioner's decision, May 26, 1998, to be $2,310.36 by the method set forth in the Rules Governing the Courts, *R.*4:42-11, because it was unable to obtain any discovery from respondents as to their financial affairs. Respondents claimed loss of all financial records in the move to Livingston. In his opinion of May 28, 1999, the Commissioner determined that the record was insufficient to determine the interest by the method specified in *N.J.A.C.* 6:24-1.16(d)1, as directed by the State Board, and remanded the matter to OAL for the sole purpose of computing the pre-judgment interest in accord with the applicable regulation.

The ALJ concluded that one last attempt should be made to comply witb the requirements of *N.J.A.C.* 6:24-1.16(d)1, that is, to calculate pre-judgment interest based upon "the average rate of interest earned on investments by" respondents from January 22, 1991 through May 26, 1998. The ALJ ordered respondents to produce all records and documents relating to their investments for the years 1991 through 1998 for the Board by April 15, 2000. Upon receipt of the information, the Board would review the records to ascertain the average rate of interest and submit the calculations. If respondents fail to disclose the information or provide inadequate information by the specified date the ALJ ordered that, upon submission of an affidavit stating that respondents failed to provide the required discovery, the Board would receive an order granting summary decision for pre-judgment interest in the amount of $2,310.46 as calculated in accord with *N.J.A.C.* 6:24-1.15 and *N.J.A.C.* 6:24-1.16(d)2.

The Commissioner concurred with the ALJ and adopted findings and determination in Initial Decision as his own. Commissioner directed respondents to remit the amount of $2,310.36 to the Board.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5908-99
Agency Dkt. No. 126-5/99
State Board Dkt. 60-98

ON REMAND
OAL DKT. NO. EDU 11593-96

BOARD OF EDUCATION OF THE CITY OF LIVINGSTON, ESSEX COUNTY,

Petitioner,

v.

H.L. and D.L.,

Respondents.

James J. Rothschild, Jr., Esq., for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

H.L. and D.L., respondents, *pro se*

Record Closed: April 30, 2000 Decided: May 4, 2000

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On May 26, 1998, following an Initial Decision by the undersigned at the Office of Administrative Law, the Commissioner of Education issued a final decision, affirming that the respondents were not domiciled in Livingston from October 1, 1990 until January 22, 1991, and, consequently, petitioner was entitled to tuition in the amount of $5614.03 for the attendance of H.L. and D.L.'s two children in the Livingston schools

during that period. The amount of tuition due was based upon the calculation by the Board for the period in question and this amount was accepted and affirmed by the Commissioner. In addition, the Commissioner granted the Board's request for prejudgment interest.

On June 26, 1998, the respondents filed an appeal from the Commissioner's decision with the State Board of Education. On February 3, 1999, the State Board issued its decision affirming the award of prejudgment interest and tuition, as calculated by the Board and affirmed by the Commissioner, but remanding the matter for the recalculation of the prejudgment interest in accord with the provisions of *N.J.A.C.* 6:24-1.16(d)1. The State Board ordered interest from January 22, 1991 through the date of the Commissioner's Decision, May 26,1998.

The Board calculated the prejudgment interest to be $2310.36 by the method set forth in the New Jersey Court Rules, *R.*4:42-11, because it was unable to obtain any discovery from the respondents as to their financial affairs. In his opinion of May 28, 1999, the Commissioner determined that the record was insufficient to calculate the interest by the method specified in *N.J.A.C.* 6:24-1.16(d)1, as directed by the State Board, and remanded the matter to the Office of Administrative Law on July 17, 1999, for the sole purpose of computing the prejudgment interest in accord with the applicable regulation. That is the only issue to be determined by the undersigned in this hearing.

On March 29, 2000, the Appellate Division of the Superior Court affirmed the award, including the amount, of the tuition due and the prejudgment interest. (A-3897-98T1) (unreported). The decision of the Appellate Division did not render moot the issue which is the subject of this appeal: the calculation of the prejudgment interest.

THE APPLICABLE REGULATION

N.J.A.C. 6:24-1.16(d)1, which governed the awarding of interest in an education case, provided, in relevant part:

> (a) The Commissioner pursuant to the criteria herein may award both prejudgment and/or post-judgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award.
>
> (b) "Interest" is defined as follows:
>
> 1. Prejudgment interest is interest awarded for that period of time prior to the adjudication of the monetary claim.
>
> .....
>
> (c) The following criteria shall be applied when awarding interest:
>
> 1 Prejudgment interest shall be awarded by the Commissioner where he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.
>
> .....
>
> (d). Rate of interest shall be awarded as follows:
>
> 1. Prejudgment interest shall be awarded based upon the average rate of interest earned on investments by the party responsible for such payment during the period of time in which the monies awarded were illegally detained.
> 2. Post-judgment interest shall be awarded based upon the prevailing rate of interest established by court rules at the time that the right to the monetary claim was determined. (See New Jersey Court Rules, R.4:42-11(a).)

N.J.A.C. 6, Chapter 24, was readopted and recodified as *N.J.A.C.* 6A, Chapter 3, effective April 3, 2000. Specifically, the applicable regulation, *N.J.A.C.* 6:24-1.16, was recodified and amended, effective April 3, 2000, as *N.J.A.C.* 6A:3-1.17(d). As a result, prejudgment interest is now to be computed in accord with the provisions of *N.J.A.C.* 6A:3-1.17(d):

> (d) The rate of interest for the awarding of prejudgment and postjudgment interest shall equal the average rate of return, to the nearest one-half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury.
>
> [*N.J.A.C.* 6A:3-1.17(d)]

DISCUSSION AND CONCLUSION

Previously, the Board was unable to compute prejudgment interest according to the provisions of *N.J.A.C.* 6:24-1.16(d)1 because of the respondents failure and refusal to provide the necessary information during discovery. Pre-hearing discovery requests for the necessary financial information were denied by respondents as irrelevant. Other Board demands for financial information in pre-hearing discovery and/or hearing testimony during the prior appeal in this matter were met with the response that relevant documents were lost or mislaid and respondents had no recollection of the information sought. As a result, there was no way to apply the governing regulation as written to calculate the prejudgment interest owed by D.L. and H.L. Consequently, the Board moved before the undersigned for summary decision to apply the method of *R.*4:42-11 which did not require any cooperation from respondents.

In the resulting Order on Motion by the undersigned, dated January 8, 2000, the Board's motion was granted to the extent that the respondents were given until April 17, 2000 to provide the necessary discovery. If it were not provided, the Board, upon application to the undersigned, would be granted summary decision with the prejudgment interest to be calculated in the most reasonable manner possible under the circumstances as described in the Order. As of April 30, 2000, the required information had not been provided to the Board and, therefore, I **CONCLUDE** that it is entitled to prejudgment interest in an amount as computed by the method below.

Initially, in the event that respondents failed to cooperate, it was determined that *N.J.A.C.* 6:24-1.15, which permits the regulations to be relaxed, should be applied. By relaxing the regulation, the Board could then utilize a method of computing the interest which did not require the cooperation of respondents.

However, since the Order on Motion was issued in January 2000, the applicable regulation was recodified and amended, effective April 3, 2000, as set forth in full

above. Consequently, I **CONCLUDE** that there is now no longer a need to relax the regulations and the new regulation, *N.J.A.C.* 6A:3-1.17(d), may be applied as written.

In any event, the use of this regulation to calculate prejudgment interest leads to exactly the same result as the application of the old *N.J.A.C.* 6:24-1.16(d)2, as proposed in the Order on Motion, would have reached. This last regulation utilized the method of *R.* 4:42-11(a)(ii) of the New Jersey Court Rules applicable to post judgment interest awards, which is precisely the same method used to calculate prejudgment interest awards in *R.* 4:42-11(b) and *N.J.A.C.* 6A:3-1.17(d).

Accordingly, I **CONCLUDE** that the calculation of prejudgment interest should be performed according to *N.J.A.C.* 6A:3-1.17(d). Since its language, in relevant part, is identical to that of *R.* 4:42-11(a)(ii), the applicable annual rates set forth in the Publisher's Note for *R.* 4:42-11(a)(ii) will be utilized here.

The Publisher's Note contains the following interest rates for the relevant years in this case:

Year	Interest Rate
1991	8.5%
1992	7.5%
1993	5.5%
1994	3.5%
1995	3.5%
1996	5.5%
1997	5.5%
1998	5.5%

Applying these interest rates on an annual basis to the tuition award of $5,614.03 results in a sum of $2,310.36 in simple interest. I **CONCLUDE** that this is the correct amount of prejudgment interest to be awarded to the Board in this matter.

ORDER

It is **ORDERED** that respondents pay prejudgment interest to the Board in the amount of $2,310.36 as calculated above in accord *N.J.A.C.* 6A:3-1.17(d).

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

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

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

May 4, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

5-9-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EK/cb

OAL DKT. NOS. EDU 5908-99 AND EDU 11593-96 (ON REMAND)
AGENCY DKT. NO. 126-5/99

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
H.L. AND D.L.,		
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, the Commissioner concurs with the conclusions of the ALJ and, accordingly, adopts the Initial Decision as his own. Respondents are directed to remit to the Board $2,310.36, representing pre-judgment interest from January 22, 1991 through May 26, 1998 on $5,614.03, the amount of tuition determined due and owing in the matter entitled, *Board of Education of the Township of Livingston v. H.L. and D.L.*, Commissioner Decision on Remand May 26, 1998, *aff'd* State Board of Education February 3, 1999, *aff'd* Appellate Division March 29, 2000, A-3897-98T1.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 22 2000

Date of Mailing: JUN 23 2000

[1] As noted in the ALJ's Order on Motion, dated January 28, 2000, *N.J.A.C.* 6:24-1.16(d)1 governs the award of pre-judgment interest in this matter, notwithstanding that the more recent approach to awarding such interest, as recently adopted by the State Board of Education (*N.J.A.C.* 6A:3-1.17(d)) may provide guidance. Pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of January 28, 2000.

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JUAN COTTO,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct, corporal punishment and insubordination against respondent teacher for alleged incidents from the 1996-97 school year -- using excessive force to discipline students, uttering profanity and making derogatory and demeaning statements to students.

In light of the testimony of the witnesses and the evidence in the record, the ALJ concluded that the District sustained its tenure charges of unbecoming conduct against respondent. The ALJ determined that even though respondent knew that corporal punishment is illegal and had received ample notice to refrain from excessive use of physical force in disciplining students, he used excessive physical force on five separate occasions within a four-month period. Moreover, the ALJ found that not only did respondent control his students by physical intimidation, he also verbally abused them and that respondent had been accused of similar misconduct in 1991. The ALJ concluded the appropriate penalty was dismissal. (*In re Ostergren, In re Cowan*) The ALJ ordered respondent dismissed from his tenured position.

The Commissioner adopted findings and determination in the Initial Decision as his own. Respondent was ordered dismissed from his tenured teaching position as of the date of this decision. The Commissioner forwarded the matter to the State Board of Examiners for action, as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7420-97
AGENCY DKT. NO. 210-6/97

IN THE MATTER OF THE TENURE HEARING OF JUAN COTTO

Gregory G. Johnson, Esq., for petitioner

Eugene G. Liss, Esq., for respondent,

Record Closed: January 19, 1999 Decided: May 10, 2000

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

Statement of the Case

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 to -18. Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." Petitioner State-Operated School District of the City of Newark ("District") has brought several charges of "corporal punishment," "unbecoming conduct" and "subordination" against respondent Juan Cotto ("Cotto") arising out of a series of incidents occurring in February 1997 and at other times during the 1996-97 academic year.[1] Specifically, the District accuses Cotto of using excessive force to

[1] *N.J.S.A.* 18A:6-10 authorizes the bringing of tenure charges against a teacher "for inefficiency, incapacity, unbecoming conduct or other just cause." While the District refined the charges into three separate categories, all of the incidents fall under the general heading of "unbecoming conduct."

discipline students, of uttering profanity and racial epithets in his classroom, and of referring to students in derogatory and demeaning language. Additionally, the charges refer to the previous use of force and inappropriate disciplinary methods during the 1991-92 academic year. These earlier charges are best viewed in the context of prior warning to Cotto that his conduct was unacceptable and should not be repeated. Basically, the outcome of this dispute depends on an assessment of the witnesses' credibility. If any of the tenure charges is sustained, the Commissioner of Education ("Commissioner") must determine whether dismissal or some lesser penalty is warranted.

Procedural History

On April 29, 1997, Cotto's building principal filed tenure charges, together with a sworn statement of supporting evidence, with the district superintendent. Cotto filed a timely response. Upon review of these papers, the district superintendent determined that there exists probable cause to credit the supporting evidence and that the charges, if true, warrant some type of disciplinary action.[2] Accordingly, on June 16, 1997, the district superintendent certified the tenure charges to the Commissioner. Thereafter, on July 18, 1997, Cotto filed an answer in which he denied all the charges.

Subsequently, on July 29, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held

[2]On July 5, 1996, the Commissioner of Education entered an order removing the Newark Board of Education, creating a state-operated school district, and authorizing the Commissioner to appoint a state district superintendent to direct all operations of the new district. *Contini v. Newark Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 196, 228, *aff'd* 286 *N.J. Super.* 106 (App. Div. 1995). Ordinarily, it is the local school board that would determine the existence of probable cause and certify tenure charges to the Commissioner. *N.J.S.A.* 18A:6-11. But the enabling legislation authorizing creation of a State-Operated School District confers board powers on the State District Superintendent "to perform all acts and do all things consistent with the law necessary for the proper conduct, maintenance and supervision of the schools in the district." *N.J.S.A.* 18A:7A-35(e). *See also N.J.S.A.* 18A:7A-38(b).

twelve days of hearing ending on September 23, 1998.[3] Both parties submitted post-hearing briefs by January 19, 1999. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Many of the background facts are undisputed. Juan Cotto has been a teacher in the Newark public school system for twenty years. He received most of his schooling in the Newark public school system, except for two years spent at St. Benedict's Preparatory High School. After high school, he was awarded a scholarship to Seton Hall University, where he earned a bachelor's degree in Spanish language. Cotto holds an administrator certificate endorsed as principal/supervisor and an instructional certificate endorsed as teacher of elementary and bilingual education.

Throughout most of his teaching career, he served as either a bilingual or English as a Second Language ("ESL") teacher at different elementary schools in the district. He started working for the Newark school district as a team teacher of bilingual education in December 1976. For the next three years (1977-78,1978-79 and 1979-80), he served as an ESL teacher at Wilson Avenue School. In 1980-81, he took a leave of absence and returned to Seton Hall University to obtain a master's degree in education. Upon his return to the Newark school system, he taught one year (1981-82) as a bilingual teacher at McKinley School and one year (1982-83) as an ESL teacher at the Norton School. For a twelve-year period (1983-84 to 1995-96), Cotto was a bilingual classroom teacher at the Elliott Street School, teaching mainly at the third and fourth grade level.

Shortly after the State took over operation of the Newark school district, the new administration sought candidates for promotion to a vice-principal position. Cotto was an attractive applicant for the job, because of his fluency in Spanish and his roots in the

[3]At the conclusion of the District's proofs, the OAL granted respondent's motion to dismiss for lack of evidence charges alleging that Cotto had told a female student identified as J.T. that she was "hooking with her boyfriend," and that he had also called her "a bitch." Similarly, the OAL dismissed as beyond the scope of the charges allegations that in October 1991 Cotto hit a student identified as T.V. in the head.

Newark community. Assistant Superintendent Lydia Silva interviewed Cotto for the job and reviewed his resume and certifications. She did not have access to his personnel file, however, because the district records had been sealed. Before selecting Cotto for the job, she spoke to his building principal, Jorge Almeda, who gave him "a warm recommendation." Starting in September 1996, Cotto became the acting vice principal of the Franklin School, which has a high proportion of Spanish-speaking students.[4]

Within a short time, Silva began receiving complaints about Cotto's performance as an administrator. She recalls getting reports from Benigno Santiago, principal of the Franklin School, that Cotto was antagonizing parents and staff, that he was acting unprofessionally and that his management style was confrontational. As a result, she made a decision to transfer Cotto back to a teaching position. Unfortunately, Santiago, who has since retired and moved away, was unavailable to corroborate Silva's testimony. Although respondent called two officials of the Newark Teachers' Union who indicated that Santiago had never expressed any dissatisfaction with Cotto's performance, a school administrator would not necessarily broadcast his unhappiness with another administrator to teachers' union representatives.[5]

Silva testified unequivocally that she was unaware of an earlier investigation of Cotto by state child-welfare authorities and that such investigation did not enter into her thinking. Joseph Del Grosso, president of the teachers' union, gave hearsay evidence that the reason for Cotto's demotion was to avoid embarrassing Silva, who had recommended promotion of someone under investigation for child abuse.[6] The present matter, however, does not involve the validity of Cotto's transfer, which was the subject of a separate grievance proceeding concerning salary.

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[4]For a few days in late August 1996, Cotto temporarily served as acting vice principal at the Raphael Hernandez School, before being switched to Franklin School by the start of the new school year.

[5] Since Cotto was an administrator at the time, he was not represented by the teachers' bargaining unit.

[6] Ultimately, state authorities concluded that the prior charge against Cotto was unsubstantiated.

Several times during the hearing, Cotto sought to deflect attention from the underlying tenure charges by accusing others of conducting a personal vendetta against him. His attacks were directed not against Lydia Silva alone, but also against Delores Brandao, a vice principal who was his last supervisor, and Carmen Ruiz, the person who replaced him as vice principal. These collateral issues have little to do with the truth of the tenure charges, which must stand or fall on the credibility of witnesses to the alleged incidents.

Cotto remained as vice principal at Franklin School for only two weeks before receiving notification of his transfer to a teaching position. He learned in the third or fourth week of September 1996 that he was transferred to teach a regular sixth-grade class at Abington School. Silva explained that the assignment was based on the needs of the District and that Cotto was properly certified to teach the class. Nonetheless, it was the first time in his career that he had not been put in charge of a bilingual or ESL class.

When Cotto took over, the class had been in session for nearly a month and had already had two teachers. Initially, there were twenty-eight students in the class, ranging in age from ten to fifteen, all crowded into a small room. Despite his teaching experience, Cotto acknowledges that he had difficulty maintaining discipline in his class. Problems developed in December 1996, when three female students were added to his roster. Cotto attributes the breakdown in discipline to the arrival of these additional students, one of whom had been incarcerated in a juvenile facility and another of whom had been a disruptive force in another class. Interestingly, however, the charges of excessive use of force by Cotto do not involve these particular children.

Excessive Use of Force

Each separate instance of unbecoming conduct will be discussed under an appropriate heading:

(1) Pushing a Student Against a Wall on November 2, 1996

Count 1(e)(i) of the tenure charges alleges that Cotto "grabbed pupil A.M. and threw him against a wall in class," causing him to "hit his head." A.M., who was thirteen-years old at the time of the incident, was a student in Cotto's sixth grade class at Abington School. Smiling mischievously, he admitted "getting smart with the teacher" and giving him "a lot of mouth." While Cotto was teaching a lesson on November 2, 1996, A.M. asked another student for some paper and Cotto evidently overheard him. Going to the back of the room where A.M. was sitting, Cotto announced, "You're pushing too many buttons." A.M. gave the impertinent response, "What button did I push to get you so [mad]."

What happened next is the subject of conflicting testimony. According to A.M., Cotto "grabbed" him by the shirt and "pushed" him back, so that his chair tilted on two legs. As he leaned backwards in his chair, A.M. claimed to have hit his head against a padded pole located in the rear of the room. Later, he noticed marks on his clothes at chest level, like a "burn" or "rubbing mark." Although not seriously injured, A.M. said he was scared that his teacher "was going to go crazy."

Next day, A.M.'s father sent a note to the school complaining that his son's teacher "plays too rough with him and plays too much." In the handwritten note, the father elaborated that his son "told me that [Cotto] grabbed him pretty hard, and he did mark him cause I saw it." Efforts to discredit A.M. by virtue of the fact that Cotto had accused him of cheating on a test and threatened to retain him in sixth grade were unsuccessful, since those events only occurred after the shoving incident. Vice Principal Delores Brandao immediately investigated the matter and spoke separately with both participants. While she did not see any mark on his body so long after the alleged physical contact, A.M. repeated his story that Cotto "had a tendency to joke around with him" and had "grabbed him and . . . made this mark on him." Cotto did not deny touching A.M., but "dismissed it as an accident."

Classmates largely corroborate A.M.'s version of the event. J.E., then eleven-years old, remembered seeing Cotto "pushing A.M. towards the blackboard." She was a good student with no disciplinary record and no motive to fabricate her testimony. Similarly, L.B., a ten or eleven-year old male student, witnessed Cotto "grab" A.M. in his neck area and "shove" or "push" him in the back of the room by the closet. L.B. could tell Cotto was angry "because he starting acting in a weird way and he started yelling[.]" When A.M. blurted out that he wanted to transfer out of Cotto's class, L.B. heard Cotto reply, "I don't care. I don't want you in my classroom anyway." Although L.B. had problems of his own in Cotto's class, he appeared relatively unbiased. Indeed, L.B. testified that he liked Cotto because he "was funny" and "made me laugh."

At the hearing, Cotto maintained that he and A.M would occasionally "nudge" each other, but "[t]hat was the extent of our horseplay." Drawing a diagram of the layout, Cotto argued that A.M. could not possibly have hit his head as he claimed because a desk with books blocked off access to the radiator pipe located at the rear of the classroom. Contradicting Vice Principal Brandao's testimony, Cotto denied that she had ever confronted him with the father's note or asked for his side of the story.

I FIND that Cotto used unnecessary force to punish A.M. in retaliation for a wisecrack made by the child. Resort to physical force was totally inappropriate, since the situation did not pose a genuine threat to the safety of himself or others. Whether or not Cotto actually meant to cause harm, he had no business committing what amounts to an assault against one of his students. Surrounding circumstances strongly support a finding that Cotto lost his temper as a result of A.M.'s verbal taunt and lashed out by pushing or shoving him.

Several reliable student witnesses confirm that Cotto's push was the precipitating force that propelled A.M. backwards. Corroboration comes from the child's father, who observed a mark on A.M.'s body when he returned home from school and promptly brought the incident to the school's attention. Falling backwards in his chair, A.M. would not necessarily have been aware of what object came in contact with the back of his head, only that he felt an impact. It is inconsequential whether A.M. happened to hit

his head on the wall, the pipe, the blackboard or a cabinet. The important point is that Cotto clearly pushed him with sufficient momentum to cause him to fall. Fortunately A.M. did not suffer any lasting injury.

(2) Pushing A Student Into a Chair in January or February 1997

Count 1(e)(ii) of the tenure charges alleges that Cotto "grabbed pupil L.B. by his coat, pushed him and forced him to sit down." L.B., the child who liked Cotto because he was funny, had skipped a grade and was younger than other children in the class. Cotto described him as "immature" and "very hyper[active]." L.B. confessed that he "talked a lot" and "messed with Mr. Cotto." He lived in Stephen Crane Village and regularly took a school bus for seven or eight blocks to his home. On the date in question, Cotto had kept the class after school as punishment for misbehavior. Testimony differs on the reason for this mass detention. As L.B. remembers the incident, Cotto had wrongfully accused him of stealing a poster and, when a search of L.B.'s belongings did not turn up the missing item, he made the whole class stay after school. Cotto, however, recalled that he detained about ten students, including L.B., because of their mistreatment of the school librarian and because L.B. had been "very abusive with his cursing."

Both witnesses agree that L.B. disobeyed his teacher by getting up from his chair and trying to leave the classroom. L.B. admits that he left his chair without permission and went over to the doorway "trying to turn the door knob". He agrees that Cotto kept telling him to sit down and that he kept getting up and trying to leave. According to L.B., Cotto "kept shoving me and shoving me," until one time when he "pushed me over the chair." With his hands, L.B. demonstrated Cotto pushing him in his chest area.

Although L.B. acknowledged that Cotto "wasn't using a lot of force," he surmised that the weight of a book bag strapped to his back caused him to fall over the chair. Apparently, L.B. was not wearing his coat, so that it was impossible for Cotto to have grabbed him "by his coat" as charged. As he fell back, L.B. hit his shoulder against the chair. Nevertheless, the incident was not regarded as serious enough to send him to

the nurse or to notify his parents. On cross-examination, L.B. agreed that Cotto may not have purposely pushed him over the chair, but added that Cotto "shouldn't have pushed me." Soon after being released, L.B. ran crying to Vice Principal Brandao. She spoke to Cotto, who admitted that he was trying to "restrain" the child from leaving the classroom.

Numerous eyewitnesses substantiate L.B.'s complaint that Cotto pushed him and that he fell into a chair. M.L., an eleven or twelve-year old child who took the same school bus home, verified that Cotto "grabbed" L.B. as he was trying to leave the classroom and "pushed him down in his seat." D.M., a child of approximately the same age, saw Cotto "pushing" L.B. to prevent him from walking out of the class. J.C., who must have been ten or eleven, recalled that Cotto would not let L.B. catch his bus and "kept pushing him away from the door." J.G., also eleven or twelve, stated Cotto "just grabbed" L.B. and "set him in the seat." J.V., in the same age range, recalled seeing Cotto "pushing [L.B] away from the door," "grabb[ing] him by the arm," "kind of lift[ing] him up" and "put[ting] him in his seat." F.C., age eleven or twelve, confirmed that Cotto "grabbed" L.B. and "pushed him down into the seat." Notwithstanding minor differences in the details, they all agreed that Cotto pushed or grabbed L.B. to keep him in the room.

Cotto's version is largely consistent with the District's evidence, although he denies that he deliberately sought to hurt L.B. Cotto recounted that L.B. tried on several occasions to leave the room and that he stood in front of the doorway blocking the exit with his body. L.B. "would try to push me out of the way," and "I would resist." Each time, Cotto "escorted" him back to his chair and, on the fifth or sixth try, L.B. "tripped over the chair or one of the kids put their legs out." Cotto contends that it was an accident, and that he never intentionally pushed L.B. into the chair. When L.B. got up again in a last attempt to leave the classroom, Cotto finally summoned the security guard, who responded to the scene in "about three or four minutes."

I FIND that Cotto used a disproportionate amount of force to maintain discipline in his classroom. Unquestionably, L.B.'s failure to remain in his seat was an act of

defiance to the authority of his teacher, and the District concedes that Cotto was justified in blocking the doorway to prevent him from leaving the room. Proofs establish, however, that Cotto's response went beyond mere passive resistance. Instead, he repeatedly pushed or shoved the youngster to encourage him to return to his seat. Cotto overreacted to the situation and utilized more force than necessary under the circumstances. Certainly it should have been foreseeable that exerting pressure against a young boy wearing a backpack might cause the child to fall and hurt himself. In addition, Cotto failed to explain adequately why he chose to engage in a physical confrontation with one of his students. He could easily have called the security guard for assistance, as he eventually had to do anyway.

(3) Pushing a Student Against a Blackboard in February 1997

Count 1(e)(iii) of the tenure charges alleges that Cotto "grabbed pupil M.L. by the neck and pushed him against the blackboard causing him to hit his head." M.L. transferred to Abington School after having been expelled from Good Counsel School for fighting in front of the principal. While in Cotto's class, he was suspended for passing notes, talking back to the teacher and fighting with other students. Reportedly he also had disciplinary problems with other teachers.

Insofar as the record reveals, the blackboard incident occurred shortly before February 10, 1997. On that occasion, M.L. was unable to solve a math problem at the board and asked his teacher for help. According to M.L., Cotto came up behind him, pushed him into the board and grumbled, "Do the damn problem." M.L. testified that Cotto "grabbed" the back of his neck with one hand, held his arm with the other hand, and "just pushed me into the board[.]" On further questioning, M.L. acknowledged that Cotto had instructed him to stay at the board, but that he was about to return to his seat. Only M.L.'s hand came in contact with the board, not his head as alleged in the charges.

Cotto flatly maintained that the blackboard incident never occurred and denied ever touching M.L. He suggested that M.L. might have a motive to lie because Cotto

had talked to his mother about not promoting him and had given him a bad grade in penmanship. However, it appears that M.L. was promoted to seventh grade at the end of the year and has been generally receiving good grades.

Immediately after the incident, M.L. went see Vice Principal Brandao. She personally observed scratch marks on the back of M.L.'s neck. The next morning, M.L.'s parents came to the school to discuss what had happened. Cotto says that he met with M.L.'s mother on February 10, 1997, but that she never said anything about the blackboard incident. Around the same time, Principal William Afflitto and Vice Principal Brandao asked M.L. to write a note about Cotto's treatment of students in his class. On February 10, 1997, M.L. prepared such a note regarding Cotto's inappropriate use of language, without mentioning the blackboard incident.

I FIND that in February 1997 Cotto grabbed M.L. by the back of his neck and arm and pushed him into the blackboard. M.L. was having difficulty doing a math problem and had asked Cotto for assistance. Instead, Cotto employed physical force to prevent M.L. from returning to his seat and, incidentally, to punish him for not knowing the right answer. Again, this application of power was totally out of proportion to the circumstances. The situation clearly called for instructional intervention, not for a gratuitous display of violence. Independent observation corroborates that Cotto utilized sufficient force to leave scratch marks on M.L.'s neck. With respect to credibility, M.L. honestly recognized his own shortcomings and did not exaggerate the extent of his injuries. In contrast, Cotto failed to offer any explanation of how M.L. acquired scratch marks in his class.

(4) Grabbing a student by the neck on February 11, 1997 and pushing him in a chair on February 20, 1997

Count 1(e)(iv) of the tenure charges alleges that Cotto "grabbed pupil L.R. by the neck, placing a choke hold on him, causing loss of breath" and "also pushed pupil L.R." It turns out that these are actually two separate incidents, one of which occurred on February 11, 1997 and the other on February 20, 1997. At the completion of the petitioner's case, the District conceded that the proofs failed to support the allegation of

using a choke hold and contended that the charge should be considered as another example of the use of excessive force.

L.R., age ten or eleven, was the product of an abusive home environment. His father confided to Cotto that the Division of Youth and Family Services ("DYFS"), the state agency responsible for investigating child abuse, had brought charges against the child's mother for physically and mentally abusing L.R. and for leaving him home alone. Consequently, the family court awarded custody to the father. Once the father gained custody, he enrolled L.R. in the Newark school system, where L.R. was put in Cotto's sixth-grade class at Abington School. Thus, Cotto had advance knowledge that L.R. was a particularly fragile and vulnerable child. The initial incident took place on February 11, 1997, L.R.'s first day of class in his new school.

Problems began almost immediately, when L.R. repeatedly asked permission to go to the bathroom and, on one visit, disappeared for approximately half an hour. When lunchtime arrived, Cotto lined up the class so that he could control their movement down several flights of stairs to the cafeteria. Due to the morning misadventure, Cotto stationed L.R. in the front of the line, where he could watch him. But L.R. refused to stay in place and kept returning to the back of the line to be with another child.

L.R. asserted that Cotto "put his forearm around my neck, walked me downstairs and let go." L.R. claimed that he was trying to get to the front of the line at the time that Cotto "grabbed me." They marched together down two flights of stairs before Cotto "let me go." Even if Cotto had his arms around his neck, L.R. still "could breathe [and] could talk." He indicated that Cotto "did not hurt me," and the encounter left no marks or bruises. L.R. did not promptly report the incident to his father or put it in writing because he felt that "no one would believe me."

Much of Cotto's testimony comports with L.R.'s recitation of events. Since L.R. persisted in ignoring his directions, Cotto had to retrieve him at least four times and transport him to his proper place at the head of the line. For the first four times, Cotto

escorted L.R. "by putting my right hand on his shoulder blade and walking him to the beginning of the line." On the fifth or so occasion, Cotto put his hand "on L.R.'s back and over his shoulder once," but never touched "his throat or face or anything like that." Rather, Cotto approached L.R. from behind, reached his right hand over L.R.'s shoulder, and "patted him on the chest." Cotto acknowledged that he was "upset, but not angry" at L.R.'s uncooperative attitude. Denying that the incident amounted to "physical intervention," Cotto admitted putting his arm "lightly" on L.R.'s "chest area." He did not call for security because "[t]eachers have to handle things on their own."

One week later, on February 20, 1997, Cotto and L.R. were involved in a second incident. L.R. had written a note and was passing it to M.L, when Cotto intercepted the message, rolled it into a ball and threw it on the floor near the garbage can. Cotto moved L.R.'s seat next to his own desk in the front of the room. Meanwhile, L.R. tried to recover his crumpled note from the floor. L.R. testified that Cotto then "grabbed me by the shirt" and "pushed me into the chair." A letter from L.R.'s father, who knows only what his son told him, alleges that, as L.R. was walking to his desk, Cotto "came and pull[ed] him and shook him and threw him in his chair." During the hearing, L.R. clarified that he was not really shaken and that a more accurate description would be that Cotto "tossed" him into his chair. For his part, Cotto never really addressed the second incident, except to say that he had no recollection of ever pushing L.R. in a chair. He added, however, that often he had "to walk behind L.R. until he got to his chair" and "make a motion of escorting him to his chair."

I FIND that on February 11, 1997 Cotto inappropriately used physical force when L.R. failed to follow his instruction on where to stand in line. Cotto's own testimony suggests that he placed his arm around L.R's shoulder and put him in some sort of a wrestling hold. Certainly Cotto had no good reason to retain his grip on the child's midsection or neck as he paraded him down two flights of stairs. Cotto's behavior was particularly egregious in view of the fact that L.R. had been the victim of abuse at home and this was the child's first day at a new school.

Cotto committed a second violation on February 20, 1997, when he pushed L.R. into a chair after he caught L.R. passing a note to another student. Once more, Cotto lost control of his temper at the slightest provocation and overreacted by manhandling a child. Cotto's testimony that he has no specific recollection of this incident may indeed be true, since he did not appear to have any appreciation that what he was doing was wrong.

(5) Making Derogatory or Demeaning Statements to Students

Count 3 of the tenure charges alleges that during the 1996-97 academic year Cotto "referred to pupils in a demeaning, disrespectful manner by . . . using profanity, racial epithets and other derogatory language." These comments were directed at several different individuals and heard by many children in the classroom.

For instance, T.F. testified that Cotto said that "welfare kids" or "project kids" are ""stupid" and "because we're on welfare we're never going to get nowhere." She believed Cotto was referring not to her alone, but to the whole class, because he generalized that "black people . . . are too lazy to get a job." L.B. overheard Cotto ridiculing T.F. because "she was on welfare" and "lived in Section 8 houses, stuff like that."[7] He sympathized with her because "[his] mother used to be on welfare when she couldn't support me." When Cotto asked him if he lived in Section 8 housing, L.B. said he did not, he just lived in a "little village."

Unaware of the situation, T.F.'s grandmother went to see Cotto on February 4, 1997. During a conference with a vice principal, T.F. divulged that Cotto "belittl[ed] the children in his classroom" by telling them they "would never amount to anything because they are on welfare." Complaining of the damage to her granddaughter's self-esteem, the grandmother called for an investigation into what was going on in the classroom. When Vice Principal Brandao confronted Cotto with the grandmother's

[7] Section 8 is a federally subsidized rent program designed to assist low-income families in obtaining housing. 42 *U.S.C.A.* §1437f. *See also*, 24 *C.F.R.* Part 882

complaint, Cotto submitted a letter requesting an immediate transfer from Abington School.

Other children verified Cotto's use of hurtful language about welfare clients and their children. M.L. felt "embarrassed" when Cotto told him that "[his] mother was on welfare" and that "she can't afford the clothes or the money that he gets." In addition, M.L. confirmed that Cotto "called us stupid" because "we couldn't do the work and other people could do it." Similar comments were reported by J.C., who recalled that Cotto "used to say that our mothers were on welfare" and "used to laugh at us, because we were on welfare." She "felt like crying" when her teacher made those remarks. On another occasion, Cotto derided D.M. in class, telling her that she and her sister "will be in a corner asking for money with a whole bunch of kids." F.C. also heard Cotto predict that D.M would end up on the streets with a couple of kids "begging for money." Requesting a transfer to another teacher, A.M. wrote on March 11, 1997 that Cotto told him "you will be in the corner of 6th street asking for 25¢ so you can buy a pair of pants."

Significantly, Cotto admits that he made comments such as the one related by A.M., but insists that that were taken out of context. Cotto claims he was referring to recent legislation replacing welfare with workfare when he counseled students that they could either get a decent job or they would wind up "on the street corners begging for money or cleaning windshields." Moreover, Cotto defended his actions by maintaining that it was necessary for him to question his students about their financial circumstances in order to complete a survey form required by the federal government. From the nature of the children's emotional reactions, however, it is apparent that Cotto went far beyond routine data-collection and conveyed his personal disapproval of their families' lifestyle. It is doubtful that Cotto would have taken such an abusive approach if he were sincerely seeking to inspire his students. Even if Cotto intended to teach a lesson about the evils of the welfare system, there is no possible excuse for making his students feel hopeless and bad about themselves.

At other times, Cotto referred to his students by insulting names, like when called L.B. a "crack baby" or referred to L.R., who is small for his age, as "a midget." One

time, when a fat girl in class was crying, Cotto told her that the only time he had ever heard her cry was "when they closed down Burger King." L.B. testified that Cotto identified his mother as a drug user and told him "that's why you came out the way you are." J.C. cited a similar instance in which Cotto "used to call this girl named T.F, that she was a crack baby." Although Cotto recollected a classroom discussion about the high percentage of crack babies at University Hospital in Newark, he denies telling any of his students that they were crack babies, "even jokingly."

Children also accuse Cotto of using vulgar expletives in the classroom. The record is replete with examples of Cotto having uttered curse words such as "shit," "damn" and "hell" in front of various students. In one such instance, M.L. asked to go to the bathroom, and Cotto replied, "I don't give a shit what you do." L.R. was nearby at the time and corroborated M.L.'s account of the language used. Acknowledging that he indeed muttered "bullshit" under his breath, Cotto contends that he used such language only after M.L had asked to go to the bathroom for the fifth time. Generally, however, Cotto denies that he spoke to his students using words like "shit" or told students they were "dumb" or "stupid." His denials have a hollow ring, however, in light of the consistent and credible testimony by nearly all other witnesses. Of ten students from Abington School who testified, only J.C. did not hear Cotto cursing in the classroom.

Worse yet, several students report that Cotto made disparaging racial remarks implying that black people have a criminal mentality. In the course of a discussion of current events, L.B. recalls Cotto teaching that, "there's too many black-on-black crimes and that it's the black[s] making all the crimes." He understood Cotto to be saying "that black people was doing all the crimes and all the killing[.]" However, the lesson did not make much sense to him because, as L.B. put it, "I know that it's not just all of us and I know that it ain't me." F.C. thought that Cotto said that, "Most black people in our neighborhood commit crimes." Likewise, A.M. remembered Cotto telling the class that "thieves and junk would like mostly be black people, African American" and that "they're the ones that mostly rob." So too, T.F. said Cotto told the class that black people are so lazy `"they'd rather go out and rob and steal from people instead of getting a straight job." She felt it "wasn't right," but "wasn't going to cry."

Far from denying the substance of the students' testimony, Cotto readily admits that he discussed FBI statistics, including a breakdown of crime data by ethnic group, as part of a lesson on current events. He would bring in newspaper articles regarding crime in the neighborhood and open up the topic for classroom discussion. Cotto never adequately explained what educational benefit would be achieved by identifying the racial characteristics of individuals committing crimes in Newark. At one point, he mentioned that his students "wanted to know what was going on in their community," although it would certainly have been possible to discuss the detrimental impact of a high crime rate without turning it into a racial issue. Later in his testimony, Cotto told a rambling story about tribal warfare in African history and suggested that somehow this historical background would enable his students "to appreciate and see the cultural significance of what was happening."[8] As the record clearly shows, however, all that the black children managed to learn from this experience is that they are likely to grow up to become criminals.

I FIND that Cotto called some of his students by insulting names critical of their socioeconomic status or physical appearance. Repeatedly, Cotto made comments implying that his students were incapable of learning. Often he cursed or uttered profanity when he did not like what a student was doing. Moreover, Cotto made racially charged statements suggesting that African-American children are more violent and less industrious than children of other races. Such constant barrage of negativity had the effect of causing his students to lose confidence in their natural abilities and of hampering their ability to succeed in school. None of these methods served any useful educational purpose or met any federal requirements.

[8] Cotto apparently has a theory that the origin of crime in Newark traces back to days when one black tribe in Africa "raided [the] village" of another black tribe and "raped [their] women." Ironically, he expounded his views in celebration of Black History Month, which is intended to develop students' pride in their heritage.

(6) Prior Warnings and Reprimands

Count 1(a) of the tenure charges alleges that in or about September 1991 Cotto "slapped pupil X.L. and another student across the back of their heads as an inappropriate method of stopping a fight." Five years ago, DYFS conducted an investigation into Cotto's alleged use of excessive force in quelling an altercation between a group of third-grade students in a boys' lavatory at the Elliott Street School. Unlike the other charges against Cotto, this one involved breaking up a fight, so conceivably Cotto may have been justified in using some physical force to prevent personal injury. After thorough investigation, including interviews of all persons with knowledge of the facts, the DYFS institutional-abuse investigation unit issued written findings, in which it concluded that the allegations of child abuse were "unsubstantiated with concerns."[9]

An accompanying report by DYFS investigator Patricia Rogers determined that two students had been fighting and that Cotto intervened to stop them. According to the report, Cotto had admitted to the investigator that he "slapped X.L. and J.M. across the heard with an open hand." The report concluded that, "[t]he method of intervention was inappropriate" because the blow was to the head area, "although no excessive force was utilized." In the final section, the report recommended that Cotto be retrained "regarding appropriate methods of intervention."

[9] State rules governing investigation of complaints of child abuse require DYFS to make a finding of whether the allegations were "substantiated," "not substantiated" or "unfounded." The designation "not substantiated" is used "when the available information, as evaluated by the Division representative, provides some indication that a child was harmed or placed at risk of harm, but does not indicated that the child is an abused or neglected child[.]" *N.J.A.C.* 10:129A-3.3(a)(2).

Investigator Rogers, an impartial witness with no interest in the outcome, testified that Cotto "denied slapping any student in the face," but "did indicate that he slapped both of the students on the back of the head with an open hand." She also recalled Cotto saying that he had "apologized" to the mother for his actions and promised "to refrain from such methods of discipline." X.L.'s mother confirmed that Cotto thought her son was involved in the bathroom fracas, but nonetheless "apologized for hitting him." Cotto, on the other hand, claimed that he separated four children "slugging it out" in the bathroom and denied hitting any child in the back of the head. He admits apologizing to the mother, but only for the inconvenience of having her take time off to come to school.

Regardless of whose recollections are more accurate, the significance of the 1991 episode is that Cotto was put on notice that he should not use unnecessary force in disciplining students. In October 1991, Principal Jorge Almeda sent a letter reminding Cotto "teachers cannot use corporal punishment in any way or manner" and asking him to "review Title 18 in order to avoid any future incidents."

Soon after Cotto arrived at Abington School in September 1996, Vice Principal Brandao, Cotto's immediate supervisor, gave him a one-on-one orientation and handed him an information package that included materials on corporal punishment. By late October or early November 1997, Brandao met with Cotto and offered him advice on strategies for handling disciplinary problems. Principal Walter Afflito also took Cotto aside and warned him, "[W]hatever you do, don't put your hands on any student. If you have a problem, you either call the office, call the security guard or call an administra[tor.]"

A revealing moment came on cross-examination when Cotto was asked for his understanding of the term corporal punishment. Displaying an incredible lack of insight, Cotto stated that corporal punishment occurs when someone physically hits a child "and leaves bruises [or] marks" or mentally damages a child "to the point that he needs therapy."

I FIND that Cotto was aware that corporal punishment is illegal and had received ample notice that he should refrain from excessive use of physical force in disciplining his students.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the District has sustained its tenure charges of unbecoming conduct against Cotto and that the appropriate penalty is dismissal.

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Toward that end, *N.J.S.A.* 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are written into the law.

"Unbecoming conduct" is an elastic term broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City,* 152 *N.J.* 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 22, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge

the duties and functions of one's office or position." *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974).

Use of physical force by a teacher to maintain discipline or to punish infractions constitutes conduct unbecoming an employee. *In re Fulcomer*, 93 *N.J. Super.* 401, 421 (App. Div. 1967). *See also*, *In re Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). In addition, a teacher may not administer corporal punishment, except for use of such force reasonable and necessary to quell a disturbance, to disarm students carrying weapons, to defend himself, or to protect other persons or property. *N.J.S.*A. 18A:6-1. *In re Wagner*, 93 *N.J.A.R.*2d (EDU) 143, 145 (Comm'r Jan. 15, 1993.) Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. *Ostergren v. Franklin Twp. Bd. of Educ.*, 1965 *S.L.D.* 185, 186 (Comm'r Oct. 25, 1966). Unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J. L.* 369 (Sup. Ct. 1943), *aff'd* o.b. 121 *N.J.L.* 326 (E. & A. 1944). Generally, however, dismissal is reserved for cases where there has been a continuing pattern of misconduct accompanied by prior warnings or counseling. *In re Cowan*, 741. *In re Fulcomer*, at 421.

Here Cotto used excessive physical force on five separate occasions within a four-month period. All of these incidents followed a predictable pattern in which Cotto pushed or shoved a small child in order to get him to sit down, stay at the blackboard, remain at the head of the line, or otherwise obey his instructions. Each instance involved sufficient force to cause the child to fall backwards or, in one instance, to incapacitate the child while walking down stairs. Therefore, there was a foreseeable risk of injury to children as a result of Cotto's actions. None of the incidents involved any genuine classroom disturbance, threat to the safety of the teacher or of other students, indication of weapon possession or damage to property. Under the circumstances, the use of physical force by the teacher was unjustified. Furthermore, Cotto had received prior warnings as the result of a DYFS investigation into his past conduct and had been repeatedly counseled by his supervisors on proper methods of

student discipline. Given the frequency and similarity of Cotto's outbursts, it is difficult to believe that they were simply accidental or unintentional.

Teachers represent "one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools[.]" *In re Sammons*, 1972 *S.L.D.* 302, 321 (Comm'r June 12, 1972). Children are entitled to a supportive and nurturing classroom environment in which to develop their intellectual capacities and bolster their self-esteem. Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. Constant negativity and insensitivity in dealing with students is a serious deficiency. *In re Gilbert*, 1982 *S.L.D.* 274, 326 (Comm'r April 5, 1982), *aff'd* 1982 *S.L.D.* 382 (St. Bd. Nov. 3, 1982). *See In re Birch*, 1978 *S.L.D.* 63 (Comm'r Feb. 9, 1978), wherein a teacher was dismissed for displaying a negative attitude toward students, including making disparaging remarks about students in class. Being a teacher requires an intense dedication to civility and respect for people as human beings. *Morris Sch. Dist. v. Brady*, *92 N.J.A.R.*2d (EDU) 419 (Comm'r 1992). Psychological damage from steady exposure to verbal abuse from a teacher may be longer lasting than scars from physical abuse. *In re Johnston*, 1995 *N.J.A.R.*2d (EDU) 439 (Comm'r Feb. 6, 1995). Cotto's hostile attitude and constant barrage of criticism undermined his students' self-confidence and eroded their eagerness to learn.

Factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J.Super.* 404, 420-422 (App. Div. 1967). *In re Doyle*, 201 *N.J. Super.* 347, 351 (App. Div. 1985). Excessive use of force to discipline students and intentional infliction of emotional distress are matters of the utmost seriousness. *See In re Cowan*, at 741, upholding dismissal of an "experienced, capable and generally well-liked" teacher whose uncontrollable temper "has led him to abuse his students verbally and physically." As the Commissioner has aptly observed, "teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. *Ostergren*, at 187.

In terms of extenuating circumstances, Cotto's length of service cuts both ways. On the one hand, he has served the children of Newark for twenty years with noted success in the field of bilingual education. On the other, a teacher with such experience should surely know better than to push, shove and verbally abuse his students. It is not a mitigating circumstance that Cotto may have resented having been demoted from a supervisory position and put in charge of a difficult-to-teach class. Whatever grievance Cotto may have against the District, he had no right to take out his frustrations on innocent children. While teachers are subject to the same emotional stresses as other individuals, "their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control." *Ostergren*, at 186.

One major aggravating circumstance is that Cotto had been accused of similar misconduct in 1991, so this is not the first time that questions about his disciplinary methods had been brought to his attention. He failed to heed the advice of his supervisors, who offered to assist in overcoming any problems in this area. Another aggravating factor is that his conduct was not limited to a single isolated occurrence, which might be attributed to a lapse in judgment or a bad day, but consists of a series of events pointing to Cotto's lack of appropriate temperament.

Lastly, Cotto's repetitious misconduct had a devastating effect on classroom atmosphere. Not only did Cotto try to control his students by physical intimidation, but also he cast aspersions on their intellectual capacity, their physical appearance and their ethnicity. Told enough times that they are stupid, ugly or inferior, impressionable children may come to believe what their teacher is saying about them.

Order

It is **ORDERED** that the tenure charges of unbecoming conduct are sustained.

And it is further **ORDERED** that Juan Cotto is dismissed from his tenured teaching position in the Newark public school district.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/23/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 15 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Witnesses

1. Margauerite Goralemon, ESL teacher, Newark Public School District
2. L.R. Sr., father of L.R. Jr.
3. L.R. Jr., student
4. Delores L. Brandao, vice principal, Newark Public School District
5. L.B., student
6. A.M. Jr., student
7. Patricia Rogers, assistant supervisor, Division of Youth & Family Services
8. Jorge Almeda, elementary school principal, Newark Public School District
9. T.F., student
10. E.F., grandmother of T.F.
11. D.M., student
12. I.A., mother of X.L.
13. X.L., student
14. M.L., student
15. Jill Ameiorsano, substitute teacher, Newark Public School District
16. Carmen Cicurillo, librarian-media specialist, Newark Public School District
17. Juan Cotto Sr., teacher, Newark Public School District

18. J.C., student

19. O.R., mother of J.C.

20. J.G., student

21. J.V., student

22. F.C., student

24. Walter Afflitto, principal, Newark public school district

25. Lydia Silva, assistant superintendent for school leadership team No. 4, Newark public school district

26. Gene Bryan Geldziler, art teacher, Newark public school district

27. Joseph Del Grosso, president, Newark Teacher's Union

List of Exhibits

No.		**Description**
J-1		Copy of petitioner's request for admissions, dated May 19, 1998
OAL-1		Copy of procedural memorandum No. 37, dated October 2, 1980
P-1		Copy of letter to Juan Cotto from Jorge L. Almeda, dated October 1991
P-2	Id.	Copy of note to Mr. Afflitto from M.M., undated
P-3		Copy of letter to Ms. Brandao from R.M., undated

P-4 Copy of note addressed to Whom It May Concern from D.A., dated December 9, 1996

P-5 Copy of note addressed To Whom It May Concern from E.F., dated February 4, 1997

P-6 Copy of note from M.L., dated February 10, 1997

P-7 Copy of note from M.C., dated February 10, 1997

P-8 Copy of note from E.F., dated February 10, 1997

P-9 Copy of note from T.F., dated February 11, 1997

P-10 Copy of letter to Mr. Afflitto from A.M. Jr., dated March 11, 1997

P-11 Copy of memorandum to Lydia Silva from Walter Afflitto, dated March 11, 1997

P-12 Copy of memorandum to Mr. Afflitto and Ms. Silva from L.R. Sr., for the period February 10, 1997 to February 20, 1997

P-13 Copy of letter to Mr. W. Afflitto from L.R. Jr., dated February 20, 1997

P-14 Copy of incident report form, dated November 4, 1996

P-15 Id. Copy of investigation report from the Division of Youth & Family Services, dated June 16, 1996

P-16 Copy of institutional abuse and neglect report by DYFS investigator Patricia Rogers, dated July 2, 1992

P-16 (a) Copy of letter to Dr. Gene A. Foti, from DYFS regional supervisor Robert Hornstra, dated July 9, 1992

P-17 Id. Copy of letter to Gene A. Foti, from DYFS supervisor Robert Hornstra, dated July 28, 1992

P-18 Id. Copy of letter to Dr. Gene A. Foti, from DYFS investigator Louis A. Fonolleras, dated October 22, 1992

P-19 Id. Copy of IAIU case review, dated June 23, 1992

P-20 Copy of memorandum to Juan Cotto from Delores L. Brandao, dated February 10, 1997

P-21 Id. Copy of letter to Lydia Silver from Juan A. Cotto Sr., undated

P-22 Id. Copy of letter to Mr. Cotto from A. Tiritilli, dated February 20, 1996

P-23 Id. Copy of letter to Mr. Cotto from Amelia Zangari-Tiritilli, dated February 15, 1996

P-24 Id. Copy of letter to the parent or guardian of X.Q. from Jorge L. Almeda, dated January 29, 1992

P-25 Id. Copy of letter to Juan Cotto from Jorge L. Almeda, dated October 11, 1991

P-26 Id. Copy of letter to Juan Cotto from John P. Duggan, Ed.D., dated December 20, 1996

P-27 Copy of incident report form, dated February 4, 1997

P-28 Copy of letter to Juan Cotto from Randall N. Kanter, dated March 13, 1997

P-29 Copy of mission statement of Abington Avenue School, undated

P-30 Id. Copy of handwritten note by E.C., undated

P-31	Id.	Copy of memo to Juan Cotto from Delores L. Brandao, dated December 12, 1996
P-32	Id.	Diagram of classroom drawn by L.B. on June 18, 1998
P-33	Id.	Copy of tenure charges, dated April 1997
P-34		Copy of excerpt on corporal punishment from orientation packet of Abbington Street School, undated
R-1		Copy of teacher annual evaluation report, dated June 4, 1984
R-2		Copy of teacher annual evaluation report, dated June 1985
R-3		Copy of teacher annual evaluation report, dated June 1986
R-4		Copy of teacher annual evaluation report, dated June 1987
R-5		Copy of teacher annual evaluation report, dated June 1988
R-6		Copy of teacher annual evaluation report, dated June 1990
R-7		Copy of teacher annual evaluation report, dated June 1991
R-8		Copy of teacher annual evaluation report, dated June 1992
R-9		Copy of teacher observation report, dated November 16, 1993
R-10		Copy of teacher observation report, dated January 13, 1994
R-11		Copy of teacher observation report, dated March 18, 1994
R-12		Copy of grievance filed by Juan A. Cotto, Sr., dated February 4, 1997, together with supporting documentation
R-13	Id.	Copy of letter to Susan Manion from John P. Duggan, Ed.D., dated December 20, 1996

R-14		Copy of memorandum to Juan Cotto from Delores L. Brandao, dated February 21, 1997
R-15		Copy of memorandum to D. Brandao from Juan A. Cotto Sr., dated February 28, 1997
R-16	Id.	Copy of memorandum to D. Brandao from Juan Cotto, dated February 28, 1997
R-17	Id.	Copy of letter to Juan Cotto from John P. Duggan, Ed.D., dated April 7, 1997
R-18	Id.	Copy of letter to Beverly L. Hall from Juan Cotto, dated May 12, 1997
R-19		Copies of various letters of recommendation, dated December 10, 1991 through September 5, 1995
R-20		Copy of letter to Mr. Afflitto from A.M. Sr., dated November 3, 1996
R-21		Copy of letter to Gloria Santiago from Walter Afflitto, dated January 2, 1997
R-22		Copy of letter to Ms. Santiago from Delores L. Brandao, dated February 13, 1997
R-23		Copy of letter to L.C. from Walter Afflitto, dated January 3, 1997
R-24		Copy of letter to Ms. Marguins from Delores L. Brandao, dated February 13, 1998
R-25		Copy of letter to Delores L. Brandao from Juan Cotto, undated
R-26		Copy of handwritten letter to Ms. Silva from Juan Cotto, dated February 4, 1997

R-27	Copy of letter to Mr. Afflitto from S.Z., dated February 20, 1997
R-28	Copy of letter to Mr. Afflitto from M.N., dated February 20, 1997
R-29	Copy of letter to Mr. W. Afflitto from S-T. V., dated February 20, 1997
R-30	Copy of letter to Mr. Afflitto from F.C., dated February 20, 1997
R-31	Copy of letter to Mr. Afflitto from A.M. Jr., dated February 20, 1997
R-32	Copy of letter to Mr. Afflitto from L.B., dated February 20, 1997
R-33	Diagram of class made by A.M. Jr. on June 19, 1998
R-34 Id.	Copy of DYFS initial response-incident report
R-35	Diagram of classroom No. 208 as of October and November 1996, drawn by Juan Cotto on July 16, 1998

OAL DKT. NO. EDU 7420-97
AGENCY DKT. NO. 210-6/97

IN THE MATTER OF THE TENURE	:	
HEARING OF JUAN COTTO,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The primary arguments set forth in respondent's exceptions are briefly summarized below:

> 1. The Administrative Law Judge (ALJ) ignored the preponderance of the credible evidence which supported the fact that respondent never acted unprofessional or confrontational while he served as vice principal and that he was unfairly demoted to a teacher status in order that Carmen Ruiz succeed to his earned vice principalship.
>
> 2. The preponderance of the credible evidence rebuts the allegation that respondent pushed A.M. against the wall as alleged in count 1(e)(ii).
>
> 3. The ALJ failed to recognize that Assistant Superintendent Silva's office placed respondent in a school he requested not to be sent to, thus exhibiting an existing bias against him.
>
> 4. Respondent was not credited by the ALJ for the four months of success he had with his class. The ALJ failed to recognize the success respondent had with a difficult class, ignoring the impact on the class when three students were added in December.
>
> 5. The ALJ ignored the poor character and credibility of L.B., a student who was not unbiased to respondent and who, himself,

denied the charge that respondent pushed him and forced him to sit down.

6. The preponderance of credible evidence supports the fact respondent never committed the actions alleged in charge 1(e)(iii) involving M.L.

7. The ALJ erred when he concluded that respondent's testimony was that he put L.R. in a wrestling hold and the preponderance of the credible evidence does not sustain that respondent used excessive force.

8. The ALJ failed to acknowledge the evidence that the students who alleged he made derogatory statements were influenced to do so by the administration at the Abington Avenue School and did so to prevent their being retained in sixth grade.

9. The penalty of dismissal as ordered by the ALJ is too severe.

Having conducted a thorough and independent review of the record of this matter, including the transcripts of the 12 days of hearing,[1] the Commissioner concurs with and adopts as his own the ALJ's findings, conclusion and recommended penalty for the reasons well expressed in the Initial Decision, since they are amply supported in the record. In the process of the detailed examination of the record, the Commissioner gave careful consideration to respondent's exceptions but finds no basis in either the transcripts or the record as a whole to overturn the ALJ's credibility determinations in this matter. Further, the Commissioner is fully satisfied that the ALJ's recitation of testimony is thorough and accurate and that the ALJ carefully assessed and gave due weight to conflicts, inconsistencies and potential biases in determining which testimony and evidentiary documentation to credit in reaching his findings of fact.

The Commissioner is unpersuaded by respondent's arguments set forth during the hearing, in his post-hearing brief and in his exceptions, relative to his removal as an acting vice

[1] It is noted for the record that a portion of the June 16, 1998 hearing had to be reconstructed based on the ALJ's notes due to a problem experienced with the audio tape recording of the session. During the last day of the hearing,

principal, after two weeks of service, at the Franklin School, and his assignment as a sixth grade class at the Abington Avenue School, a school to which he had requested not to be assigned. While it is understandable that respondent raises such arguments in an attempt to demonstrate that the tenure charges are a result of bias and bad faith by administrative staff and to impugn the credibility of witnesses, the fact remains that this matter concerns allegations regarding respondent's actions as a ***teacher.*** In that regard, the ALJ was correct when he stated during the hearing, "One thing that I'd like to make clear is that this really is not a case about why Mr. Cotto was transferred from his vice principal's position to -- to a teaching position. Really it is a tenure charge which picks up at the time he was a teacher. However, I -- I understand, Mr. Liss, you're – you're raising this as background information to show a bias or an attempt of [the administrative staff to remove respondent]." (Tr. 9/23/98, at 8) Furthermore, the Commissioner is in complete agreement with the ALJ's statement that:

> The present matter, however, does not involve the validity of Cotto's transfer, which was the subject of a separate grievance proceeding concerning salary.
>
> Several times during the hearing, Cotto sought to deflect attention from the underlying tenure charges by accusing others of conducting a personal vendetta against him. His attacks were directed not against Lydia Silva alone, but also against Delores Brandao, a vice principal who was his last supervisor, and Carmen Ruiz, the person who replaced him as vice principal. *These collateral issues have little to do with the truth of the tenure charges, which must stand or fall on the credibility of witnesses to the alleged incidents.* (Initial Decision at 4-5, emphasis supplied)

Given the nature of the tenure charges herein, which rest upon a multitude of alleged actions by respondent involving the use of excessive force, corporal punishment and making derogatory and demeaning statements to students, an assessment of the credibility of witnesses is of the utmost importance to a determination in this matter, and, as stated above, the

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counsel agreed that the reconstructed testimony derived from the ALJ's notes comported with/were not materially different from their recollection of the testimony. (Tr. 9/23/98, at 4)

Commissioner, upon thorough examination of the record, is fully satisfied that the ALJ properly considered all testimony and measured the credibility of same. In so holding, the Commissioner is aware that this was an admittedly difficult task for the ALJ, particularly in light of the number of student witnesses and the need to examine the testimony of children with great caution (*In the Matter of the Tenure Hearing of Quinones,* 96 *N.J.A.R.*2d (EDU) 649, 653), a task which, in the Commissioner's judgment, the ALJ did quite competently herein. Contrary to respondent's exceptions, the Commissioner determines that the preponderance of the credible evidence amply supports the ALJ's findings and conclusions relative to the specifications involving A.M., M.L., and L.R.

Furthermore, the Commissioner finds respondent's exceptions with respect to L.B. to be entirely without merit. The ALJ's summation of testimony and his conclusions regarding respondent's pushing L.B. and shoving him into his seat (pages 8-10 of the Initial Decision) are well stated and fully supported by the record. Upon review of the record, the Commissioner does not accept respondent's assertion that L.B. is of "poor character" and biased towards respondent. The Commissioner also rejects respondent's glib suggestion that L.B. denied respondent pushed him and forced him to sit down. L.B.'s account of events regarding the incident was substantially corroborated by a preponderance of the credible evidence by numerous other students. As set forth by the ALJ, L.B. candidly testified, *inter alia*, that he disobeyed respondent by getting up from his chair "plenty of times" (Tr. 6/18/98, at 165) and tried to leave the classroom, despite respondent telling him to sit down. Insofar as falling over his chair is concerned, L.B. was also forthright in acknowledging that the fall could have been accidental in that the heavy weight of his book bag/backpack could have triggered the fall over the chair. (*Id.* at 127,165 and 185) However, as stated by L.B., "It might have been an accident but he shouldn't have pushed me." (*Id.* at 166). Further, the ALJ is correct in finding that

respondent used a disproportionate amount of force, even taking into account L.B.'s disobedience/defiance. As stated by the ALJ:

> Unquestionably, L.B.'s failure to remain in his seat was an act of defiance to the authority of his teacher, and the District concedes that Cotto was justified in blocking the doorway to prevent him from leaving the room. Proofs establish, however, that Cotto's response went beyond mere passive resistance. Instead, he repeatedly pushed or shoved the youngster to encourage him to return to his seat. Cotto overreacted to the situation and utilized more force than necessary under the circumstances. Certainly it should have been foreseeable that exerting pressure against a boy wearing a backpack might cause the child to fall and hurt himself. In addition, Cotto failed to explain adequately why he chose to engage in a physical confrontation with one of his students. He could have easily called a security guard for assistance, as he eventually had to do anyway. (Initial Decision at 9-10)

As to respondent's position that the students made false allegations against him to prevent retention in sixth grade, the Commissioner finds no credible evidence in the record to support this.[2] What is supported by the record is that respondent subjected the students to a constant barrage of negative commentary of a type which could readily cause students to lose confidence in their natural abilities and hamper their ability to succeed in school. (*Id.* at 17) Moreover, the Commissioner finds the ALJ's recitation of testimony and the analysis relative to respondent's derogatory and demeaning comments/remarks to students to be fully supported by the record and he finds totally incredible respondent's attempts to evade culpability with claims that any mention of such things as welfare, crime and crack babies/drug use was tied to instruction in current events. An excerpt from L.B.'s testimony gives some insights into what a student felt, even when news articles may have been used as an instructional strategy. L.B. states when being questioned on cross-examination by *respondent's attorney*:

Q. [D]id you like being taught current events?

[2] A review of the transcripts indicates that all students who testified in this matter were promoted in 1997 from grade six and in 1998 from grade seven. Further, one student was transferred to the sixth grade Gifted and Talented class when removed from respondent's class and received grades of all B's and one C (Tr. 6/19/98, at 4-5), and in 1998 one student had been promoted to ninth grade, having been moved out of respondent's class in 1997and placed into seventh grade. (Tr. 7/13/98, at 5 and 53)

A. Yes.

Q. And why did you like it?

A. Because since I don't watch the news a lot it gets me to catch up on the outside world.

***

Q. Okay.***[N]ow you said that current events is about the outside world, does that refresh you to some degree of what you were talking about in current events with Mr. Cotto?

A. Yes, a little bit.

Q. Okay.***[C]an you remember about some of the subjects you talked about?

A. I remember one subject when he talked about what --what-- the killing of black-on-black, stuff like that.

Q. [C]ould I have that again?

A. [W]hy is the black killing the black and why is there so much black-on-black crime.

Q. Okay. So one subject that he discussed with you in current events is why -- why blacks are killing blacks and why there is so much black crime. That was in -- that was being taught in current events; is that correct?

A. Yes.

Q. And did Mr. Cotto have any newspapers at the time or any -- anything at the time while he was discussing the subject with you?

A. A newspaper.

***

Q. Now, do you recall him -- the newspapers that he brought in about black-on-black crime and crimes committed by blacks, did he bring in anything about white crime and Puerto Rican crime***did he discuss that type of situation with you?

A. He didn't discuss that.

THE COURT: Pardon me?

[A.] He brought in newspapers but he didn't discuss nothing like that. It always had something to do with black people on welfare, black people killing black, this and that.

Q. Okay.

A. And statistics.

Q. Okay. So he brought in newspapers on welfare during current events and he brought in newspapers on black people killing black people. And during all the time that you had current events did he ever talk about Puerto Ricans?

A. No.

Q. Did he ever bring in papers about Puerto Rico?

A. Once.

Q. Oh.

A. About the Puerto Rican – about a Puerto Rican parade.

Q. Okay.***Did Mr. Cotto ever say that it was good that black people were killing black people?

A. No.

Q. Was he concerned about black people harming black people?

A. No. ***

***

A. -- but he was concerned that -- it seemed like he -- he liked it or he just -- it seemed he wasn't concerned in a good way. It was like -- how do you say it-- like happy about it or something like that -- not happy but joy -- he was like glad to see it or something like that.

Q. You thought he was -- it was your impression that he was glad to see that the newspaper said that black people were killing black people -- and that he was glad that -- that there was black crime on black crime.

A. Yes. (Tr. 6/18/98, at 170-174)

As to the ALJ's conclusions of law, the Commissioner fully concurs that the District has sustained its tenure charges against respondent and that the appropriate penalty is dismissal for the reasons set forth in the Initial Decision. Although stated more than thirty years ago, the holding of the Commissioner in *In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 *S.L.D.* 159 has applicability in the instant matter and bears repeating herein.[3] The Commissioner held in *Appleby* that:

> While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. [*In re Ostergren, supra*] The Commissioner said further, [*In re Fulcomer, supra*],
>
> > "that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. ***The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen'***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control."
>
> Thus, when teachers resort to "unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. [*Ostergren, supra*] (*Appleby*, at 172-173)

[3] In the *Appleby* matter, the Commissioner determined the teacher had exhibited a pattern of conduct that demonstrated a disposition to resort to unlawful physical force and to harsh and abusive treatment of students whose conduct the teacher found offensive.

Moreover, the Commissioner is in full agreement with the ALJ's conclusions that a teacher with respondent's experience should have known better than to push, shove and verbally abuse his students and that it is not a mitigating circumstance that Cotto may have resented having been demoted from a supervisory position and put in charge of a difficult-to-teach class. This is particularly true in light of respondent's failure to heed prior warnings about similar misconduct as charged herein. As aptly stated by the ALJ:

> Cotto's repetitious misconduct had a devastating effect on classroom atmosphere. Not only did Cotto try to control his students by physical intimidation, but also he cast aspersions on their intellectual capacity, their physical appearance and their ethnicity. Told enough times that they are stupid, ugly, or inferior, impressionable children come to believe what their teacher is saying about them. (Initial Decision at 23)

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Respondent is dismissed from his tenured teaching position with the State-Operated School District of the City of Newark as of the date of this decision. This matter shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as it deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 26 2000

Date of Mailing: JUN 26 2000

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

205-00

EDU # 7420-6/97
C # 205-00
SB # 40-00

IN THE MATTER OF THE TENURE	:	
HEARING OF JUAN COTTO,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

Decided by the Commissioner of Education, June 26, 2000

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Eugene G. Liss, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 03 2000

IN THE MATTER OF THE TENURE	:	
HEARING OF EUGENE M. LEGGETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
CITY OF TRENTON, MERCER	:	
COUNTY.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent physical education teacher due to his handling of two incidents in his swimming classes. Board alleged that respondent utilized improper techniques to effectuate the rescue of students and failed to properly supervise students. After barring, in an interlocutory order affirmed by the Commissioner, the Board's presentation of testimony and/or report of its expert as a result of the late submission of the report, the ALJ found, and the Commissioner affirmed, that the Board failed by proofs, by either direct or by reasonable inferences, to establish a *prima facie* case on any of the four charges that it brought, and, therefore, concluded that the charges must be dismissed. On appeal, the State Board reversed the interlocutory order and remanded the matter, determining that the Board should be given the opportunity to present expert evidence in regard to respondent's alleged professional misconduct.

In his decision on remand, the ALJ found that the contribution made to the record in the proceedings on remand did not result in any meaningful addition to the evidence in the matter such that the ALJ and the Commissioner would be compelled to alter their previous determination that the four charges of unbecoming conduct must be dismissed because the Board failed to establish a *prima facie* case in support of the charges.

The Commissioner adopted the findings and determination in Initial Decision as his own. Tenure charges were dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04551-99S (EDU 04017-98S remanded)
AGENCY DKT. 84-4/98

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Petitioner,
v.
EUGENE M. LEGGETT,
Respondent.

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

Arnold M. Mellk, Esq., (Wills, O'Neill & Mellk, attorneys)

Record Closed: May 1, 2000 Decided: May 11, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This contested case involving tenure charges brought by the Trenton Board of Education ("Board"), against Mr. Leggett, a tenured physical education teacher in the Trenton District ("District"), is before the Office of Administrative Law ("OAL") on remand from the State Board of Education ("State Board"), which determined that the Board should be given the opportunity to present expert evidence in regard to Mr. Leggett's alleged professional misconduct. [1] In short, the charges against Leggett arose from concerns regarding his handling of two incidents that occurred in the pool at the Holland Middle School, to which he was assigned as the supervisor.

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[1] See Initial Decision dated November 5, 1998, *Board of Education of the City of Trenton, Mercer County v. Eugene Leggett*, EDU 4017-98, Initial Decision, (November 5, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>, *adopted,* Comm'r of Ed., (December 17, 1998), <http://www.state.nj.us/njded/legal/index.html>; *remanded,* State Bd. of Ed. (June 2, 1999) <http://www.state.nj.us/njded/legal/index.html>.

In each instance a student was in trouble in the water, in each instance the student was rescued and fortunately, did not suffer any lasting or serious injuries. The first incident occurred in late September or early October 1997; the second incident occurred on February 10, 1998.

Following the State Board's remand, the respondent filed a motion for summary decision. This was denied in a Letter Order dated March 14, 2000. The testimony of the Board's expert, Mr. Joseph Blazejewski was received on May 1, 2000. The record closed following that testimony.

Mr. Blazejewski is the Director of Health and Safety Services for the Burlington County Chapter of the American Red Cross ("Red Cross") and is responsible for the training of instructors and trainers in first aid, CPR and aquatic water safety and lifesaving. He possesses certifications as an instructor trainer in these several specialties. He serves as the Aquatic Director for a Boy Scouts of America ("Boy Scouts") summer camp and has been a certified lifeguard since the late 1960's. He holds certifications from the Red Cross, YMCA and Boy Scouts. He has never trained personnel for work in public school settings. He provided his expertise and his report and testimony to the Trenton Board of Education without compensation. Prior to rendering his report he did not visit the pool in question, did not determine the equipment that was available to Mr. Leggett at the time of either incident and did not interview anyone, although he did review the tenure charges, the police reports and the interviews conducted by the police, including that of Mr. Leggett. He visited the site a few days before testifying, but the information gathered at the site visit would not have changed the contents of his report and his conclusions.

In his report Mr. Blazejewski first concluded that on February 10, 1998, Mr. Leggett had left the pool area unsupervised (except by a teacher who could not swim) and that as the person in charge and responsible for the pool area he should not have left the area. He asserted, based upon his understanding gathered from the police interview with Leggett that Leggett had received a Red Cross lifesaver certification in 1973, that Leggett would have known from his training that he was never to leave the pool area unless relieved by a properly trained person. When he left the pool area he was not able to conduct proper supervision and this was a violation of his responsibilities.

Blazejewski next concluded that Leggett had acted improperly and in derogation of his training on February 10, 1998, when he sent a student into the water to go down to the bottom of the pool (which was eight feet deep) and check upon the condition of a student who was apparently in trouble. By doing so Leggett exposed the student who he sent into the water to possible endangerment. In the Red Cross training one is taught that one should never send a non-trained person to perform a rescue. Leggett would have learned this in his training for the lifesaving certification. Instead of sending a surrogate, Leggett should have entered the water himself and brought the student to the surface.

Leggett also acted improperly on February 10 when he used a shepard's crook pole in the rescue as such a device is hard to use at the bottom of the pool.[2] It is hard to get the hook underneath a person lying on the bottom, and the crook is better suited for the rescue of someone who is floating. There is a danger that the person using the pole might poke or grab the victim in the wrong way. In addition, the victim might become conscious and could grab the rescuer and both might go down into the pool. Leggett's training would have taught him to recognize an emergency and respond properly to it. One is taught to approach the situation with caution and dive in, hesitate and change position, then to grab the victim with both hands and kick to the surface.

In the case of the student (who had a cramp) rescued in late September or early October, Leggett violated proper procedure in having a student who was located at the side of the pool enter the pool and go to the victim's aide. Again the danger was that the victim would grab the rescuer. His training should have led him to use a pole or crook to assist the victim and/or to have entered the water himself. Additional options would have been to reach the victim, to throw out a floatation device or to go to the victim with support.

Blazejewski concluded that Leggett had received Red Cross lifesaving training because in response to a question posed by the police, Leggett had produced a December 1973 Red Cross life-saver card. Knowledge of the possession of such an old certification would be of no use in

[2] Blazejewski at first was under the impression that the pole used had a net attached to it. He later learned that it was in fact a pole with a hook thereon, a so-called Shepard's Crook. Such a pole is a more appropriate device to use than a pole with a net, but is nevertheless not easy to use and therefore not favored for such a rescue.

determining whether the holder was trained in up to date procedures now approved by the Red Cross. Some procedures have in fact changed over the twenty-five years between 1973 and the dates of the incidents and some have not.

The witness acknowledged that he was not aware when he drew his report that the finding of fact made in the original hearing concluded that there was no evidence that the February 10, 1998, incident had originated at a time when Leggett was out of the pool area. *See* Initial Decision of November 5, 1998, page 5 ("So, in regard to the First Count, if my understanding of the First Count is that the Board suggests that there was a failure to supervise based upon the idea that somehow D. ended up at the bottom of the pool when Leggett was outside the room and not supervising, and that there was a problem with his supervision. I can find no evidence either direct or by reasonable inference to conclude that that charge had been out or could be made out.").

The witness acknowledged that certified Red Cross, YMCA and/or Boy Scout lifesaving personnel must be re-certified every three years. He had no evidence that Leggett was ever re-certified after 1973. Blazejewski testified that there was "no adequate supervisor" on duty at the pool on either occasion in question as neither Leggett nor anyone else present was properly certified. In such a situation, Blazejewski would not be comfortable using the pool himself and the presence of someone who had last received training twenty-five years ago would not lessen that discomfort. He did note that the Red Cross and the other certifying agencies have never trained anyone that it was proper to send an untrained individual into the pool to effectuate a rescue.

No further evidence was received from either party.

DISCUSSION

The State Board determined that it was appropriate in light of the very serious issues involved in this case to allow the District to present its expert witness despite the serious discovery derelictions that led to the denial of the admission of that evidence at the prior hearing. The Board has presented that evidence. It should be noted here that the Trenton Board has also

suggested that some or all of Leggett's conduct could be condemned without the need for expert evidence, as his conduct was purportedly so inappropriate that on its face it constituted misconduct and a violation of the professional standards governing tenured teachers. However, the evidence presented in this hearing establishes that in the area of lifesaving there is a long-standing practice to certify persons as trained in the techniques and methods to be used in lifesaving and rescue. While there may be instances where a non-certified person could be held civilly liable for improper actions, in the context of a tenure proceeding, where the issue is whether the teacher has violated recognized professional standards, I **CONCLUDE** that the proper test of Leggett's conduct must include the recognition of these certification procedures and the fact that, as will be noted below, it is well-recognized that in public settings, only those persons properly certified should be assigned to the supervision of swimming pools and swimming classes. As will also be discussed, that recognition of the need for such "appropriate supervision" was ignored by the Trenton Board in the instances at issue in this proceeding, despite its own regulations and policies, and has only very recently been recognized by the State Board through the adoption of administrative regulations. I am convinced that Leggett's conduct on the days in question must be assessed with reference to those standards of conduct to which a properly trained individual could be held. In an area which requires considerable training, testing and certification in order to teach one the proper and safe methods of rescue, it is not appropriate to condemn Leggett for actions which he may have undertaken and directed that a trained individual would have known were inappropriate, unless it has been demonstrated that Leggett could be held to have knowledge of and to be chargeable with responsibility as a properly trained and certified individual.

Mr. Blazejewski has proffered his opinions as to the failure of Mr. Leggett to comply with appropriate lifesaving techniques in regard to the rescues effectuated in late September or early October 1997 and on February 10, 1998. His first premise, that Leggett failed to maintain proper supervision of the pool area, was made without knowledge that the earlier initial decision had found no evidence that there had been a failure of supervision involved in either matter. As such, the expert's first premise cannot be sustained, and he has not added anything to the evidence that would cause any change in my original opinion as to the First Count of the tenure charges.

As for Blazejewski's other opinions, they all proceed from the basis that Leggett was a trained individual who therefore must have been instructed in and should have known the proper techniques for lifesaving and rescues. Of course, the flaw in this thinking is that while at one time some twenty-five years before the incidents in question Leggett did hold a certification from the Red Cross, by 1997-98 that certification was hopelessly out of date. As the expert acknowledged, the certifying agencies require that a certified individual undergo re-certification every three years. These certifying agencies therefore have concluded that one must be regularly updated and re-examined in order to continue to hold the imprimatur of authorization and expertise that the certifications are meant to identify. As Leggett was some eight re-certifications from certified status, it is grossly unfair and unwise to hold him to any standard that might be applied to one who is currently certified, or even to one who, while not presently certified, has recently been certified. It would be foolish to rely upon the ability and expertise of one possessing a perhaps faded (or even non-existent) memory of training in rescue and lifesaving techniques acquired long ago, and even the Board's expert would feel uncomfortable as a user of a pool at which no currently certified "appropriate supervision" was present, if he would even use the pool at all in such circumstances.

The Board, unlike the State Board at the time of these events[3], apparently had standards that were apparently intended to identify those who could properly be assigned to pool duty. According to the Board's amended answer to Interrogatory 12, the Trenton Board at the time of the incidents required that a teacher of swimming have a New Jersey State teaching certificate, an American Red Cross Water Safety Instructor's Certificate, a Lifeguard Training Certificate, a CPR certificate and be certified in standard First Aid. Presumably the Board intended that the certifications be up to date. Unfortunately, the Board failed to follow its own standards and assigned Leggett in derogation of those standards. Mr. Leggett clearly did not belong where he was on either day in question and the District had no business assigning him as it did and placing the children in its charge under his supervision. The District now seeks to hold Leggett responsible for not using proper techniques to save children whom he in fact did save. There is great irony here. The fault which lies here is very much that of the Board, for assigning

[3] The State had no standards that required that a teacher assigned to a pool have any particular certifications, although in the wake of the events of February 10, 1998, and this case, standards have since been proposed and adopted. 31 *N.J.R.* 3559 (November 15, 1999); 32 *N.J.R.* 448 (February 7, 2000). These regulations, codified at

unqualified personnel to supervise a pool in violation of its own policies. Fortunately, Mr. Leggett's efforts successfully rescued the children despite the unorthodox manner of the rescues. That he may have placed others in a degree of danger is unfortunate (though it must be noted that no assisting student was in any way injured), but in the absence of any evidence that he can be held to the standards of a trained individual in the performance of a task which is well acknowledged to require significant training and examination leading to certification, there is no basis to fault him for using the wrong method to achieve successful rescues. As the Board did not train him for the task, did not require that he be currently certified, violated its own policies, and in essence placed an unqualified individual in a very inappropriate role, thereby placing its students and even Leggett in a precarious position, there is no basis for finding that Leggett violated the professional standards to which the Board and the Commissioner have a right to hold him. Therefore the tenure charges are **DISMISSED**.

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

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

N.J.A.C. 6:11-4.7, require that teachers assigned to teach swimming must possess a valid Lifeguard Certificate, a valid Water Safety Instructor Certificate and a valid CPR for Professional Rescuer Certificate.

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

May 11, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

5-12-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Hand-drawn diagram of pool room

P-2 Trenton Police Division Investigation Report dated 2/10/98

P-3 Letter dated 2/28/98 from Joseph G. Blazejewski to Mr. Thomas W. Sumners, Jr., Re: In the Matter of the Tenure Charges Against Eugene M. Leggett, School District of the City of Trenton, Mercer County, New Jersey

FOR THE RESPONDENT:

None

IN THE MATTER OF THE TENURE	:	
HEARING OF EUGENE M. LEGGETT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
CITY OF TRENTON, MERCER	:	
COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and the respondent's reply thereto, filed in accordance with the directives of *N.J.A.C.* 1:1-19.4, were fully considered by the Commissioner in making his determination herein.

The Commissioner has independently and carefully reviewed and considered this matter, which was remanded as a consequence of the State Board's reversal of the Commissioner's Interlocutory Order, affirming the Administrative Law Judge (ALJ), precluding the introduction of the Board's expert's report and testimony on the basis of such report's untimely submission. Upon such review, the Commissioner must agree with the determination of the ALJ that the contribution made to the record in these further proceedings on remand has not made any meaningful addition to the evidence in this matter, such that the ALJ and the Commissioner would be compelled to alter their previous determination that the within four charges of unbecoming conduct must be dismissed because the Board has failed to establish a *prima facie* case in support of these charges. *See In the Matter of the Tenure Hearing of Eugene M. Leggett, School District of the City of Trenton, Mercer County,* decided by the Commissioner of Education, December 17, 1998. In so determining, the Commissioner is obliged to remain mindful of the well-established principle that, in order for him to sustain charges brought

pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, the District bears the burden of proving such charges by a preponderance of the credible evidence. *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13 (App. Div. 1974).

In this matter, as the Commissioner previously recognized,

> the focus of the examination here is not whether the Commissioner, or any other individual for that matter, in retrospect, might find that there were more appropriate procedures which might have been utilized under the circumstances which occurred in these incidents but, rather, *the relevant issue in this tenure case is whether the Board has established that respondent's actions breached any established standard of behavior.****
> (emphasis added) (*In re Leggett,* Slip Opinion at 22)

Once again, as aptly expressed by the ALJ here,

> in the absence of any evidence that [Leggett] can be held to the standards of a trained individual in the performance of a task which is well acknowledged to require significant training and examination leading to certification, there is no basis to fault him for using the wrong method to achieve successful rescues. ***[T]here is no basis for finding that Leggett violated the professional standards to which the Board and the Commissioner have a right to hold him.*** (Initial Decision at 7)

Accordingly, the Initial Decision of the OAL is affirmed for the reasons clearly stated therein and the within tenure charges are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 26 2008

Date of Mailing: JUN 26 2008

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

TONI HEALY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning nontenured teacher challenged the Board's decision to deny her a contract for the 1997-98 school year and sought a contract of employment for the 1998-99 school year. Petitioner withdrew all claims except those for back pay for April through June 1998. (Petitioner's long-term substitute teacher position ended on April 3, 1998.)

The ALJ determined that it was clear that it was the Board's intent to reappoint petitioner notwithstanding the negative recommendation of the superintendent at its August 1997 Board meeting. The Board acted on that intent at the September 24, 1997 Board meeting. Petitioner's salary pursuant to her reappointment for the 1997-98 school year was not in dispute; the Board, however, did not pay petitioner after April 4, 1998 although it was obligated to do so and it did not reassign her to other teaching duties, although it was entitled to do so. The ALJ concluded that petitioner was entitled to summary decision compensating her for the balance of the 1997-98 school year April through June 1998. The ALJ ordered the Board to compensate petitioner for back pay in the amount of $8,991.75 with reimbursement to the Department of Labor for unemployment compensation benefits for the same period.

The Commissioner adopted findings and determination in initial decision as his own and directed payment of back pay tc petitioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6173-98

AGENCY DKT. NO. 192-6/98

TONI HEALY,

Petitioner,

v.

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

Respondent.

Arnold M. Mellk, Esq., for petitioner, (Wills, O'Neill & Mellk, attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: March 28, 2000 Decided: May 12, 2000

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on June 10, 1998, when Toni Healy (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of the Township of Hamilton (hereinafter respondent) had wrongfully deprived her of her contract of employment for the 1997-98 school year. The petition of appeal also sought an

order awarding petitioner a contract of employment for the 1998-99 school year. An answer on behalf of respondent was filed on June 26, 1998, and on July 13, 1998, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was conducted on September 14, 1998, at which time the following were identified as the issues for determination at hearing:

1. Was respondent arbitrary, capricious and unreasonable in declining to offer petitioner a full-time position for 1997-98?

2. Was respondent arbitrary, capricious and unreasonable in declining to offer petitioner a contract of employment for 1998-99?

3. Is issue number one barred by the regulatory statute of limitations?

4. What are the appropriate remedies, if any?

A hearing was scheduled for February 8 and 9, 1999, at the Trenton office of the Office of Administrative Law. Prior to that time, however, respondent filed a motion for summary decision together with supporting papers. Petitioner filed a response opposing the motion for summary decision and on July 26, 1999, the undersigned issued an order denying respondent's motion for summary decision. That order is attached hereto and made a part hereof as if set forth herein at length. By letter dated August 25, 1999, counsel for petitioner wrote to the undersigned with a copy to counsel for respondent, as follows:

> We respectfully request that an initial decision issue in this matter. We believe that Ms. Healy's salary claim for the period of April 3, 1998 to the end of the school year is warranted.

The undersigned replied by letter dated October 4, 1999, as follows:

> Although *N.J.A.C.* 1:1-12.1(a)2 provides that no technical forms of motion are required, something more specific that your August 25, 1999 letter to me is necessary to advise your adversary and me concerning what relief you are requesting. As my July 26, 1999 letter order stated, your pleadings seek relief in addition to compensation for April-June 1998 and if you now are abandoning those other claims, we need to know that. Please advise in writing whether you are moving for partial summary decision or whether the only remaining claim is for salary for the period April 3, 1998 to the end of the school year and you are therefore, moving for summary decision.

Thereafter in a letter dated November 2, 1999, petitioner withdrew all claims except those for back pay for April through June 1998 and reiterated her request for judgment on the papers. The undersigned advised the parties by letter dated February 1, 2000, that she would interpret the November 2, 1999 letter from petitioner's counsel as petitioner's motion for summary decision, following which counsel for respondent advised that he would be filing opposition to the motion. Respondent's brief and the certification of Michael Luciano were received on February 25, 2000. Petitioner filed two responding certifications on March 14, 2000, hers and one from Andrew Kaszimer. Nothing further having been received from respondent, the record closed on March 28, 2000.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute, and I therefore **FIND** the following as uncontested facts.

Petitioner was employed initially by respondent from September 1, 1996 to June 30, 1997, as a Special Education Teacher. At the conclusion of her first year of employment she was informed by her supervisors that her contract would not be renewed for the upcoming school year. Thereafter petitioner wrote to respondent requesting a statement of reasons for her non-renewal. Respondent replied by letter dated July 23, 1997, as follows:

> This letter is in response to your request for the reason your employment as a teacher in the Hamilton Township School District was not renewed for the 1997-98 school year.

The reason is as follows:

> "Your supervisors were not satisfied with the behavior management system you utilized for students."

Petitioner subsequently requested a hearing before respondent Board of Education for the purposes of convincing the Board to rehire her. This hearing was held on August 27, 1997. At the hearing Andrew Kaszimer, President of the Hamilton Township Education Association, spoke on petitioner's behalf, whereafter petitioner herself addressed the Board. Following discussion it was the consensus of the Board not to accept the superintendent's recommendation for non-renewal of petitioner's contract. The Board did not adopt a resolution that evening reappointing petitioner, however, because Joan Josephson, Esquire, the Board attorney who was present at the meeting, advised the Board that statutory law provided for the superintendent to make final recommendations concerning reappointment of staff. On August 27, 1997, when the attorney rendered such advice to the Board, it was in fact inaccurate because on August 6, 1997, the State Board of Education had issued its decision in *Angelo Velasquez v. Board of Education of the Borough of Brielle*, Monmouth County, EDU 8276-95, wherein it reversed the Commissioner's decision so interpreting the provisions of *N.J.S.A.* 18A:27-4.1.* At the next Board meeting on September 24, 1997, Board member Philip Bowe made a motion "to reappoint the employee discussed in Executive Session (petitioner) at the discretion of the Superintendent." This motion was subject to a roll-call vote and carried with five in favor, two opposed and two abstaining. On September 24, 1997, there were no vacant full-time positions in respondent's district for which petitioner held a valid certificate/endorsement. On November 5, 1997, petitioner was assigned as a long-term substitute for a special education teacher who was on an approved maternity leave. An unsigned copy of petitioner's contract for this position provides:

> It is agreed between the Board of Education of the Township of Hamilton in the County of Mercer, party of the first part, and Toni Healy, party of the second part, that said Board of Education has

* Although the decision was issued on August 6, 1997 by the State Board of Education, it was not mailed to the parties in the case (neither of which were represented by Hamilton Board counsel) until sometime thereafter. Accordingly, the failure of Board counsel to be aware of the State Board decision, a mere three weeks after it was issued, was completely understandable.

> employed and does hereby engage and employ the said party of the second part as a Long-term substitute teacher** in public schools, under the control of said Board of Education, from the 5th day of November, 1997 to the 3rd day of April 1998, at the annual salary of $30,321, prorated, to be paid in equal biweekly installments. That the said party of the second holds an appropriate certificate issued in New Jersey now in full force and effect, and that said person, before entering upon the duties of such position, will exhibit the certificate to the Superintendent of Schools/designee in which such school is situate.
>
> The said party of the second part hereby accepts the employment aforesaid and agrees to faithfully do and perform duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education.
>
> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days notice in writing of intention to terminate the same, but that in absence of any provision herein for a definite number of days notice, the contract shall run for the full term named above.
>
> Dated this 25th day of November 1997 Board of Education of the Township of Hamilton, in the County of Mercer.

** You are replacing a teacher who is on a leave of absence and who may be returning to his/her position at the expiration of this contract. This position is non-tenurial and carries no seniority eligibility. You will be assigned to the Substitute Teacher List if no position is available at the [missing word or line].

Although the copy of the contract in the record is unsigned and respondent was unable to produce a signed copy at the request of the undersigned, a March 10, 2000 certification, signed by petitioner, states "I signed a contract for a long-term substitute position with the Board under the assumption that I would receive a permanent appointment when such became available. I was under this assumption due to a conversation between Michael Luciano and Andrew Kaszimer, during which Mr. Luciano related such information to Mr. Kaszimer. (See certification of Andrew Kaszimer.)" The referenced certification of Mr. Kaszimer states that (at some unidentified time) Michael Luciano (Assistant Superintendent) informed him that when a permanent position became available with the Board, petitioner would receive the assignment. Mr. Kaszimer's certification states that he related this information to Ms. Healy. At the

conclusion of petitioner's employment as a long-term substitute, the superintendent determined not to reassign her to any position for the remainder of the contract year, stating as his reason concerns related to her performance. Petitioner requested and was granted an appearance before the Board of Education at its regular meeting on March 25, 1998. The minutes from that meeting recite:

I. Personnel Matter – T.H.

A. President of HTEA stated his understanding of the Velasquez ruling as it applied to T.H.

1. State Board upheld ruling of Administrative Law Judge allowing employees to convince boards of education to renew their contract in the event they are not recommended by the Superintendent.

2. HTEA understanding was that the Board was agreeable to reappointing T.H.

3. Two special education positions were filled this evening T.H. was not appointed.

B. Statement by T.H.

1. Employee concerned with her professional reputation.

2. Employee believed she did a good job and alleged that she was not told otherwise by her supervisor.

Board member questioned why employee sought representation if there were no concerns with performance.

Employee responded she did not seek or have union representation when she met with her supervisor.

3. Employee distributed letters from colleagues and parents in support of her performance.

Andy Kaszimer and T.H. left at 10:55 P.M.

C. Board attorney advised the Board that only the Superintendent has the authority to rehire the employee at this time.

1. Velasquez only applies when a non-tenured teacher is not recommended for rehire.

2. In August, the Board passed a motion to appoint T.H. at the discretion of the Superintendent.

D. Discussion by Board Members

1. Concern was expressed that the motion was structured based on the situation at the time. (At the time there was no position open. Employee was appointed as long-term sub.)

2. Question was raised regarding employee's performance.

Assistant Superintendent expressed some concerns that were raised in the employee's recent evaluation. Based on performance, the administration is not recommending the employee for reappointment.

The meeting adjourned at 11:07 P.M.

Respondent took no official action with respect to petitioner on March 25, 1998 or thereafter. Petitioner filed the petition of appeal commencing the within action on June 10, 1998. The additional salary petitioner would have received had she continued to work until June 30, 1998 was $8,991.75.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the

standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.* 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (Citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, although none of the facts set forth hereinabove under the Findings of Facts section are in dispute, respondent nevertheless argues that summary decision may not be granted in favor of petitioner because of the absence in the record of any evidence concerning mitigation. In this regard, it is true that individuals such as petitioner must exercise reasonable diligence and ordinary care to mitigate damages. It is also true that there are no facts in the record concerning mitigation. The principle is well established, however, that in an action to recover damages for wrongful discharge from employment the defense that a petitioner earned or could have earned a livelihood during the term of his/her discharge is an affirmative one and the

burden of proof rests upon the breaching employer. *West Orange Supplemental Instructors Association, et al. v. Board of Education of the Township of West Orange*, 92 *N.J.A.R.* 2nd (EDU) 287, 302, citing *Roselle v. LaFera Contracting Company*, 18 *N.J. Super.* 19, 28 (Ch. Div. 1952). The discovery period in the within matter was over long before respondent filed its motion for summary decision and certainly long before petitioner filed her motion. Accordingly, considering the burden of proof as required by *Brill, supra*, the absence of any evidence in the record concerning mitigation prevents respondent from prevailing on the damages issue, not petitioner. Furthermore, although it is true as respondent argues in its most recent brief in opposition to petitioner's motion for summary decision that petitioner may have received unemployment compensation during the months in issue, it is not true that the respondent Board is entitled to have those monies deducted from the damage award it owes to petitioner. Neither may petitioner retain any monies paid to her as unemployment compensation when she receives her damage award from the Board of Education, however. Petitioner is statutorily obligated to return those monies to the Department of Labor. See *N.J.S.A.* 43:21-5(b) and *Jeffrey Bellamy v. Essex County Hospital Center*, 95 *N.J.A.R.* 2d (CSV) 652, 654 . After reporting the full amount of back pay to the Teachers' Pension and Annuity Fund and deducting and forwarding the appropriate employee contributions to the TPAF, as a practical matter, respondent may transmit to the Department of Labor any monies owed by petitioner for reimbursement of unemployment compensation, but neither petitioner nor respondent may be unjustly enriched at the cost of the unemployment compensation fund.

The other legal issues remaining in this matter have already been addressed in my Letter Order, dated July 26, 1999, which is attached hereto and made a part hereof.

N.J.A.C. 6:24-1.2(c) requires a petitioner to file a petition of appeal no later than the ninetieth day "from the date of receipt of the notice of a final order, ruling or other action by the district board of education. . . which is the subject of the requested contested case hearing." Under the facts as I have found them to be hereinabove, the earliest date upon which petitioner could be charged with notice of all the facts necessary to file a petition of appeal is March 25, 1998, the date of the board of education meeting at which her continued employment was discussed. The petition was filed on June 10, 1998, well within the 90-day period following March 25, 1998. As I ruled on July 26, 1999, when respondent determined by recorded roll call

vote on September 24, 1997, to reappoint petitioner, it granted her a new annual contract of employment for the 1997-98 school year (as it would have done in August of 1997, but for its mistaken belief that it could not). Although documentation in the record indicates that respondent "approved" petitioner's "reappointment" to the long-term substitute position on November 25, 1997, in fact she had already been reappointed at the September 24, 1997 meeting, subject only to the specific assignment, and it is clear that respondent never acted at a public meeting to invoke the termination clause which is standard in a non-tenured teacher's contract. See, *e. g.*, the language of the termination clause in the contract quoted hereinabove at pages 4-5. The fact that respondent may have been confused about what it was doing with respect to petitioner's reappointment does not negate the legal effect of its official action reappointing her. It is clear that it was the respondent's intent to reappoint petitioner notwithstanding the negative recommendation of the superintendent at its August 1997 board meeting; it acted on that intent at the September 24, 1997 board meeting. The annual salary to be paid to petitioner pursuant to her reappointment for the 1997-98 school year is not in dispute; after April 3, 1998, respondent did not pay petitioner, although it was obligated to do so, and it did not reassign her to other teaching duties, although it was entitled to do. Accordingly, I **CONCLUDE** that the petitioner is entitled to summary decision compensating her for the balance of the 1997-98 school year (April 4, 1998 to June 30, 1998.) It is therefore **ORDERED** that respondent compensate petitioner for back pay in the amount of $8,991.75. It is further **ORDERED** that both petitioner and respondent cooperate to ensure that the Department of Labor is reimbursed for unemployment compensation benefits which petitioner received related to her period of unemployment from April 3, 1998 through June 30, 1998, if any.

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

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

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

May 12, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

5-12-00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

July 26, 1999

Arnold M. Mellk, Esquire
Wills, O'Neill & Mellk
10 Nassau Street - Box 614
Princeton, New Jersey 08542

LETTER ORDER

Dennis M. DeSantis, Esquire
Destribats, Campbell, DeSantis,
Magee & O'Donnell
247 White Horse Avenue
Trenton, New Jersey 08610

RE: Toni Healy v. BOE of Township of Hamilton
OAL DKT. NO. EDU 6173-98

Dear Counsel:

I have reviewed the verified pleadings in this matter, the respondent's motion for summary decision with supporting certification, petitioner's letter brief in opposition to the motion, the tape of oral argument on May 15, 1999, respondent's supplemental certification and petitioner's reply. I have also conducted my own research and have come to the conclusion that when respondent "reappointed" petitioner at its meeting on September 24, 1997, "at the discretion of the Superintendent," petitioner was granted a new annual contract of employment for the 1997-98 school year, subject to specific assignment at the discretion of the Superintendent. This is the only legally permissible interpretation of the resolution passed by the Board on September 24, 1997; boards of education have been specifically authorized by the Legislature to appoint teaching staff members by a recorded roll call majority vote and the board may not delegate its responsibility to appoint teaching staff members to any of its agents, officers or other employees. Cardman v. BOE of Millburn, 1977 S.L.D. 746, 750. Accordingly, the "discretion of the Superintendent" must necessarily refer to assignment, not to reappointment. If the Board failed to pay petitioner's salary for September and October 1997, I **CONCLUDE** that the June 10, 1998 petition is out of time to seek reimbursement for those months. I assume that she was in fact paid for November 5, 1997 to April 3, 1998, the time she actually did teach, and her claim for salary from April 3 to the end of the school year is not barred by N.J.A.C. 6:24-1.2(c). Whether

petitioner ever signed or saw the contract which appears at Exhibit F of Mr. Luciano's February 9, 1999 certification is irrelevant in light of my foregoing conclusion that respondent granted her a new teaching contract on September 24, 1999; pursuant to the Commissioner's decision in Bickford v. BOE of Elmwood Park, 1978 S.L.D. 855, cited by petitioner, because the respondent took no official action to terminate the contractual relationship, it remained legally in effect for the duration of the 1997-98 school year. For these reasons, respondent's motion for summary decision dismissing the petition of appeal is **DENIED.**

I am reluctant to issue an initial decision at this point because there is no pending cross-motion for summary decision and the petition of appeal does seek an order granting relief in addition to compensation for April-June 1998 (although we did discuss the merits of the additional prayer for relief.) In view of my legal conclusions herein, I am not certain what else, if anything, remains to be decided in this case. Please advise if a hearing date is necessary.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Very truly yours,

M. Kathleen Duncan

M. KATHLEEN DUNCAN
Administrative Law Judge

MKD:cc

OAL DKT. NO. EDU 6173-98
AGENCY DKT. NO. 192-6/98

TONI HEALY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on May 15, 2000 and the exceptions, bearing a face date of May 31, 2000, were filed on June 1, 2000[1]. Consequently, these exceptions were not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record, the Commissioner affirms the Initial Decision of the ALJ for the reasons expressed therein. Accordingly, the Board is directed to compensate petitioner the amount of $8,991.75, representing back pay from April 3, 1998 through June 30, 1998.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 26 2000

Date of Mailing: JUN 26 2000

[1] The thirteen days permitted by regulation to file exceptions expired on Sunday, May 28, 2000, and the next day, May 29, 2000, was a State holiday. Therefore, exceptions were due on or before May 30, 2000.
[2] In accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of July 26, 1999.
[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MAMUNES,	:	
PASCACK VALLEY REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT, BERGEN	:	DECISION
COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent tenured social studies teacher, based on accusations that he uttered racist, sexist and/or derogatory comments to students in his third-period classroom on seven occasions.

Based on the evidence presented at hearing, the ALJ concluded that the Board had established, by a preponderence of the relevant credible evidence, that the incidents serving as a basis for the tenure charges had occurred. However, the ALJ found that respondent's actions did not warrant termination in light of his prior lengthy and unblemished record of service, finding that, although he exercised poor judgment and was insensitive in his remarks to students, respondent did not intend his comments to be racist, sexist or demeaning to his students. Therefore, the ALJ recommended the penalty imposed be the forfeiture of 120 days of salary withheld following the certification of tenure charges, the forfeiture of two months' additional salary and that merit increments be withheld until the end of the 2000-2001 school year.

The Commissioner adopted the Initial Decision of the ALJ for the reasons expressed therein as the final decision in this matter. In so determining, the Commissioner noted that, although he is without authority to compel respondent to attend training classes designed to address and prevent insensitive conduct in the classroom, it would be appropriate for the Board to do so within the confines of respondent's tenure and contractual rights. (*In re DiPillo*)

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7245-98N

AGENCY DKT. NO. 229-7/98

IN THE MATTER OF THE TENURE HEARING OF GEORGE MAMUNES, PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY

Rodney T. Hara, Esq., for Petitioner (Fogarty and Hara, attorneys)

Harold N. Springstead, Esq., for Respondent (Springstead and Maurice, attorneys)

Record Closed: January 29, 1999 Decided: May 5, 2000

BEFORE **BARBARA A. HARNED** CALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this proceeding, petitioner, Board of Education of the Pascack Valley Regional High School District (Board), charges respondent, George Mamunes, a tenured teacher employed by the Board, with unbecoming conduct and seeks his dismissal from his tenured position. On July 13, 1998, the Board filed seven tenure charges against Mr. Mamunes with the Commissioner of Education. The tenure charges assert that Mr. Mamunes exhibited unbecoming conduct on seven occasions in the classroom when he uttered racist, sexist and/or derogatory comments to students and when he required students to chant "school sucks" in the classroom. Respondent's answer to the

tenure charges was filed with the Commissioner on July 23, 1998. The matter was transmitted by the Commissioner to the Office of Administrative Law (OAL) on July 30, 1998 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-10 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A pre-hearing conference was held on September 9, 1998 and a pre-hearing order was entered on September 11, 1998. On October 9, 1998, a telephone conference was held at the request of the Board who objected to responding to some of the interrogatories propounded by respondent on the basis that complying with the discovery request would violate the provisions of *N.J.A.C.* 6:3-6.5 which govern the confidentiality of student records. On that date an interlocutory order was entered stating that the Board would not be compelled to respond to any interrogatory seeking pupil records in the absence of a court order or consent of the parents. The hearing was conducted on November 23, 24, 25, December 1, 9, 15, 17, 18, and 30, 1998. Post-hearing submissions were filed by respondent on January 28, 1999 and by petitioner on January 29, 1999, on which latter date the record closed.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated that all procedural requirements of the Tenure Act were satisfied in this matter. It is undisputed that during the 1997/1998 school year, Mr. Mamunes taught five college preparation classes in World History at Pascack Valley Regional High School (Pascack).

Five students, J. M., R. L, P. W., A. S. and A. K. and the mothers of J. M. and P. W. testified on behalf of the Board. J. M. is a fifteen-year-old student at Pascack and at the time of her testimony she was in the tenth grade. J. M. was an entirely credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** During the 1997/1998 school year J. M., who is African-American, was in ninth grade and a student in Mr. Mamunes' third period World History class. In November 1997, the school held a pep rally on a Friday afternoon. J. M. attended the rally, as did Mr. Mamunes. The next Monday in history class Mr. Mamunes congratulated J. M. on her performance on the dance team during the pep rally. J. M., who was not on the dance team, thought that Mr. Mamunes had confused her with J. D., an African-American who was on the team. J. M. told Mr. Mamunes that she was not on the team. He replied,

"Oh sorry, I didn't mean to get my colored people mixed up" (P-1, Exhibit A). The comment was not made in a joking manner and it upset, embarrassed and discouraged J. M. She was the only African-American student in the third period World History class and the comment made her feel bad because her mother told her that "colored people" was a derogatory term. No one before had ever used the term "colored people" in referring to J. M.

J. M. is friends with J. D., the African-American student who was on the dance team. However, they do not look alike in that J. D. is lighter-skinned than J. M., taller than J. M. and they have different hair styles (P-2). J. D. is two years older than J. M and had been in Mr. Mamunes' class two years earlier. Other students in the class were shocked by Mr. Mamunes' comment to J. M. and looked at her to see how she would react. After class, students in the class told her they were shocked by the comment. Even students in other classes asked her how she felt about the comment. J. M. told the other students that she was embarrassed and upset. She felt awkward that everyone seemed to know about the comment. Throughout the following week, students came up to J. M. and said things like "I can't believe he said that." She was trying to forget the incident but the other students were upset and kept asking her about it.

That night J. M. told her parents about Mr. Mamunes' comment. They were both very upset. Her father wanted to go to the school and "punch him out." Her mother is a teacher and could see no reason why a teacher would ever make a comment like that made by Mr. Mamunes. J. M.'s mother eventually got the family to calm down. J. M. did not want her parents to go to the school to discuss the matter because she was afraid of a reaction and told them that she wanted to handle the situation in her own way. Her parents respected her wishes and "let it go" because she wanted them to. That night J. M. also spoke with her friend A. S., whom she has known since kindergarten. A. S. was shocked and upset and asked J. M. what she was going to do about it. At some point, Mr. Mamunes apologized for the comment but he did not do so right after the incident and he did not ask her how she felt about the comment.

J. M. described another incident that occurred after the class had taken a quiz. Most of the students did not do well on the quiz. Mr. Mamunes closed the door to the classroom and told the students to say in unison "school sucks" (P-1, Exhibit A). J. M. recalled that Mr. Mamunes said

everyone had to say, "School sucks." However, other students recalled that Mr. Mamunes did not require the students to say the phrase but rather permitted them to do so. J. M. was amazed because no other teacher had students say anything like that about school and she had no idea why Mr. Mamunes had the class say this phrase. This happened at least one other time but J. M. did not remember much about the second incident.

A third incident in World History class involved a student C. A. J. M. testified that C. A. is overweight and had suffered a lot of ridicule in the past from other students because of her weight. C. A. is a sweet person but keeps to herself. One day in class, Mr. Mamunes told C. A. to get up and close the classroom door because "you need the exercise." J. M. did not remember when this incident occurred. J. M. felt horrible for C. A. and felt it was really wrong for Mr. Mamunes to make such a statement because teachers are supposed to build students up. Others in the class were also shocked by the comment.

J. M. also described an incident that occurred in the third period World History class during the 1997/1998 school years when the class was studying the Middle East. A. K., who is Indian, was a student in the class. A. K.'s father owns a convenience store. One day in class, Mr. Mamunes made a statement to A. K. that "your dad owns a porno shop" and that A. K. did not have to go to college because he could work in the store like his father. J. M. did not recall what was going on in the class at the time but both statements were made in front of the entire class. J. M. is friends with A. K. who gives out a lot of candy in class from his father's store. He is a "tough type of kid" who "blew off" Mr. Mamunes' comment. A. K. frequently "blows off" such things. J. M. did not speak with A. K. about the comments. She does not recall ever hearing A. K. say that he did not need an education, although other students recalled that he did so when joking with his friends.

J. M., her brother and her parents have a tradition of going to church together on Martin Luther King, Jr. Day and learning about him and the civil rights movement. While school was in session on that day during the 1997/1998 school year, J. M. did not attend classes but rather celebrated with her family. The next day in class Mr. Mamunes said to J. M. " you should be proud of Martin Luther King." J. M. thought he said it in a sarcastic tone. There was a discussion in class about King at the time but the tone of the comment by Mr. Mamunes was sarcastic and it upset J. M.

She felt the comment was demeaning because of his tone and in the context of the earlier remark he made to her and to A. K. about "colored people." J. M. did not recall whether the comment was said in front of the class. J. M. never told Mr. Mamunes that she was upset about the comment because she was afraid of more "smart remarks" from him. She did tell her parents and they were upset. J. M. was told by the other students that Mr. Mamunes holds a Martin Luther King Day celebration in his class but she did not know if other teachers also did so.

J. M. described a video that Mr. Mamunes showed during the third period class for two days in March 1998. The title of the video was "Not Without My Daughter" and it told the story of an American woman who married an Iranian man and went to Iran with her husband for a visit. The husband "tricked" his wife because he had no intention of returning to the United States but rather intended that his wife and daughter would remain in Iran with his family. The movie depicted in various ways the manner in which women are treated in a fundamentalist Moslem society and the woman's attempts to leave Iran with her daughter in spite of her husband's and his family's opposition. At various points during the movie, Mr. Mamunes made comments such as "good, she's listening now;" "she should have listened before" and "women should listen to their husbands." When the woman was beaten in the movie, Mr. Mamunes said that she deserved it. Mr. Mamunes did not stop the movie to discuss his comments and J. M. did not understand why he made them. There was a discussion about the movie before and after it was shown but no discussion while it was running. J. M. recalled that Robert McKenna, a student teacher at the time, was in the class when the video was shown, although Mr. McKenna testified that he was not present at that time. After class, J. M. spoke with students A. S., P. W. and R. L., about the movie and Mr. Mamunes' comments. P. W. was very upset and said she could not take it any longer. As with A. S., J. M. has known R. L. since kindergarten. However, she did not meet P. W. until high school. J. M. does not "hang out" with P. W. or R. L. While she may occasionally go out with R. L., she seldom sees P. W. socially.

On March 27, 1998, Frank D. Sullivan, the Vice Principal of Pascack and Doug Burek, the Board's affirmative action officer, interviewed J. M. She did not know at the time that they had already spoken with P. W. Mr. Sullivan told J. M. that P. W. mentioned her name in connection with Mr. Mamunes and he asked her what she had heard in class. Neither Mr. Sullivan nor Mr. Burek asked J. M. any specific questions. J. M. was not afraid to speak with Mr. Sullivan nor Mr.

Burek but was afraid of more "smart remarks" from Mr. Mamunes. Sullivan and Burek asked her to submit a written statement, which she did on March 30, 1998 (P-1, Exhibit A). In the statement, she wrote of the pep rally and "school sucks" incidents but did not write about the other incidents of which she testified (P-1, Exhibit A). She did not include all the incidents in her written statement because she wrote only of those that most affected her. J. M. prepared the written report during her lunch period and did not have time to give it much thought. She wrote it in the same room with A. S. who also gave a written statement but they sat in opposite sides of the room and did not discuss what to put in their statements. R. L. was not in the room when A. S. prepared her statement. When Sullivan and Burek interviewed J. M. and Mr. Sullivan asked her a general question about what she heard in class, J. M. forgot some of the incidents until she went home and thought about them. She does not think she spoke with A. S. about her meeting with Sullivan and Burek and did not discuss the meeting or her statement with other students because Mr. Sullivan told her not to do so. J. M. thinks she told Sullivan and Burek about the video incident during her interview but was not sure if she told them about the "porn shop" comment.

On cross examination, J. M. acknowledged that class participation counted a lot in Mr. Mamunes' class, more so than in other classes. Nine weeks into the school term, J. M. completed a survey for Mr. Mamunes in which she stated she liked the fact that class participation counts a lot, liked the exercises done in class and enjoyed working in groups (R-2). Mr. Mamunes asked the students to tell him what they liked and disliked about class on the back of the survey form. J. M. completed the back part of the survey and did not indicate that she disliked any comments made by Mr. Mamunes (R-2). However, the form was completed before the incidents occurred. Other than on the form, J. M. did not tell Mr. Mamunes about anything she disliked in class. J. M. thought Mr. Mamunes' class was "alright," at least during the first marking period. Between November 1997 and April 1998 she got along with Mr. Mamunes, volunteering for example to write on the blackboard. Towards the end, however, J. M. did not enjoy the class as much but she is not the type to tell a teacher she does not like his class. J. M. did not recall Mr. Mamunes using a "Devil's Advocate" method of teaching. She received either an A or a B from Mr. Mamunes.

N. M., J. M.'s mother, testified on behalf of the Board. I found N. M. a completely credible and convincing witness and, unless a factual dispute is specifically noted below, I adopt her

following testimony as **FINDINGS OF FACT.** N. M. has been an elementary school teacher in Newark for 29 years. She, her husband, her daughter, J. M. and her son, C. M., sit together every night at dinner and talk about the day's events. One night, J. M. told them that Mr. Mamunes had closed the classroom door and said "school sucks." N. M. was shocked because she felt it was an inappropriate remark for a teacher to make or have students repeat. In her opinion, it is not a positive statement about school and teachers should instill positive attitudes in their students about school. As a teacher, N. M. would never make such a statement about school.

On another evening after school, J. M. told her parents that Mr. Mamunes had confused her with J. D. and that when J. M. told him this, he replied he "gets his colored people mixed up." N. M knows J. D. who is very tall, light-skinned and two years older than J. M. J. M. and J. D. look nothing like each other. Both N. M. and her husband were very angry, upset and offended about this comment. The comment was offensive to N. M. as both a mother and a black person. Even if the comment was meant as a joke, it was offensive to her and her family. Her husband was so upset about the derogatory comment that he wanted to "punch out" Mr. Mamunes. N. M. was particularly concerned because it was J. M.'s freshman year in a new school and she wanted her daughter to feel comfortable, and not hurt, in her new school. Even though both parents were very angry, they decided not to raise the matter with school officials for a number of reasons. Firstly, N. M. teaches her children that as blacks there will be negative things said to them in life and that they cannot react to all such comments. Rather they have to restrain themselves, disregard the comment and find strength in their family. In addition, J. M. did not want her parents to raise the issue. N. M. and her husband decided to respect J. M.'s wishes in order to give her some independence and strength. In effect, they "turned the other cheek" and gave Mr. Mamunes the benefit of the doubt. N. M. never told anyone in the district how offended she and her family were because they decided to handle it within the family. N. M. did, however, talk to both her children about the comment and told them to tell their parents if anything derogatory was said to them.

The day after Martin Luther King Jr. Day, J. M. told her parents that Mr. Mamunes told her that she "should be proud of Martin Luther King," or words to that effect. J. M. thought that Mr. Mamunes said this sarcastically and she was upset about the comment. N. M. has taught her children to respect Martin Luther King Jr. and J. M. is very proud of him and her race. She was let down by

Mr. Mamunes' remark. If Mr. Mamunes said "we" should be proud of Martin Luther King instead of "you" should be proud, it would have been a far different statement.

J. M. also told her mother about the video shown in class. While N. M. could not remember exactly what Mr. Mamunes said, she thought he said "good for her" or something like that when a woman was beaten in the movie. N. M. could not recall specifically J. M. mentioning any other comments made by Mr. Mamunes.

N. M. feels that Mr. Mamunes is prejudiced and not just toward blacks. That Mr. Mamunes has conducted a classroom presentation on Martin Luther King Jr. Day for the past fifteen years and coordinated a fund drive for famine relief in Ethiopia does not alter N. M.'s opinion that he is prejudiced because she questions the sincerity of his civil rights activities in light of the comments he made. The totality of what happened in Mr. Mamunes' third period World History class in 1997/1998 leads her to conclude that he is prejudiced. Some of the comments he made to the children were inappropriate and degrading. Teachers make a big impact on children and their job is to raise the children up and not to put them down. N. M. believes that Mr. Mamunes is not sensitive to hurting children and she does not want similar comments to be made to her son or to other children. N. M. acknowledged that J. M. had a positive experience with Mr. Mamunes in the beginning of the school year and that she does not think that J. M. would let problems with Mr. Mamunes affect her academic performance.

When the issues involving Mr. Mamunes first arose, J. M. wanted to come forth and provide information and N. M. initially said no due to a "mother's protectiveness." When J. M.'s name was mentioned to Mr. Sullivan and Mr. Burek, J. M. told her mother that she had to come forth in order "to stop this." N. M. and her husband have always taught their children to tell the truth.

R. L. is a fifteen-year-old student at Pascack and was in Mr. Mamunes' third period World History class during the 1997/1998 school year. I found R. L. to be an entirely credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** At some point during the school year, R. L. was called out of class to Mr. Sullivan's office. Mr. Burek was also there. Mr. Sullivan asked R. L. if anything had happened in Mr.

Mamunes' class and then he asked her to put it in writing. He did not tell R. L. what to write but rather just to write down anything that happened that was strange or different. Mr. Sullivan also told her not to talk with anyone about their meeting or her statement and she did not do so. When she wrote her statement R. L sat at a separate lunch table. She did not discuss her statement with either J. M. or P. W. Nor was R. L. aware at the time that P. W. had complained about Mr. Mamunes. In her written statement, R. L related two incidents involving A. K.; two incidents involving J. M. and one incident involving C. A. (P-1, Exhibit C).

The first incident involving A. K. occurred sometime in November 1997 when Mr. Mamunes told A. K. that his father owns a porn shop and that A. K. did not have to go to college and he did not need an education because he will take over his father's shop (P-1, Exhibit C). This comment was made in front of the entire class. R. L. was surprised by the comment because it is not something a teacher would ordinarily say to a student. She did not know A. K.'s reaction to the comment and she did not speak to him about it. However, R. L. felt the comment insulted A. K. R. L would have been insulted if the comment were made to her because education is very important to her. R. L. agreed that A. K. is outgoing, joked around with other students and brought candy to class but did not recall A. K. ever saying that he did not need an education because he could work at his father's store, although other students testified that he did joke around in this manner. The second incident involving A. K. occurred when Mr. Mamunes told A. K. that the only reason A. K. reads the paper is because he unpacks the newspapers at his father's store (P-1, Exhibit C). This comment was made when the class was talking about current events. R. L. does not know if A. K. felt insulted by the comment because she did not speak to him about it. However, she felt it was insulting and she would have been insulted if the remark had been made to her.

The first incident involving J. M. occurred around the time of the winter pep rally when Mr. Mamunes told J. M. that he "gets his colored people mixed up" (P-1, Exhibit C). R. L. was surprised by this comment and felt that J. M. would be upset by it because she was the only black in the class and may already have felt different. In addition, the comment was made in a different tone. R. L. did not know whether Mr. Mamunes meant the comment as a joke and did not know whether he later apologized. J. M. told R. L. during class that she was upset by the comment. If the comment had been made to R. L. she would have been upset. The second incident involving J. M. occurred when

Mr. Mamunes told J.M. that she should be grateful for Martin Luther King (P-1, Exhibit C) because she would not be where she is today without him. Other students, including J. M., recalled the comment as "you should be proud of Martin Luther King." R. L. initially thought this comment was made to J. M. on Martin Luther King Day when the class was discussing Dr. King and that J. M. was in class on that day. She later testified that the comment was made on or about Martin Luther King Day. J. M. was upset by this comment because it insulted her. R. L. did not know specifically why it upset J. M. but if the comment had been made to her, she would have felt "put down."

The fifth incident related in R. L.'s written statement occurred when Mr. Mamunes told C. A. "to shut the door, you need the exercise" (P-1, Exhibit C). C. A. has a weight problem and is very quiet and shy. R. L. could not believe what Mr. Mamunes said to C. A. Even though R. L. did not discuss the remark with C. A. or any other student, she felt that Mr. Mamunes had insulted and upset C. A. R. L. does not recall when this incident occurred.

While not included in her written statement, R. L. testified as to other incidents. R. L. recalled these incidents when she was asked to prepare another written statement in preparation for this hearing. Before a quiz or a test, Mr. Mamunes would close the classroom door and tell the class to say "school sucks." R. L. recalled that he made all the students say this, although other students recalled that he did not require the statement but rather permitted the students to say "school sucks." R. L. felt this was inappropriate because teachers should encourage students about school. R. L. also testified about the video "Not Without My Daughter." During the movie, Mr. Mamunes made comments to the effect that "she's getting what she deserves." The comments upset R. L. R. L. did not recall whether Mr. Mamunes stopped the movie to discuss his comments. After the movie ended, there was a discussion but R. L. did not remember what was said. R. L. spoke with classmates during the movie about the comments and they were surprised and upset about them, although she does not recall which classmates she spoke with. R. L. did not talk with J. M., A. S. or P. W. about the video after class. She does not remember if she sat with J. M., A. S. and P. W. during the movie nor whether any articles were handed out before the movie or a quiz given after the movie. R. L. did not include these incidents in her written statement because she just did not remember them at the time.

R. L. never discussed any of the incidents with Mr. Mamunes. She is not comfortable discussing things that upset her with her friends and to do so with a teacher would be even harder. R. L. agreed that Mr. Mamunes' teaching style is different from some other teachers. There is less memorization in his class and more "thinking things out." R. L. got on okay with Mr. Mamunes while she was in his class. In the World History class, R. L. sometimes sat next to A. S., J. M. and P. W. but there were no assigned seats and sometimes other students would sit with them.

P. W. is a fifteen year-old student at Pascack and was in Mr. Mamunes' third period World History class during the 1997/1998 school year. P. W. was an entirely credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** In the classroom, R. L., J. M. and A. S. sat one behind each other in a row by the window. P. W. sat in a different row and there were empty desks between her and the other girls. P. W. found Mr. Mamunes' class to be very different from her other classes in the way he would say things to get the students to learn. She could not actually describe his teaching techniques but that she found some of them to be good and some to be bad. Throughout the year, Mr. Mamunes made comments that P. W. "shrugged off." However, the comments he made during the showing of "Not Without My Daughter" upset P. W. very much and she decided to complain to the Vice Principal, Mr. Sullivan.

P. W. related Mr. Mamunes' comments during the video were as follows: "it's the wife's fault;" "the husband did nothing wrong - he's just fighting for his rights" and "she should just listen to her husband." Additionally, when the husband beat his wife, Mr. Mamunes said "she's getting what she deserves." P. W. was very hurt and shocked by his comments. She felt as though what happened to the wife in the movie could happen to her and it made her feel "selfless." There was no discussion about Mr. Mamunes' comments either during or after the movie.

After class, P. W. was walking toward the lunchroom with A. S. and she started crying. A. S. asked her if she wanted to see Mr. Sullivan and P. W. decided to do so. P. W. was crying during the meeting with Sullivan and she told him about the comments Mr. Mamunes made and that it could not have been part of a discussion. P. W. also told Mr. Sullivan about the comment made to J. M. regarding "colored people" because it was a comment she would never forget. She could not recall if

she told Mr. Sullivan about any other comments during this first meeting. At that time, it was mainly the video comments that were on her mind. Mr. Sullivan told P. W. that he would get back to her. P. W.'s closest friends are L. Q. and S. R. and they knew she was doing something about the video comments and may have known that she went to see Mr. Sullivan. P. W. told her parents about her reaction to the comments made during the video and her mother wanted to go to the school but P. W. told her not to.

The following week, P. W. met with Mr. Sullivan and Mr. Burek. They asked her if Mr. Mamunes had made any racial or discriminatory comments but did not ask her any specific questions. At their request, P. W. submitted a written statement (P-1, Exhibit B). She did not discuss her written statement with anyone else. The first incident related in P. W.'s written statement was the comment to C. A. to "close the door please. You need the exercise" (P-1, Exhibit B). P. W. was amazed that Mr. Mamunes would make such a comment to an overweight student. Although P. W. did not discuss the comment with C. A., if P. W. were C. A. she would have been very upset. P. W. found the comment very hurtful and unfair to C. A. and would not have been able to stay in the class if she had been C. A. According to P. W., some students in class laughed at the comment and thought it was funny, although other students did not recall any such reaction. This incident occurred towards the beginning of the school year.

The second incident related in P. W.'s written statement is the "school sucks" incident (P-1, Exhibit B). P. W. recalled that someone in class complained about a quiz and Mr. Mamunes replied that school is not your friend. Then Mr. Mamunes asked someone to close the door. When the door was closed Mr. Mamunes said "everyone say with me 'school sucks.'" When some students did not make the statement, Mr. Mamunes said "come on, you're thinking it - say it with me." At first P. W. thought it was funny; however, she did not say "school sucks" with the class. The incident did not have much effect on P. W., although she felt it was not right for a teacher to make such a comment about school. A teacher should be promoting school, not putting it down. This incident also occurred towards the beginning of the school year.

The third incident related in P. W.'s written statement was the comment by Mr. Mamunes to J. M. that he was "sorry I get my colored people mixed up sometimes" (P-1, Exhibit B). This

occurred around Thanksgiving. P. W. was surprised by this comment. J. M. is her friend and it bothered P. W. that J. M. was being hurt because of her skin color. Mr. Mamunes did not make this comment in a joking manner and even if he had, it would not change P. W.'s negative reaction to the comment. P. W. told J. M. that she would have left the class but J. M. "shrugged it off" and did not want to talk about it. The whole class heard the comment. Mr. Mamunes did not apologize at the time of the comment or at the end of the class. He appeared embarrassed. J. M. did not do or say anything in class about the comment because, according to P. W., she was "holding it in." P. W. discussed the comment with her mother that night. Her mother asked P. W. if she should go to the school but P. W. told her not to because J. M. did not want the incident to go any further.

The fourth incident related in P. W.'s written statement concerned the comments made during the movie and indicated that Mr. Mamunes had said "it's her fault. She shouldn't have believed him. He wasn't doing anything wrong" (P-1, Exhibit B). The fifth incident(s) related in P. W.'s written statement was that Mr. Mamunes "talks to people about their religions and cultures" (P-1, Exhibit B). P. W. explained that she meant the comments Mr. Mamunes made during the video and the comments he made to A.K. The last incident related in P. W.'s written statement was that Mr. Mamunes "told a student that their father owns a 'porn shop'" (P-1, Exhibit B). P. W. explained that she was not in class when this comment was made but that J. M. told her about the comment. If such a statement had been made to P. W., it would make her feel very low and upset.

Although not in her written statement, P. W. testified that Mr. Mamunes also told A.K. that he did not have to go to college because his father's shop "would keep him alive". This was not said in the context of any class discussion and the whole class heard the comment. P. W. was stunned by the remark because it is not true that A. K. does not need a college education and she was surprised that a teacher would make such a remark. P. W. did not include this incident in her written statement because she did not remember it then. Since she wrote her original statement, P. W. has had more time to think about the incidents in class. P. W. recently overhead a conversation between A. K. and another student, P. H. P. H. asked A. K. why he was going to testify at this proceeding and whether Mr. Mamunes had said anything to him. A. K. replied "yes." P. W. told her mother about each statement made by Mr. Mamunes as they occurred.

P. W. had a B average with Mr. Mamunes and received an A from the teacher who took over the class when Mr. Mamunes was suspended. She acknowledged that she received extra help from Mr. Mamunes on a paper. P. W. agreed that Mr. Mamunes had "unique teaching techniques." He would joke with the students and try to be their friend. She felt it was an "okay" approach but to her the fact remains that he was putting down education. P. W. completed a class evaluation during the first semester (R-3). In the evaluation she described the class as "fun" and stated that it was "easy to listen to Mr. Mamunes" (R-3). She also noted that the students were allowed to bring two pages of notes to a test (R-3). However, P. W. noted that she did not like it when Mr. Mamunes told her or the class "to figure it out for yourself' (R-3). For example, Mr. Mamunes told her this when she asked when the next paper was due. P. W. felt that Mr. Mamunes' answers to her questions were not informative enough. P. W. could not recall whether any of the incidents she described occurred before she completed the class evaluation.

P. W.'s mother, R. W., testified on behalf of the Board. R. W. was an entirely credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** R. W. has a doctorate in Biomedical Research in the field of hematology. She speaks with her daughter about school all the time, particularly during dinner and when she calls P. W. from work. During the 1997/1998 school year when P. W. was a freshman, she was often angered about comments made by Mr. Mamunes in the third period World History class, comments which P. W. viewed as racist and sexist. P. W. was particularly upset about comments Mr. Mamunes made during the showing of "Not Without My Daughter." Her daughter told P. W. that Mr. Mamunes said to the class "now she's getting what she deserved" when the wife was beaten by her husband during the movie. P. W. was infuriated about this remark and so was her mother because children should be taught not to condone abuse.

P. W. told her mother that she had gone to see Mr. Sullivan and told him what had occurred in class. She also told her mother that there had been a number of comments throughout the year that were insulting and this comment was the straw that broke the camel's back. R. W. was surprised that P. W. had the courage to go to Mr. Sullivan but proud that she was standing up for herself and speaking out. The authority of teachers in school can be intimidating to students and they fear retaliation if they speak against a teacher. Therefore, R. W. thinks it "terrific" that her daughter

spoke out against something that is wrong. She did not go to speak with Mr. Sullivan at that time because P. W. wanted to handle it on her own and R. W. respected her wishes.

Prior to the video incident, P. W. had told R. W. about the comment Mr. Mamunes made to J. M. This was shortly after Thanksgiving. P. W. told her mother that Mr. Mamunes said to J. M. that he "gets his colored students mixed up." P. W. was incensed. She had never heard the phrase "colored people" but knew it was part of a past vernacular and thought it was derogatory. P. W. was very angry for J. M. and she and some other friends offered to go with her to complain about the comment but J. M. told them that the best way to deal with prejudice is to ignore it. R. W. believes the comment was inappropriate because there is no room for prejudice. She offered to go with P. W. to complain about the comment but P. W. said no because J. M. did not want to take it any further.

R. W. agreed that P. W. thought some of the discussions in Mr. Mamunes' class were interesting. She did not recall calling Mr. Mamunes about one of P. W.'s papers, although she agreed she may have done so. R. W. never discussed any of the comments with Mr. Mamunes. She did not discuss the video comments with Mr. Sullivan before P. W. went to him with the problem but she did speak with Mr. Sullivan after P. W. went to him. He asked her if she would participate in an investigation and talk with the Board's attorney.

A. S. is a fifteen year-old student at Pascack and was in Mr. Mamunes' third period World History class during the 1997/1998 school year. A. S. was an entirely credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** A. S. was an alternate on the dance team last year and a member during the 1998/1999 school year. In March 1998, A. S. was asked to see Mr. Sullivan and Mr. Burek. They asked her if anything was going on in Mr. Mamunes' class that should be discussed. They did not ask her about any specific events but did ask her to tell them anything that came to her mind about racism or discrimination in Mr. Mamunes' class. They did not ask that she tell them everything that might have occurred. Mr. Sullivan subsequently asked A. S. to come to his office a second time to write a statement (P-1, Exhibit D). He did not tell her what to write in the statement. A. S. wrote the statement based on what she remembered at the time. She did not have a lot of time to write it and did not realize the importance of the written statement. Some of the incidents she testified to were

not included in her written statement because she did not realize the importance of other incidents until she spoke with the Board's attorney. A. S. did not know that J. M. had also spoken with Mr. Sullivan, although they both wrote their statements in the same room.

A. S. danced during the pep rally in November 1997. The next class day Mr. Mamunes congratulated her. After he also congratulated J. M. and she told him she was not on the team, he said "I'm sorry, I didn't mean to get my colored people mixed up." The only black student on the dance team is J. D., who is taller and lighter-skinned than J. M. and has shorter hair. They do not look anything alike. A. S. could not understand why Mr. Mamunes would make such a comment because, to her, it is not right to use the term "colored people." After the comment, J. M. turned and looked at A. S. with a look of incomprehension. During lunch that day, J. M. told A. S. that she was upset and did not understand why Mr. Mamunes would make such a comment. That afternoon, A. S.'s mother drove her and J. M. home from school. A. S. told her mother about the comment. J. M. was sitting on the edge of the car seat, tense and into herself. She was not comfortable talking about the comment with A. S.'s mother. About a week later, J. M. told A. S. that she wanted to talk with Mr. Mamunes about the comment. A. S. went with J. M. to see Mr. Mamunes. J. M. told Mr. Mamunes that she was upset about the comment. Mr. Mamunes said "I'm sorry" but nothing else. He did not appear sincere to A. S. and the apology did not make J. M. feel any better. A. S. included this incident in her written statement (P-1, Exhibit D).

A. S. was in class when Mr. Mamunes told J. M. that "you should be proud of Martin Luther King." To A. S., the comment was not said in a good way but rather as though Mr. Mamunes was talking down to J. M. The comment did not need to be said in class and the way Mr. Mamunes said it was wrong. A. S. spoke with J. M. after class about the comment. J. M. was offended and asked "why does he say things like that?" A. S. did not include this incident in her written statement (P-1, Exhibit D).

A. S. described incidents when Mr. Mamunes would have the class say "school sucks." He would ask a student to close the door and then have all the students say "school sucks." If a lot of students did not say the phrase, Mr. Mamunes would have the class repeat it. This occurred more than once although A. S. did not recall it occurring in connection with a quiz as other students

testified to. These incidents made no sense to A. S. She does not think the phrase should be said in school and especially not by a teacher. A. S. spoke with J. M. about these incidents. At first they laughed but when they thought more about it they realized it just did not make sense for a teacher to say that about school. A. S. included this incident in her written statement (P-1, Exhibit D).

During the video "Not Without My Daughter," A. S. testified that Mr. Mamunes said "she's finally getting what she deserved" when the husband was beating his wife. During her testimony, A. S. did not recall any other comments Mr. Mamunes made during the video. However, in her written statement she stated that he made the following comments: "she is finally coming around;" "it was her fault that her husband did this and she should just listen" (P-1, Exhibit D). In her written statement, A. S. did not use the phrase "she's finally getting what she deserved" (P-1, Exhibit D). She was not aware that she had to write down every comment he made. Mr. Mamunes did not stop the video to discuss his comment nor did he discuss the comment afterward. Mr. Mamunes' comment made no sense to A. S. because the wife obviously was not getting what she deserved since no one should be beaten. A. S. spoke with J. M. about the comment and they agreed that Mr. Mamunes was wrong. A. S. included this incident in her written statement (P-1, Exhibit D).

A. S. described comments that Mr. Mamunes made to A. K., such as his father's shop is a porn shop and A. K. does not need to go to college. Mr. Mamunes also told A. K. that the only reason he reads newspapers is because he unpacks them at his father's store. These comments were made in front of the entire class and A. S. was not sure whether they were made in a joking manner. To A. S. the comments made no sense and were wrong. A. K.'s father's store is a convenience store, not a porn shop. At about this time, another student, P. H., used to fool around with A. K. that the store was a porn shop. However, to A. S. it is different when a teacher makes the comment. The college statement surprised A. S. because it was not something you would expect to hear from a teacher. A. S. believes everyone needs to go to college. She did not understand why Mr. Mamunes made these remarks. They did not need to be said and a teacher should not cut students down or insult them. If these comments had been made to A. S. they would have hurt her. She asked A. K. if they bothered him but they just "rolled off his back." A. S. agreed that A. K. frequently brought in candy to class and gave it to his friends. She could not recall when these comments were made to A. K. but thought it may have been during the second marking period. Nor could A. S. recall when in

class the comments were made or what was being discussed at the time. A. S. did not include these comments in her written statement (P-1, Exhibit D).

A. S. described a student in class, C. A., as being overweight and the subject of ridicule because of her weight. A. S. first recalled that Mr. Mamunes told C. A. to turn off the lights because she needed the exercise. After a clarifying question, however, she recalled that Mr. Mamunes told C. A. to close the door because she needed the exercise. A. S. believes Mr. Mamunes made such comments to C. A. more than once. A. S. felt bad for C. A. If a similar comment was made to A. S., she would be upset. In her opinion, comments like that should not be made to teenage girls, especially in light of the eating disorders that can plague teenage girls. A. S. did not include the comment to C. A. in her written statement (P-1, Exhibit D).

A. K. is a sixteen year-old student at Pascack and was in Mr. Mamunes' third period World History class during the 1997/1998 school year. With one exception noted below, A. K. was a credible witness and, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS OF FACT.** In 1997, A. K. had lived in New Jersey for three years after immigrating with his family from India in 1994. During a class discussion one day, Mr. Mamunes said that A. K.'s father owned a porn shop. A. K. thought this was an inappropriate comment for a teacher to make in front of the class but he did not really care since he thought Mr. Mamunes was joking around. A. K. acknowledged that he frequently brings candy into class and jokes around with his friends, some of who have kidded him that his father owns a porn shop. At another time, the class was talking about going to college. Mr. Mamunes said that A. K. did not have to go to college because he would take over his Dad's store. Again, A. K. did not care about the comment; he just "blew it off." A. K. has joked with his friends that he does not have to go to college because he can work at home. Mr. Mamunes made a third comment when the class was discussing a current event and A. K. said something about it. Mr. Mamunes then told the class that A. K. only reads papers because he unpacks them at his father's store. A. K. did not take the comment seriously because he thought Mr. Mamunes was joking with him.

A. K. also described an incident involving C. A. As C. A. went to turn off the lights and close the classroom door, Mr. Mamunes said she needed to work out. A. K. saw C. A.'s face and she

looked mad. Most students were laughing at C. A. Mr. Mamunes should not have made the comment because many people made fun of C. A. because of her weight.

Mr. Sullivan and Mr. Burek interviewed A. K. in March 1998. According to A. K. he told Sullivan and Burek about the above incidents. However, A. K.'s demeanor when he testified in this regard changed and he became defensive. Both Mr. Sullivan and Mr. Burek testified that A. K. denied any comments were made to him when they interviewed him. Based on his change in demeanor and Sullivan and Burek's testimony, A. K. was not credible during this part of his testimony. In November 1998, Mr. Sullivan called A. K. and asked him to write down what happened and A. K. provided a written statement on November 16, 1998 in which he acknowledged the comments made to him by Mr. Mamunes (P-3).

A. K. likes Mr. Mamunes and thought World History was a good class. He received some extra help from Mr. Mamunes on a Watergate project for about five or six minutes but could not remember any other tutoring or extra help nor could he remember whether Mr. Mamunes worked with him on a paper on eastern cultures in the library on April 1, 1998. A. K. did speak with Mr. Mamunes about a problem he had with another student involving a calculator but did not know if Mr. Mamunes spoke to the other student thereafter.

Frank D. Sullivan testified on behalf of the Board. Mr. Sullivan was a credible witness and, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS OF FACT.** Mr. Sullivan has been employed by the Board for thirty years and is the Vice Principal at Pascack. In that capacity he supervises students, scheduling, operational matters and is responsible for disciplinary matters. At Pascack, the students have the right to present a grievance or complaint and the Student Handbook encourages them to bring such grievances to their counselor, the vice principal or the principal.

On March 19, 1998, P. W. came to see Mr. Sullivan during the middle of the day. It was her lunch period and she came directly from Mr. Mamunes' class. P. W. was very upset and told him she had come to file a complaint. She explained she had just come from Mr. Mamunes' class where he had shown a film about an American woman who married an Iranian and that during the course of

the movie, the wife was beaten by the husband. P. W. told Mr. Sullivan that Mr. Mamunes had made various comments during the movie such as "she was getting what she deserved" and "she should do what her husband wants" and "it's her fault." Mr. Sullivan did not ask P. W. if the entire video was shown in one class or if any documents had been handed out in the class. It was apparent from the way P. W. presented herself that she was very upset. She was red in the face and gave a forceful presentation. P. W. told Sullivan that she had spoken with her parents and friends, although she did not say specifically what friends. Her parents urged her to come forward. Mr. Sullivan asked P. W. if she thought Mr. Mamunes was trying to stimulate discussion because the comments conveyed to him by P. W. seemed very harsh. P. W. repeated Mr. Mamunes' comments and added that he was sexist. P. W. then told Mr. Sullivan that Mr. Mamunes had said to J. M. that he was "sorry, I get my colored people mixed up," or words to that effect. P. W. told Mr. Sullivan that J. M. was upset with this comment. P. W. did not tell Mr. Sullivan about any other incidents during this meeting. Mr. Sullivan told P. W. that he would report the matters to the Board's Affirmative Action Officer and get back to her. Mr. Sullivan did not take notes of his initial meeting with P. W. and he could not recall how long this meeting lasted. He did not tell P. W. at the end of this meeting not to talk to anyone about their meeting.

At the time Mr. Sullivan met with P. W., the school's principal, Dr. Barbara Sapienza, was attending a conference. When she returned on March 25, 1998, Mr. Sullivan told her about his meeting with P. W. Dr. Sapienza told him to contact the Board's Affirmative Action Officer, Doug Burek. It was her decision to bring in Mr. Burek. In conducting an affirmative action investigation, the investigators gather information and talk to any one who is mentioned in the course of the investigation. It was Mr. Burek's responsibility to ensure compliance with affirmative action procedures.

Early on March 25, 1998, Mr. Sullivan called Mr. Burek who came to Pascack shortly thereafter. Sullivan asked P. W. to come to his office and he introduced her to Mr. Burek. Mr. Burek asked P. W. to relate what she had told Mr. Sullivan on March 18, 1998. P. W. related the incident with J. M. in which Mr. Mamunes had made the "colored people" remark. P. W. further told them that Mr. Mamunes would close the classroom door and make students yell "school sucks." P. W. did not think this was an appropriate thing for a teacher to do. She also felt that girls were not

treated equally in Mr. Mamunes' class. She was not questioned further on this comment. P. W. related to Sullivan and Burek that Mr. Mamunes told A. K. that he did not have to go to college because he could run a store like his father. According to P. W., other students were also upset and she mentioned the names A. S., R. L. and J. M. Mr. Sullivan did not know whether these students were friends of P. W. and that was not an important consideration to him. During this second meeting, P. W. also gave more description about what the video was about and, to Mr. Sullivan, she was still upset about that incident. Mr. Sullivan did not take any notes during this meeting. However, Mr. Burek did take notes which do not indicate that P. W. was upset (P-4).

Neither Mr. Sullivan nor Mr. Burek questioned or directed P. W. as to her statements. Nor did they cross-examine her. Rather, they were just gathering information and let her tell them what was on her mind. She volunteered the additional incidents beyond what she related during her first meeting with Mr. Sullivan voluntarily and without them asking. Mr. Sullivan again asked P. W. if Mr. Mamunes could have been stimulating discussion. She "bristled" and repeated how upset she and other students were. In addition, P. W. did not indicate that any closure had occurred after the comments were made. If a teacher makes such remarks to stimulate discussion, there should be such closure during which the teacher indicates that he or she made the statements in order to stimulate discussion by the students. Mr. Sullivan concluded that Mr. Mamunes had not conducted any closure regarding the remarks that had upset the students.

Mr. Sullivan viewed the comments by Mr. Mamunes to A. K. as inappropriate and typecasting. Comments such as those made to J. M. and A. K. were out of line and insensitive. Mr. Sullivan also felt the "school sucks" comments to be totally inappropriate, indefensible and a bad example. Mr. Sullivan concluded that Mr. Mamunes closed the door on those occasions because he knew what he was doing was inappropriate. Mr. Sullivan explained that ninth graders are subject to a lot of rebellion and comments like "school sucks" reinforce that rebellion.

Following instructions he received from Principal Sapienza, Mr. Sullivan subsequently asked P. W. to submit a written statement. On March 30, 1998, during her lunch period P. W. wrote her statement (P-1, Exhibit B). In her written statement P. W. included additional incidents than those she had related during her interview with Sullivan and Burek. The additional incidents she described

were that Mr. Mamunes told C. A. to close the door because she needed exercise; that he spoke to students about their religions and cultures and that he told A. K. his father owns a porn shop (P-1, Exhibit B). To Mr. Sullivan the remarks to C. A. and A. K. were embarrassing and held them up to ridicule. There are no circumstances under which such comments would be appropriate in the classroom. Because of the additional incidents in her statement, Mr. Sullivan concluded that P. W. had "repositioned" herself after her interview. By that he meant that it appeared there were comments made throughout the year that upset P. W. and the video comments were the "straw that broke the camel's back." Mr. Sullivan believes that after her interview, P. W. thought some more about the entire time she spent in Mr. Mamunes' classroom and then recalled the other incidents. There were also things missing in her written statement that P. W. had told Sullivan and Burek during her interview. However, Mr. Sullivan does not interpret that as meaning she was withdrawing the assertion that Mr. Mamunes made those comments.

Mr. Sullivan and Mr. Burek interviewed the students mentioned by P. W. on March 27, 1998, i.e. A. S., J. M., R. L. and A. K. All four students were in the same class at the time and Mr. Sullivan had a secretary bring them one at a time to his office. Burek and Sullivan did not interview any other students. As they did with P. W., they did not ask leading questions of any of these students. Rather, Mr. Burek explained that their names were given to them by P. W. and asked if they had any information regarding Mr. Mamunes. Sullivan and Burek were trying to receive information and not tell the students what they wanted to know. If a student did not relate an incident mentioned by another student, Sullivan and Burek did not ask them about it. Nor did they ask, for example, when the comment was made to J. M. All information that Sullivan and Burek received during the interviews was volunteered by the students. As he did with P. W., at the end of each interview with the students, Mr. Sullivan cautioned them not to talk about what was said during the interview with anyone other than their parents because he wanted to avoid rumors and/or retaliation. He also told the students that if they had any other information to get back to him. It is common for students to come back to him with additional information after a meeting.

When interviewed on March 27, 1998, A. S. told Sullivan and Burek about the "colored people" remark to J. M. and the "school sucks" incidents. She also told them about the comment to J. M. that she "should be grateful to Martin Luther King, because of him you have equality." Neither

Sullivan nor Burek asked A. S. what was going on in class at the time. A. S. was upset during the interview about what had been said by Mr. Mamunes. Mr. Sullivan did not recall whether A. S. told them that J. M. was her friend or that J. M. was upset about the comments. At that point, Mr. Sullivan and Mr. Burek had not interviewed J. M. As with P. W., Mr. Sullivan subsequently asked A. S. to submit a written statement. She did so on March 30, 1998 (P-1, Exhibit D). In her written statement, A. S. repeated the "colored people" incident with J. M. and the "school sucks" incidents (P-1, Exhibit D). However, she added the "Not Without My Daughter" incident which she had not discussed during her interview. Neither during her interview nor in her written statement did A. S. refer to any comments made to A. K. by Mr. Mamunes.

On March 27, 1998, Sullivan and Burek interviewed J. M. They told J. M. that her name was mentioned by P. W. and asked her to tell them what she heard. J. M. first related the incident with the dance team and Mr. Mamunes' "sorry, I get my colored people mixed up" comment. She told them that the comment was very upsetting to her and her parents. J. M. also mentioned the "school sucks" incidents, the statement to A. K. that he did not have to go to college and the statement to J. M. that she should be grateful to Martin Luther King. Mr. Sullivan did not recall what J. M.'s reaction was to the Martin Luther King comment. As with the other students, Mr. Sullivan subsequently asked J. M. to submit a written statement which she did on March 30, 1998 (P-1, Exhibit A). J. M.'s written statement on the "colored people" comment was consistent with what P. W. and A. S. had told Sullivan and Burek. However, in her written statement J. M. did not mention the comment to A.K. nor the Martin Luther King comment to herself (P-1, Exhibit A). Her written comment on the "school sucks" incident that "this has happened more than once" (P-1, Exhibit A) was not mentioned in her interview.

When interviewed on March 27, 1998, R. L. referred only to the comment to A. K. that he did not need to go to college. R. L. was fearful, close to tears and very reluctant to talk to Sullivan and Burek. Mr. Sullivan thought she feared retaliation from Mr. Mamunes but there is no reference to such a fear in Mr. Burek's notes (P-4). In her subsequent written statement, R. L. added the comment to A. K. that his father owned a porn shop; the comment to J. M. that he gets his colored people mixed up; the comment to C. A. about her needing exercise; the comment to J. M. regarding Martin Luther King and the comment to A. K. about his reading newspapers only because he

unpacks them at his father's store (P-1, Exhibit C). This additional information was consistent with what Sullivan and Burek had been told by the other students. On April 2, 1998, R. L.'s father called Mr. Sullivan and said he was worried about retaliation and wanted no further discussions with R. L. to occur without his presence.

Mr. Sullivan has had no disciplinary problems with A. S., J. M., P. W. or R. L. All are good students who earn A's and B's. He has received no information that would lead him to believe that any of these students would not tell the truth. Mr. Sullivan found no inconsistencies in the student's statements even though P. W. added incidents in her second interview and she and R. L. added incidents in their written statements. Ninth graders are very nervous about talking to administration and it is not unusual that they add information in subsequent interviews or written statements.

Mr. Sullivan and Mr. Burek also interviewed A. K. on March 27, 1998. A. K. told them he had no information to give them. Mr. Burek asked if he had heard anything said of him during the third period class and A. K. responded no. They did not ask him any further questions. Since A. K. had given them no information, Mr. Burek wrote nothing down in his notes about this interview (P-4). Mr. Sullivan explained that A. K. had received a one-day suspension in February 1998 for taking another student's calculator, throwing it on the floor and breaking it. Mr. Sullivan investigated the matter. He believes A. K. was reluctant to communicate with him because of the discipline. When A. K. first entered Sullivan's office, he looked worried and Mr. Sullivan told him not to worry, that he had done nothing wrong. Mr. Sullivan thought A. K. lied to him during the February investigation and that he lied to him during the March 27, 1998 interview.

Mr. Sullivan acknowledged that he never evaluated Mr. Mamunes nor sat in on his classes. Nor did he contact Mamunes' supervisor and did not know if the supervisor was ever contacted by anyone regarding Mr. Mamunes' evaluations as a teacher. Mr. Sullivan did not review Mr. Mamunes' evaluations nor did he speak with any of his colleagues. After March 27, 1998, Mr. Sullivan's involvement in the matter was very limited.

Douglass Burek testified on behalf of the Board. Mr. Burek was a credible witness and, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS**

OF FACT. Mr. Burek is the Health and Safety Officer for the Board. In this capacity he has many duties including those of Affirmative Action (AA) Officer for the district's two high schools. He has served as the AA Officer for six years. Mr. Burek attended a one-day training program run by the State for AA Officers and has attended several AA workshops. The district has AA guidelines that Mr. Burek tries to follow. His duties as AA Officer include assisting the Superintendent in implementing AA policies; developing and implementing a three-year plan which sets objectives and a time frame within which to achieve those objectives and investigating complaints of harassment or discrimination.

R-4 is a policy on sexual harassment which sets forth procedures for investigating such complaints. Attached to the policy is a checklist for Affirmative Action Investigation which indicates that a written statement should be obtained from the grievant before the grievant is interviewed (R-4, page 4). Although Mr. Burek initially testified that he tries to follow this checklist in all his AA investigations, he later testified that since R-4 is a policy on sexual harassment and this was not a sexual harassment matter, he did not follow the checklist. In any event, he testified it is difficult sometimes when a student comes in and is very upset. It would be inappropriate to tell the student that he could not talk with her or him until a complaint is put in writing. The checklist also indicates that a log should be maintained which Mr. Burek identified as P-4. The sixth step on the checklist is to interview the witnesses. Mr. Burek explained that when he interviews witnesses at this stage he tries to represent both the person being accused and the complainant. It is not intended to be a witch-hunt but an initial investigation during which his job is to gather information. At this point, Mr. Burek interviews only those whose names are mentioned in interviews. In the past, he has had parents threaten court action when he interviewed students who did not come forward on their own. Accordingly, he does not interview anyone not mentioned in other interviews unless directed to do so by the Superintendent. In cases involving complaints by students against a teacher, one of the first things that Mr. Burek considers is whether it involves grades. That was not an issue in this case, however.

On March 25, 1998, Mr. Burek received a call from Mr. Sullivan regarding a possible affirmative action matter at Pascack. He immediately went to the high school and met with Sullivan. Mr. Sullivan briefed Burek on his meeting with P. W. who had complained to Sullivan about

comments made by Mr. Mamunes during a video and a comment to J. M. about "colored people." Sullivan and Burek interviewed P. W. that day. Mr. Burek made "topic notations" of the interview (P-4). This was an initial interview designed just to listen and get the facts.

At the beginning of the interview, Mr. Sullivan introduced Mr. Burek as the district AA Officer. Burek explained his position to P. W. and that he is appointed by the Board and that every district has an AA Officer. He then asked P. W. to repeat her complaints to him. At this point in an investigation, the AA Officer is neutral. He does not ask questions but rather just listens. Burek's notes indicate that P. W. told him of the "colored people" remark to J. M.; the "school sucks" incidents; the comment to A. K. about working in his father's store; the comments made during the video and P. W.'s perception that girls are not treated equally in Mr. Mamunes' class (P-4). P-4, which Mr. Burek described as a log, is paraphrased from the notes he took during interviews. The log is not a verbatim record of the interviews Mr. Burek had with students and he may have left words out that were spoken during the interviews.

Mr. Burek did not ask P. W. how many times the "school sucks" incident occurred nor did he ask any questions about her perception of unequal treatment of girls. Although his log does not reflect precise quotes from P. W. of what Mr. Mamunes said during the video, Mr. Burek recalled that P. W. told him of the following comments: "she deserved it;" "it was her fault;" and "she should listen to him." At the end of the interview, Mr. Burek thanked P. W. and told her that he hoped she spoke with her parents about the interview but that she should not speak with anyone else. He also told her that if she thought of any further information she should come back to him and Mr. Sullivan. These instructions are standard procedures which Mr. Burek followed in all the interviews he conducted regarding Mr. Mamunes.

Mr. Burek then briefed Principal Sapienza on the interview and she indicated that she would advise the Superintendent, Dr. Willett. During her interview, P. W. indicated that J. M., A. S. and R. L. were upset about the comments and that comments had been made to A. K. Accordingly, Mr. Sullivan and Mr. Burek decided to interview those students. Mr. Burek did not know how many other students were in the third period World History class. The following day, March 26, 1998, there was a fire at Pascack and they were unable to conduct the interviews. On March 27, 1998,

Sullivan and Burek interviewed the four students. The same introductory and concluding comments that were given to P. W. were given to the other four students. As with P. W., Burek asked no specific or leading questions of the students.

A. S. was the first interviewee. Her statements regarding the "colored people" comment made to J. M. and the "school sucks" comments were very consistent with P. W.'s statements. While Mr. Burek indicated in his testimony that Mr. Mamunes made the class stand and say "school sucks," there is no mention of standing in his log (P-4). Although P. W. did not mention the Martin Luther King comment during her interview, A. S. did refer to it during her interview and indicated that Mr. Mamunes told J. M. that if not for Martin Luther King she would not have equality. Those precise words are not found in Mr. Burek's log because they were paraphrased but he distinctly remembers A. S. using those words because it "stuck in his mind" (P-4). A. S. further stated that J. M. was upset that day (P-4). However, A. S. did not include the Martin Luther King comment in her subsequent written statement (P-1, Exhibit D).

Sullivan and Burek then interviewed J. M. and asked her to tell them about anything that had upset her in class. She first related the mixing up colored people comment which was consistent with the statements of P. W. and A. S. J. M. was very upset by this comment. In addition, J. M. spoke of the "school sucks" incident, which was consistent with the statements of P. W. and A. S. and the comment to A. K. about working in his father's store which was consistent with the statement of P. W. J. M. also spoke of the Martin Luther King comment and indicated she was very upset about it.

R. L. was interviewed next. She was very upset and Mr. Burek recognized that it was an intimidating situation for a student. R. L. made one statement about the comment made to A. K. about his father's store. After that comment, Burek was afraid that R. L. would completely break down and therefore he did not push R. L. for any further statements.

A. K. was the last interviewee on March 27, 1998. He had nothing to share with Sullivan and Burek. Mr. Burek did specifically ask A. K. if he heard a comment by Mr. Mamunes that A. K. did

not have to go to college because he could work in his father's store. A. K. denied hearing the comment.

Mr. Burek has no notes of the above interviews other than his log and he did not know whether Mr. Sullivan took notes. After the interviews, Mr. Burek updated Dr. Sapienza. On March 27, 1998, Mr. Mamunes called Mr. Burek at home and asked him what the accusations were and who was filing the complaint. Mr. Burek would not reveal the names of the students to Mr. Mamunes and referred him to the Board's attorneys. On March 30, 1998, Mr. Sullivan called Mr. Burek and told him that they were getting written statements from all the interviewed students with the exception of A. K. Mr. Burek called P. W.'s mother and left a message notifying her that P. W. had filed a complaint and that it was being investigated. P. W.'s mother advised Mr. Burek that P. W. had kept her apprised of what was happening.

On April 1, 1998, Mr. Burek saw the written statements. Some of the information in the written statements was new to him, such as the comment to C..A. about needing exercise and the porn shop comment to A. K. Although it was not his understanding at the end of the interviews that additional information would be provided, it is not unusual for students to be intimidated and forget things during interviews with administration and then remember them later. In this regard, the written statements were a vehicle for the students to bring additional information to the attention of the administration. Mr. Burek felt the students were telling the truth even though there were differences between their oral and written statements. He attributed the inconsistencies to a variety of factors including the students' age, intimidation by the presence of Mr. Sullivan and himself and their emotions. Mr. Burek did not know whether the four students who submitted written complaints were friends or formed a "clic" or sat together in class. On April 20 and 21, 1998, Mr. Burek contacted the parents of the four students that submitted written statements.

On April 8, 1999, Mr. Burek, along with Dr. Sapienza, interviewed a random sample of three or four students from each of Mr. Mamunes's other classes. Mr. Burek was told to interview these students although he could not recall by whom. He did not interview any other students in Mamunes' third period class because he was not told to do so. Mr. Burek recorded the names of the students interviewed but did not note them or their comments in his log. None of these other

students had anything derogatory to say about Mr. Mamunes. The interviews with these students followed a different procedure which Mr. Burek and Dr. Sapienza felt was fair. Dr. Sapienza introduced Mr. Burek as the AA Officer and he told the students he was conducting a survey of the school environment to see if people in various relationships were being treated with respect. The questions asked the students concerned their relationship with other students, with teachers and with coaches. Mr. Burek did not identify Mr. Mamunes in any of his questions nor ask about specific types of comments that may have been made because he did not want to conduct a "witch hunt" or lead the students. Mr. Burek taught for twenty years and recognizes that there are situations when students have an ax to grind and that is why he did not use Mr. Mamunes' name in these interviews. Mr. Burek did not interview Mr. Mamunes. At this point he was under the direction of the Superintendent's office and he was not directed to interview Mr. Mamunes.

After reviewing the written statements, Dr. Sapienza ascertained who the "obese girl" was and directed Mr. Sullivan and Mr. Burek to interview her and to reinterview A. K. On April 9, 1998, they reinterviewed A. K. Mr. Burek asked A. K. if Mr. Mamunes made a comment that his father owned a porn shop. A. K. replied that he had not heard such a comment. Mr. Burek took no notes of the two interviews he had with A. K. He was not sure why he did not but it could have inadvertently resulted from his "hectic effort" to update Dr. Sapienza on the status of the investigation. A. K. was not asked to submit a written statement because, according to Burek, he was not a complainant and written statements are obtained only from complainants.

Burek and Sullivan also interviewed C. A. on April 9, 1998. The same introductory and concluding remarks as with the other students were given to C. A. Mr. Burek stated to C. A. that her name had been mentioned as someone who was upset by a comment directed at her or others in class. C. A. did not respond. Mr. Burek then asked her specifically if Mr. Mamunes ever said to her that she needed exercise. C. A. replied that she had not heard such a comment. There was no entry for C. A. in Mr. Burek's log because he found the interview not significant enough to add to the log.

On April 24, 1998, a meeting was held with Superintendent Willet, Dr. Sapienza, Mr. Burek, Mr. Mamunes and his attorney and the Board's attorney present. The written statements of the students were reviewed with Mr. Mamunes and he was given an opportunity to respond to each of

the statements. After this meeting, Willett, Burek and Sapienza reviewed what had occurred with the Board's attorney.

Barbara Sapienza, Ph. D., testified on behalf of the Board. Dr. Sapienza was a credible witness and, unless a factual dispute is specifically noted below, I adopt her following testimony as **FINDINGS OF FACT.** Dr. Sapienza is the principal of Pascack and she has been in that position for seven years. In addition to serving as principal, Dr. Sapienza has served in various other capacities, including teacher, administrative assistant and director of student activities, for a total of thirty-two years at Pascack. Prior to becoming an administrator, Dr. Sapienza taught business courses. Dr. Sapienza enjoys working with the students during classroom observations, in the hall and through student activities and feels she has a cordial and open relationship with them and that students do not hesitate to come to her if they need help.

In March 1998, Dr. Sapienza was away at a conference. Upon returning, she met with Mr. Sullivan on March 25, 1998. Mr. Sullivan told her about a student who had come to him with a complaint regarding comments Mr. Mamunes made during a video and a comment made to J. M. about "getting his colored people mixed up." Dr. Sapienza told Mr. Sullivan to call Mr. Burek, without first consulting Superintendent Willett. She did not take notes of her meeting with Mr. Sullivan. After Mr. Sullivan and Mr. Burek met with P. W. on March 25, 1998, either Sullivan or Burek gave Sapienza an oral summary of the interview. Later that afternoon, Dr. Sapienza had a meeting with Superintendent Willett during which she updated him on the interview with P. W. and advised him that an investigation would be undertaken. At this point she had seen nothing in writing and she did not know who would be interviewed on March 27, 1998. Dr. Sapienza did not tell Mr. Sullivan nor Mr. Burek not to take a statement from Mr. Mamunes.

Following the interviews of A. S., R. L., J. M. and A. K. on March 27, either Mr. Burek or Mr. Sullivan gave Dr. Sapienza a summary of the interviews. In this summary, Dr. Sapienza was told that Mr. Mamunes made inappropriate comments in class and the comments he made during the film were described as was the "colored people" comment. Dr. Sapienza was also told that R. L. was very timid during the interview and was nervous and upset and that A.K. had no substantial information in that he either did not hear any comments or he did not remember. Dr. Sapienza

advised Superintendent Willett of the summary; told him that the statements were of a discriminatory nature and gave him a few examples. Dr. Sapienza was directed by the superintendent to obtain written statements from the students. Accordingly, she directed Mr. Sullivan to obtain written statements early the following week. Dr. Sapienza did not know why Mr. Sullivan did not ask A. K. for a written statement.

Mr. Sullivan gave Dr. Sapienza the written statements contained in P-1 and she faxed them to Superintendent Willett on March 30, 1998. She called before the fax to alert the superintendent that they were coming and to ask for a "protocol" on further investigation. Superintendent Willett directed Dr. Sapienza to work with Mr. Burek and randomly select students to be interviewed from other classes taught by Mr. Mamunes that year. Superintendent Willett's instructions to Dr. Sapienza were that they were not to re-interview any student interviewed by Burek and Sullivan nor were they to interview any additional students from the third period class. Dr. Sapienza did not know exactly how many other students were in the third-period class but she thought the total class size was around seventeen. Dr. Sapienza described these instructions to her as a "protocol" for the investigation, although the protocol was not put in writing. The protocol did not include asking Mr. Mamunes or his supervisor any questions or looking at Mr. Mamunes' evaluations.

Dr. Sapienza spoke to Mr. Mamunes on March 27, 1998 and told him of the allegations regarding his conduct. A meeting between the two was scheduled for March 30, 1998 at 3:30 p.m. but she had to cancel the meeting because Dr. Sapienza could not reach the Board's attorney. On April 1, 1998, Dr. Sapienza gave Mr. Mamunes a letter signed by Superintendent Willett suspending Mr. Mamunes immediately based on "allegations [which] include comments made to students that were of a racial or ethnic nature" (P-5). Superintendent Willett further advised Mr. Mamunes that "[s]ince these allegations involve students currently enrolled in your classes, I believe that it would be in everyone's interest for you to be away from the school setting until this matter is resolved" (P-5). This suspension was with pay. No information was given to Mr. Mamunes' students regarding his absence from school. A long-term substitute teacher was brought in and was told to focus on the course content and make no statement regarding Mr. Mamunes because it was a personnel matter and that they did not know how long he would be out of school.

On April 8, 1998, Dr. Sapienza and Mr. Burek interviewed the randomly selected students from Mr. Mamunes' other classes. The interviews were conducted in the same manner for each student. Dr. Sapienza introduced Mr. Burek and explained what he did as AA Officer. The students were asked about relationships within the school, both in and out of classroom. No specific questions were asked about Mr. Mamunes or about any specific incident. Dr. Sapienza found that no significant information was derived from this process and no similar statements as those brought forward by the four third-period students were mentioned. This did not surprise Dr. Sapienza because fourteen year-old students are very reticent and afraid of retribution. She found out that students were having a good time and that people were nice to each other. The interviews were "neutral and undirected" because she did not want to make the interviews a topic of conversation among students. Dr. Sapienza took no notes of these interviews and did not know if Mr. Burek did so. They did not interview any other students in the third period class because Superintendent Willett directed them not to do so.

In addition to the randomly selected students, Dr. Sapienza decided to interview the student described in the written statements as an obese student to whom Mr. Mamunes reportedly said "close the door, you need the exercise." Dr. Sapienza was familiar with almost all the freshman and, after looking at the class list, was able to identify the reference as being to C. A., although her name had not been given to Dr. Sapienza by Mr. Sullivan or Mr. Burek. Dr. Sapienza also decided to re-interview A. K. because the reference to "porn shop" was new information contained in R. L.'s written statement which was given after A. K. was initially interviewed by Sullivan and Burek.

Dr. Sapienza and Mr. Burek interviewed A. K. and C. A. on April 9, 1998. Dr. Sapienza introduced Mr. Burek to A. K. Mr. Burek explained his position and told A.K. that they were trying to get an idea of the school environment and the relationship between students and teachers in and out of class; that they were doing a follow-up and that a statement had been made regarding A. K. Mr. Burek then told A. K. that a statement had been made that Mr. Mamunes referred to his father's store as a porn shop. A. K. paused for a long time and then said that he had not heard such a comment from Mr. Mamunes. Dr. Sapienza and Mr. Burek did not push A. K. about the comment. While Mr. Burek took notes during the interview, Dr. Sapienza did not. She did not put in writing

that A. K. said he never heard the comment nor did she believe her subsequent oral summary to Superintendent Willett included a comment that A. K. said he never heard the porn shop statement.

In Dr. Sapienza's opinion and based on her knowledge of children, when they pause and "retreat" through body language, they are usually withholding something and she felt A. K. was withholding and reticent. His statement had been bothering Dr. Sapienza because he had been called in to talk with Mr. Sullivan, by whom A. K. had just been disciplined, and Mr. Burek, a stranger. She saw it as a stressful situation for A. K. Accordingly, a short time before this hearing, Dr. Sapienza decided to talk with A. K. alone. She said to A. K. that there were statements given and that one of them was a reference to a porn shop and asked him if that comment had been made. He replied yes. Dr. Sapienza asked A. K. if there were any other comments made and again he replied in the affirmative. When she asked him what comments, he described the comments set forth in his written statement of November 16, 1998 (P-3). A. K. told Dr. Sapienza that the comments were made to the entire class. Dr. Sapienza did not ask A. K. why he had not told Mr. Sullivan and Mr. Burek about the comments but when she asked him about the porn shop comment, he responded with a reference to the disciplinary action Mr. Sullivan had imposed on him and she interpreted this to mean that A. K. was afraid to talk with Sullivan. When she spoke alone with A. K., he seemed very open and relaxed and Dr. Sapienza felt that A. K. trusted her and was truthful with her. A. K. did not tell Dr. Sapienza that he himself had referred to his father's store as a porn shop or that he did not have to go to college because he could work in his dad's store. Dr. Sapienza asked A. K. to put the comments made by Mr. Mamunes in writing and he did so before he left her office.

Mr. Burek started the interview with C. A. by introducing himself and explaining what the AA officer does. He then told her that they were checking on the environment and relationships in the school and doing a random sampling of students. He asked for C. A.'s observations and not whether she had any complaints. He and Dr. Sapienza were trying to keep the interview "neutral." Mr. Burek asked C. A. whether she had noticed any kind of relationship between teachers and students in the hallway or in class. C. A. gave no response other than a statement to the effect that everything's fine. Mr. Burek then asked her specifically if there had been a comment made in her class about her getting up to close the door because she needed exercise. C. A. cheeks got a little flushed, she looked down and her body "retreated." She responded that she did not remember

hearing such a comment in class. Neither Mr. Burek nor Dr. Sapienza pushed C. A. any further. Dr. Sapienza did not take any notes of the interview. Dr. Sapienza did not draw any conclusions at this point because she was doing a gathering of facts and not making a judgment. Afterwards, after talking to other students and reviewing the written statements, Dr. Sapienza understood why C. A. did not respond. She had been taunted in middle school about her weight and she was being interviewed by her principal and a stranger. Dr. Sapienza thought C. A. was reticent and that it was unlikely that C. A. would respond in a manner that would indicate she is overweight because it is a very sensitive issue for her. Dr. Sapienza thereafter advised Superintendent Willett of the A. K. and C. A. interviews and gave him summaries of them.

Dr. Sapienza acknowledged that C. A. had completed a class evaluation nine weeks into the World History class in which she indicated she was more confident in class; that she looked forward to class; that it's a good time and that if she has problems she can go to Mr. Mamunes who will help her understand it completely (R-5). However, Dr. Sapienza did not know whether the comment reportedly made to C. A. was made before or after she completed the evaluation.

On April 20 and 21, 1998, Dr. Sapienza met with the parents of P. W., R. L., A. S. and J. M. to update them on the investigation and to make them comfortable with her. She also met with Robert McKenna, a student teacher with Mr. Mamunes, who was at Pascack for the third marking period, from the end of January to the beginning of April, 1998. Mr. McKenna worked closely with Mr. Mamunes and had taken over all his classes except for the third period. Although he did not take over the third period class, Mr. McKenna was occasionally in the class. Mr. McKenna did not hear any of the comments mentioned by the four students and did not observe anything out of the ordinary in Mr. Mamunes' classes. According to Dr. Sapienza, Mr. McKenna provided "no significant information" regarding the investigation, by which she meant that he provided no information that would substantiate improper comments to students by Mr. Mamunes. In Dr. Sapienza's opinion, Mr. Mamunes would not say anything improper in front of another adult and thus she was not surprised that Mr. McKenna had not heard anything our of the ordinary. Mr. Burek was present at the McKenna interview and took notes but Dr. Sapienza did not know if he wrote down Mr. McKenna's statement. Dr. Sapienza did not recall any other students from Mr. Mamunes' classes coming to talk to her about him in April 1998.

Pursuant to an April 22, 1998, letter to Mr. Mamunes from Superintendent Willett (P-6), a meeting was held in Willett's office on April 24, 1998. Present at the meeting were Superintendent Willett, Dr. Sapienza, Mr. Burek, Mr. Mamunes and counsel for Mr. Mamunes and the Board. Mr. Mamunes was given the opportunity to respond to each charge and he presented a great deal of written documentation and responded at length to each of incidents raised by the students.

Thereafter, Superintendent Willett instructed Dr. Sapienza not to talk to any of the four students who gave statements. She did not do so until October 1998 when she and the Board's attorney met with P. W., A. S. and J. M. and their mothers to talk to them about this hearing and to get their cooperation. The Board attorney did the interviewing. Each student was interviewed with their mother in the room. During these interviews, Dr. Sapienza was told that C. A. had been taunted in middle school which she had not known before. Dr. Sapienza called C. A.'s parents who did not want to put C. A. through anymore. Dr. Sapienza asked her mother to talk to C. A. She told the mother that it was important to get information from C. A. because the matter was going to hearing. She explained about the comment reportedly made to C. A. and that she was aware that C. A. had been taunted in middle school. C. A.'s parents told her they would speak to C. A. and get back to Dr. Sapienza. Subsequently, C. A.'s mother called Dr. Sapienza and told her that C. A. had gotten very angry, asked "why are you asking me again" and did not want to talk about it. Dr. Sapienza interpreted this reaction as C. A.'s embarrassment about her weight.

Dr. Sapienza also spoke with R. L.'s father. Both R. L. and her father were upset and her father did not want to pursue the matter because his daughter was upset and he was concerned about retaliation. Accordingly, R. L. was served with a subpoena to testify during this proceeding. A few days before this hearing commenced, Dr. Sapienza spoke with A. K.'s father and asked him to meet with her to discuss A. K.'s written statement (P-3). Both A. K. and his father met with Dr. Sapienza. A. K.'s father was very upset when he saw his son's written statement. He explained to Dr. Sapienza that he brought his family to the United States so his children would receive a good education and he wanted his son to go to college and be successful. A. K.'s father supported A. K. testifying and A. K. agreed to do so. However, the next day A. K. was very nervous and said " I can't, I can't." He did not say why he could not. Accordingly, A. K. was also served a subpoena to testify.

The four students who signed written statements, P. W., A. S., J. M. and R. L., received an A or B grade from Mr. Mamunes and no disciplinary actions had ever been taken against them. Nor were the four students in the same classes throughout the day. Ninth graders take their Humanities courses (History and English) back to back so the students can get to know each other a little better by virtue of being together for two periods, but relationships with students in their other classes may be "momentary." Dr. Sapienza did not inquire whether the four students were friends or best friends or hung out in a group because it was not important to her. In her experience, friendships between ninth graders can change rapidly. Additionally, it did not concern her that J. M. and A. S. have been best friends for a long time because there were corroborating statements from the other two students. Dr. Sapienza did not know whether the four students sat next to each other in class or whether they confided in each other and such facts were not of significance to her.

In Dr. Sapienza's opinion the comment to J. M. regarding "colored people" (Charge 1) constitutes unbecoming conduct because it says that all African-Americans are the same with no distinguishing characteristics. Furthermore, the term "colored people" is unacceptable for anyone to use. The phrase "colored people" brings back racially inflammatory language of the 1950's and 1960's and is completely inappropriate for a teacher to say to students. A discriminatory statement such as this one is unacceptable in school because it interferes with a student's self-image and feelings and adversely affects a safe learning environment. Dr. Sapienza was not sure if "people of color" is an appropriate phrase; thought "black" is okay but that African-American is the most appropriate. Sapienza agreed that the "colored people" remark was made four months before the complaint was filed in March 1998.

The comment to J. M. regarding Martin Luther King (Charge 2) constitutes unbecoming conduct in Dr. Sapienza's opinion because it singled out J. M. for being absent on the holiday and was made to the entire class. Dr. Sapienza also believed that the comment was viewed as racially insensitive by other students which created a learning block for them, as shown by R. L. mentioning the comment in her written statement and A. S., in addition to J. M., mentioning it during their interviews (P-1, P-4). In Dr. Sapienza's opinion, it is very unusual for ninth graders in a new school to bring anything forward about a teacher and for J. M., A. S. and R. L. to mention this comment, it

must have been a powerful experience for them. Dr. Sapienza agreed that the Martin Luther King comment was made two months before the first complaint was made. She did not know whether there was any discussion by J. M. of how she celebrated the holiday or if there was any other class discussion regarding Martin Luther King. When she met with J. M. and her mother in October 1998, Dr. Sapienza observed the pain that J. M. suffered as a result of the comment and it "came to life for her."

Dr. Sapienza's views the comments made to A. K. about his father's store and college (Charge 3) as unbecoming conduct because comments about a student before the entire class are totally inappropriate. A teacher should not describe a legitimate business such as owned by A. K.'s father in a derogatory manner. Moreover, going to college should be made a priority by teachers who should not limit students but reinforce the concept that education is the basis for the rest of their lives. These statements were detrimental to A. K.'s self-esteem and educational progress. Dr. Sapienza also viewed the statements as racial because A. K. was the only student of Indian descent in the class and the only student to whom such comments were made. That A.K. was apparently not upset by the comments did not alter Dr. Sapienza's opinion because A. K. is a very strong and proud person whose lets such comments "roll off him." The adverse reaction of P. W., A. S., R. L. and J. M., who either included the comments in their written statements or referred to them during their interviews (P-1, P-4), shows that the comments were inappropriate. As to the comments made to A. K. about college, his lack of need for an education and reading newspapers only because he unpacks them (Charge 4), Dr. Sapienza believes these comments constitute unbecoming conduct because they are derogatory of a student's abilities and a student's education and work ethnic. Moreover, a student's family should not be joked about by teachers who should focus on positives in promoting a student's education.

Dr. Sapienza is of the opinion that the comment to C. A. about needing exercise (Charge 5) constitutes unbecoming conduct because a teacher and a school must be sensitive to and supportive of each student's unique sensitivities and needs. C. A. was very sensitive to her appearance and it was very unacceptable to call attention to her. Such a comment should not be made to any student because what a teacher says has a big impact on students. While a teacher can make jokes in class, he or she must be careful. Any type of ridicule directed toward a student by a teacher, whether racial

or directed at a physical characteristic like weight, is unacceptable under any condition, even if the teacher is joking.

The comments made during the "Not Without My Daughter" video (Charge 6) constitute unbecoming conduct in Dr. Sapienza's opinion because Mr. Mamunes failed to give the students a clear direction of his plan and gave no summary to put his comments in context and as a result the comments were viewed as sexist. Sexist comments are unacceptable because teachers need to teach students respect for one another. This was a long movie shown over several days. Mr. Mamunes made the comments on the last day and did not stop the video to discuss his comments. If Mr. Mamunes made the comments to elicit a response from the students, in other words to play Devil's Advocate, he should have framed the discussion so students knew where he was going. Instead he gave the students no indication that he was not serious and their perception was that he meant the comments. Other than the four students who complained about the comments, Dr. Sapienza did not know how many other students in the class may have been upset by the comments. Dr. Sapienza did not know if Mr. McKenna was asked about the video.

The "school sucks" incidents (Charge 7) constitute unbecoming conduct in Dr. Sapienza's opinion because school rules prohibit the use of profanity and cursing by students and students are subject to discipline if heard using profanity or cursing. A teacher must be a role model for students and any cursing by teachers in school is unacceptable. That Mr. Mamunes closed the classroom door on these occasions indicates that he knew it was inappropriate. It is also very disturbing to Dr. Sapienza that Mr. Mamunes would make the class repeat the phrase if one student did not say the phrase. To her, this is a violation of the students' trust and an inappropriate tool to use in any situation since there are many other ways to deal with student stress. Even if some students were not bothered by these incidents, Dr. Sapienza would still find them inappropriate.

Dr. Sapienza did a "drop in" on Mr. Mamunes' course during the middle of March 1998 pursuant to a superintendent requirement that a principal observe one-third of the teaching staff on a rotating basis. She was not sure of the exact date but it was before the complaints were brought to her attention. Mr. Mamunes was reviewing a quiz with the class when Dr. Sapienza observed. Dr. Sapienza usually takes notes of her observations and thought she maintained her notes of Mr.

Mamunes' class. She never discussed the observation with Mr. Mamunes because shortly after that, the complaints were brought to her attention.

Edwin Bialkin was the Supervisor of Instruction for the 1997/1998 school year and in this capacity he was Mr. Mamunes' supervisor. He made the assignment of Mr. Mamunes to the ninth grade World History class because he thought it was the best course for Mr. Mamunes to teach and Dr. Sapienza approved the assignment. When Mr. Mamunes was suspended, Dr. Sapienza told Mr. Bialkin that Mr. Mamunes would not be in for a while and that they would need a substitute teacher. She did not tell Mr. Bialkin the factual basis for the tenure charges. When Dr. Sapienza originally became principal she reviewed each teacher's personnel file. In addition, since becoming principal, she has signed off on all the teacher evaluations and classroom observations. Mr. Mamunes received very good evaluations for twenty years and there was nothing in twenty years of evaluations that resembled the tenure charges against him in this proceeding. Dr. Sapienza described classroom observations as a "slice of time" while annual evaluations are summaries of professional growth and development. In her opinion, the types of comments which led to the filing of tenure charges against Mr. Mamunes would not have been made while a teacher was being observed by a supervisor.

There is a positive annual evaluation for Mr. Mamunes prepared by Mr. Bialkin sometime during the spring of 1998 which has not been signed and may have been prepared after Mr. Mamunes was suspended (R-6). Dr. Sapienza had not seen this evaluation before the hearing. Her practice is to write something on every evaluation, sign and date it and forward it to Superintendent Willett. The spring 1998 evaluation does not contain any comment from Dr. Sapienza or her signature (R-6). Nor is it signed by Mr. Bialkin or Mr. Mamunes as is required and the date that a conference was held to discuss the evaluation is blank (R-6). Mr. Bialkin was not aware of the nature of the charges against Mr. Mamunes and thus the spring 1998 evaluation would not reflect the investigation conducted by Dr. Sapienza, Mr. Sullivan and Mr. Burek. On Mr. Mamunes' evaluations for years 1994 through 1997, Dr. Sapienza wrote the following comments: "Mr. Mamunes has a great deal to contribute to the ninth grade interdisciplinary program. This will be an important area of contribution for this professional" (R-11); "the principal supports Mr. Mamunes' efforts in the integration of technology into the curriculum" (R-12; "Mr. Mamunes is commended for his active participation in collegial activities. The sharing of ideas and strategies enhances the

curriculum. Thank you" (R-13) and "Mr. Mamunes is a seasoned professional who willingly shares his expertise with his department members. His dedication and interest in our students is appreciated" (R-14).

In Mr. Mamunes' file there are also positive classroom observations as exemplified by one completed in December 1994 and one completed on December 5, 1997 (R-7, R-9). Dr. Sapienza reviews classroom observations and initializes each page indicating that she has read it, although not necessarily that she agrees with what is written. Mr. Mamunes was nominated for the Governor's Teacher Recognition Program in April 1995 and was sent a letter acknowledging that nomination by the Teacher Recognition Committee (R-8). Dr. Sapienza explained that the Teacher Recognition Committee asked parents, students and teachers for recommendations for this program and a form was distributed during homeroom. Any teacher who received at least one nomination was sent the letter by the Committee. The principal does not serve on the Committee. Mr. Mamunes has never actually received the award. During the investigation of the complaint against Mr. Mamunes, Dr. Sapienza did not refer to any of these positive evaluations or classroom observations.

Richard E. Willett, Ph. D., testified on behalf of the Board. He has been the Pascack Valley Regional High School District superintendent since 1993. Prior to holding this position, he was a Department of Science Coordinator between 1978 and 1980; vice principal of Westfield High School between 1980 and 1983; principal of Columbia High School between 1983 and 1989 and superintendent of the Kinnelon school district between 1989 and 1993. Dr. Willett was a credible witness and, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS OF FACT.** Dr. Willett's duties as superintendent include overall responsibility for leadership, management and operation of schools, teachers and students. There are two high schools in the District, Pascack Hills and Pascack Valley. In fulfilling his responsibilities as superintendent, Dr. Willett speaks with each principal every day and tries to see each one every day.

On March 25, 1998, as Dr. Willett was about to convene a meeting with Dr. Sapienza and the principal of Pascack Hills, Dr. Sapienza told him that Mr. Sullivan had advised her about a student who came to him to complain about sexist comments that Mr. Mamunes made during a video. She also told him about a comment wherein Mr. Mamunes referred to a student as a colored person. Dr.

Willett directed Dr. Sapienza to have Sullivan and Burek interview P. W. and all other students who were identified by P. W. Since there was a fire in the school on March 26, the interviews were not held until March 27, 1998. Dr. Sapienza told Dr. Willett the results of the interviews that day by telephone. To Dr. Willett there appeared to be a pattern of more than one student complaining about similar types of comments. Accordingly, he asked Dr. Sapienza to get statements in writing from the four students interviewed on March 27, 1998. He also asked that A. K. be interviewed. This was a matter of great concern to Dr. Willett.

The written statements of P. W., J. M., A. S. and R. L. contained in P-1 were faxed to Dr. Willett on March 30, 1998. There was a new reference to a comment made to an obese student. Accordingly, Dr. Willett asked Dr. Sapienza to find out who this student was. Since students would not ordinarily submit such written statements, it indicated to Dr. Willett that the four students felt very strongly about the issue and were serious about their concerns over the comments. During this time period Dr. Willett spoke with Dr. Sapienza several times a day. He asked her if all the students were in the same class, whether they were from the same middle school, whether they had disciplinary records and what their grades were. There was nothing in their histories to indicate that there would be any other reason for them to come forward other than their being upset about the comments. Since Dr. Willett had no reason to doubt the veracity of the four students, he felt he did not need any further corroboration. He told Dr. Sapienza to tell the students not to discuss their statements with other students. There were 16 or 17 students in the third period class. However, Dr. Willett directed Dr. Sapienza not to interview any other students in the third period class, other than the four who had come forward, because to remove them one by one from class and ask specific questions would highlight Mr. Mamunes, which Dr. Willett did not want to do. Dr. Willett acknowledged, however, that the other students could have been brought to the office for an interview from other classes and thus would not necessarily highlight Mr. Mamunes.

Instead of interviewing any other students in the third period class, Dr. Willett told Dr. Sapienza to do a "superficial" review of Mr. Mamunes' classes without identifying Mr. Mamunes. He felt it was important to look at other classes to see if there was a larger problem. At the same time, he did not want Mr. Mamunes to be identified and he felt the students may be reluctant to be interviewed in the first place. Accordingly, he asked Dr. Sapienza not to ask the other students

specific questions. Dr. Willett described this random sampling of other students as "not deep enough or pointed enough to identify anything specific." Sixteen students from other classes of Mr. Mamunes were interviewed and none reported any complaints against Mamunes. Dr. Willett also spoke to Dr. Sapienza about Mr. Mamunes' prior history. He was told there was no indication of similar comments in the past. As a result, he saw no need to speak with Mr. Mamunes' supervisors. In addition, Dr. Willett likes to keep those "in the know" in such circumstances to a minimum. Dr. Willett was also advised that Mr. McKenna had been interviewed and reported that he did not observe anything inappropriate during Mr. Mamunes' classes. After the tenure charges were filed against Mr. Mamunes, Mr. McKenna also reported that Mr. Mamunes told him before the video class that he was going to interject comments. The procedure or protocol for the investigation was developed over time by Dr. Willett as he had never been involved in anything like this before. During this period he spoke on a daily basis with Dr. Sapienza and also with Mr. Burek on occasion.

The meeting which had been scheduled with Mr. Mamunes for March 30, 1998 was not held because he was demanding the names of the students and the administration had not yet spoken with the students' parents or told the students what would happen with their statements. This concerned Dr. Willett and he therefore directed Dr. Sapienza to meet with the students and their parents so they would be aware of what was occurring. After speaking with the Board's attorney, the March 30 meeting was cancelled. Because the students seemed so serious about their concerns and Dr. Sapienza, Mr. Sullivan and Mr. Burek fully believed the four students, Dr. Willett felt that it would be better if Mr. Mamunes was not in the classroom while the investigation was on going. He did not want the students to have to face Mr. Mamunes in class after he was given their names. In addition, Dr. Willett wanted to protect Mr. Mamunes against potential claims of retaliation if he had to take disciplinary action against a student, although he acknowledged there was nothing in Mr. Mamunes' history that showed any retaliation against students. Accordingly, Dr. Willett spoke with the Board president and then suspended Mr. Mamunes with pay effective April 1, 1998 (P-5).

During the meeting on April 24, 1998, which was attended by Drs. Willett and Sapienza, Mr. Burek, Mr. Mamunes, the attorneys and a union representative, Mr. Mamunes was asked to respond to each of the written statements. He was given an opportunity to respond to each statement. In addition, Mr. Mamunes submitted copies of his evaluations as well as documents concerning his

work in the civil rights area. Mr. Mamunes also submitted An Open Letter to the Board in which he described his efforts in class, curriculum development, publications and civil rights work (R-16). After Mr. Mamunes and his attorney left the meeting, Dr. Willett discussed Mr. Mamunes' presentation with his staff and the Board attorney. They met for two to three hours, trying to reconcile what Mr. Mamunes said with the students' statements. After follow-up discussions with Dr. Sapienza and the Board attorney, Dr. Willett concluded that Mr. Mamunes had not refuted the allegations against him. While he denied making the comment to C. A., Mr. Mamunes acknowledged that he made similar comments to students at times. He did not deny making the rest of the comments but rather had explanations for them. To Dr. Willett the explanations were unacceptable for a teacher of 27 years experience, especially one with the civil rights background that Mr. Mamunes claimed to have. Dr. Willett did not recall discussing Mr. Mamunes with Mr. Sullivan but thought that he may have had a short discussion with Mr. Burek.

Dr. Willett was aware that not all the students mentioned the same incidents and that there were some differences between the students' oral and written statements. These differences did not surprise him because he had directed Dr. Sapienza not to ask direct questions of the students but rather to keep the questions open-ended since he did not want it to seem as though the administrators had put words in the students' mouths. If all the statements had been the same, Dr. Willett would have been concerned that the students were talking with each other about their statements. The fact that there were differences made the statements more credible to Dr. Willett. Dr. Willett also thought it insignificant that some of the students may not have been in class during a particular incident.

Dr. Willett was initially concerned that A. K. did not confirm the statements made to him by Mr. Mamunes. However, Dr. Sapienza explained to him that she thought A. K. was "sloughing it off" and not being forthright because he did not want to be involved. Moreover, Dr. Willett had no reason to doubt the students' statements regarding A. K. because they were not particular friends of his. Accordingly, Dr. Willett gave more weight to the students' written statements than to A. K.'s oral denial. Similarly, he gave more weight to the written statements regarding C. A. than her oral denial because Dr. Sapienza and Mr. Burek had concluded that C. A. just did not want to

acknowledge any statement regarding her weight. In Dr. Willett's opinion, Dr. Sapienza is "superb" in reading students.

Dr. Willett agreed that Mr. Mamunes' past classroom observations and evaluations were satisfactory and did not reveal that similar comments had been made in the past by Mr. Mamunes. However, Dr. Willett believes it would be unlikely that such behavior would be demonstrated with another adult present in the classroom. A tenured teacher, who teaches over 900 classes a year, is observed once a year on a pre-announced date. Accordingly, it is very difficult to discover such behavior. It almost always comes to light through a student. In his twenty plus years as a supervisor, it has been Dr. Willett's experience that students are reluctant to bring complaints against a teacher. Students tend to feel an allegiance to a teacher rather than to an anonymous administrator. In addition, potential retaliation is a major concern of parents and students. Even though Dr. Willett has never seen a teacher retaliate against a student for raising a complaint, he knows that parents and students have this concern. At Pascack, 90% of the students are college-bound and trying for top colleges. They are very academically driven with a high commitment to success in school and they do not want to do anything that will jeopardize their grades. Dr. Willett believes it took a lot of nerve for the four students and their parents to come forward in this matter. He does not think the fact that A. S. and J. M. are best friends explains their coming forward or gives them a motive to do so because neither had an ax to grind with Mr. Mamunes as a result of a poor grade or disciplinary actions. Moreover, the complaining students were not just the two best friends but also included students in a different social circle than J. M. and A. S.

Dr. Willett views the "colored people" comment made to J. M. (Charge 1) as a racist comment which has no place in the lexicon of a teacher. In his opinion, referring to African-Americans as "colored people" is using a pejorative term comparable to referring to them as "niggers." In addition, the comment indicates that Mr. Mamunes does not recognize African-Americans as individuals, which is also pejorative. The document submitted by Mr. Mamunes during the April 24, 1998 meeting shows he had a high level of knowledge of racial relations and civil rights in the United States. This intensified Dr. Willett's belief that the comment was racist and pejorative because of all people, Mr. Mamunes should be sensitive to comments of this nature. This

comment was derogatory and demeaning to the student and even if Mamunes said it in jest, it was totally inappropriate.

The comment made to J. M. regarding Martin Luther King (Charge 2) begins to show a pattern of conduct in Dr. Willett's opinion since this was the second racist comment made to J. M. during the school year. J. M. should not have been singled out as the only student in class who should be grateful for Dr. King. Dr. Willett agreed that J. M. did not state that the comment was made sarcastically in her written statement. Nevertheless, the comment was inappropriate regardless of whether Mr. Mamunes said it in a sarcastic manner as J. M. felt he did. Mr. Mamunes was the professional in the class and he should have been sensitive to the fact that his comment upset J. M. Moreover, other students recognized the comment as inappropriate and thus the comment had an impact beyond just the one student. The district is striving to teach tolerance and understanding in school and this type of comment is not the way to accomplish that goal. Again, Mr. Mamunes' involvement in civil rights activities heightened Dr. Willett's concerns because Mr. Mamunes certainly should be aware of the importance of Dr. King to all students and making this type of comment to the whole class teaches the wrong thing.

Similarly, the comments made to A. K. (Charge 3) have no role in the classroom. Speaking pejoratively about a student's parent in simply unacceptable. This comment put A. K. and his father in a negative light and had no business being said in a classroom. In Dr. Willett's opinion, the "porn shop" comment was also racist because many Indians own convenience stores in the area. The comment to A. K. that he did not need to go to college degrades A. K. and degrades education in the eyes of other students. Neither comment would improve A. K.'s self-esteem and teachers just should not say such things to the entire class. Dr. Willett acknowledged that A. K. admitted that his friends made similar comments to him in class. However, that A. K.'s overt reaction was to ignore Mr. Mamunes comment and "slough it off," makes no difference to Dr. Willett. Other students felt the comments were out of line and this can lead to a loss of respect for the teacher that will adversely affect the students' learning.

The additional comments made to A.K. regarding his lack of a need for an education and when he reads the newspaper (Charge 4) are not acceptable because Mr. Mamunes was in effect

telling the class that education is not important. A teacher should never make such a comment. The comments also suggest that A. K. is lazy and/or stupid, which is not a statement designed to enhance A. K.'s learning. Dr. Willett was of the opinion that the comment regarding the newspaper was said to A. K. after he had given a correct answer on a current events issue. Comments such as those made to A. K. have the potential to lessen respect for Mr. Mamunes and all teachers.

In Dr. Willett's opinion the comment to C. A. that she should get up and close the door because she needs the exercise showed insensitivity and was cruel even if said as a joke. Such a comment from a teacher can be devastating to a student, although Dr. Willett acknowledged that he was not aware of C. A.'s response or whether she felt degraded because she denied hearing the remark. It was not an appropriate comment even if Mr. Mamunes said it in jest about his own physical problems in closing the door. Such comments could lead other students to wonder who would be made fun of next. To Dr. Willett, C. A.'s failure to pursue a complaint against Mr. Mamunes indicates that the comment was extremely hurtful to her. The fact that other students brought it up shows that they viewed the comment as wrong and they lost respect for Mr. Mamunes as a result of the comment. Dr. Willett agreed that prior to Mr. Mamunes' suspension, the remark to C. A. was reported only in P. W.'s and R. L.'s written statements and not during their interviews or in the other two written statements and that P. W. was not in class when the remark was made. Nevertheless, Dr. Willett gave credence to R. L.'s written statement based on what he saw as a pattern of insensitive comments to students.

Dr. Willett views the comments made during the "Not Without My Daughter" video as outright sexist comments that demean the equality that should exist between men and women and tells the students that it is acceptable to abuse women. If Mr. Mamunes intended to make the comments as a "Devil's Advocate," he should have set it up for the students. For example, he could have closed out the class by telling the students that he had played Devil's Advocate during the film and that they should think about it after class. If there were insufficient time to do this at the end of that class it should have been done at the beginning of the next class. The video was shown on March 19, 1998. There were at least seven class days between March 19 and April 1, 1998, when Mr. Mamunes was suspended (P-9, P-10). Mr. Mamunes did not give the appropriate closure to his comments during any of these classes. Giving a test at a later time does not constitute closure since

closure needs to be accomplished at the time of the comments or shortly thereafter. As a result, the students were left to reach their own conclusions and, given the lack of closure, the conclusion they reached was appropriate and logical. As an experienced educator, Mr. Mamunes should have known how to use his comments in a proper educational strategy. Dr. Willett agreed that part of Charge 6 is a criticism of Mr. Mamunes' teaching style. He also agreed that since some Iranian men have the view of women depicted in the video, that it was an appropriate lesson to teach in class but that it was not taught appropriately.

Regarding the "school sucks" comment, Dr. Willett testified that if a student made this comment, he or she would be disciplined and perhaps suspended. A comment such as this upsets the sanctity of the classroom and for a teacher to require students to say a vulgarity is just wrong. Dr. Willett could not think of any circumstance under which it would be appropriate to have students say "school sucks" in order to relieve tension. Mr. Mamunes' closing of the classroom door indicates that he knew what he was having the students do was inappropriate and wrong. Dr. Willett acknowledged that Mr. Burek never told him the students reported that Mr. Mamunes had them stand up when they yelled "school sucks."

In 1995, Mr. Mamunes received a letter from the district's Governor's Teacher Recognition Committee advising him that he had been nominated for recognition based on his "distinguished achievement as a teacher" (R-8). Dr. Willett explained that teachers, secretaries, students, parents and members of the community may nominate a teacher to the Committee. The letter sent to Mr. Mamunes is a form letter that is issued every year by the Committee. Approximately one-third of the faculty in the district have received similar letters, although Dr. Willett did not know how many teachers received a similar letter in 1995. Neither the letter nor Mr. Mamunes' past observations and evaluations had an impact on Dr. Willett's consideration of these tenure charges because comments such as those made by Mr. Mamunes during the 1997/1998 school year would not have been made while he was being observed by his supervisor.

Edwin Bialkin testified on behalf of Mr. Mamunes. Mr. Bialkin was a credible witness and, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS OF FACT.** Mr. Bialkin recently retired from Pascack Valley where he had taught for 35 years. For

twenty years, Mr. Bialkin served as the Supervisor of Instruction for the Social Studies and Foreign Languages departments. Part of his responsibilities in that position was to observe and evaluate the teachers in the two departments. Mr. Bialkin observed Mr. Mamunes in class for four to five years when they both worked at Pascack Hills High School. Mr. Bialkin then was transferred to Pascack Valley High School. After several years as a volunteer "swing" teacher at both schools, Mr. Mamunes starting teaching full-time at Pascack Valley and Mr. Bialkin observed him in class from 1992 through 1998 (R-9, R-20 to R-24).

Mr. Bialkin's observations of Mr. Mamunes were uniformly positive with comments such as: " students were given every opportunity to speak and make comment; those speaking while others were doing so were asked to stop and listen to their peers" (R-19,1/12/89); "this lesson was excellent from beginning to end; without question the objectives as indicated above were met" (R-20, 12/21/92); "student presentations and answers were greeted with continual evaluative comments; those answers which needed amplification or correction were handled in a positive way" (R-21, 2/3/94); "Mr. Mamunes showed excellent patience when dealing with student questions or contributions; sufficient time was consistently given in allowing students to think of and suggest answers to questions requiring more than knowledge or comprehension" (R-22, 12/13/94); "good review of the previous lesson as to the reasons for good discussion in this class as well as other classes or out of school situations" (R-23, 12/11/95); "without question the lesson was successful and the activity well chosen to fulfill the objectives as stated above, fine job" (R-24, 12/13/96); and "students showed absolutely no anxiety in the classroom when answering teacher questions or posing questions to the teacher; further, positive humor consistently present throughout the lesson" (R-9, 12/5/97). The back of the observation forms lists the areas to be reviewed with a breakdown of matters to be considered. According to Mr. Bialkin, Mr. Mamunes satisfied the criteria consistently. As required for every teacher, the observation forms also contain suggestions for improvement. Mr. Bialkin agreed that the observations are limited to what he observed in class on that particular day and do not reflect anything that may have happened in other classes.

It is Mr. Bialkin's opinion that Mr. Mamunes enjoyed the respect of his students. If he had not, Mr. Bialkin would have observed students fooling around or not paying attention. Students have ways of letting observers know if they do not like or respect a teacher.

Mr. Bialkin also prepared annual evaluations of Mr. Mamunes which were positive. In 1989 Mr. Bialkin evaluated Mr. Mamunes as, *inter alia,* "a teacher with strong instructional skills interested in the creation and pursuit of those strategies and techniques emphasizing student centered as compared with teacher centered lessons" and that "[h]is sense of professionalism is strong" (R-18). During his testimony, Mr. Bialkin explained that the strategies and techniques used by Mr. Mamunes forced students to read, research and discuss issues and not just accept something because it is printed in a textbook. He characterized Mr. Mamunes as a "student centered" teacher and one who was never satisfied with old ways. Between 1989 and 1993, Mr. Mamunes was evaluated by another supervisor. In 1994, Mr. Bialkin was again Mamunes' supervisor and found that "[w]ithin the area of innovative instruction, Mr. Mamunes continues to exhibit strong skills" and that "[h]e is well prepared for class and his style of classroom management creates an atmosphere in which students can succeed" (R-14). Mr. Bialkin made similar comments in evaluations he prepared of Mr. Mamunes in 1995, 1996 and 1997 (R-13, R-12, R-11).

As is required with all evaluations, Mr. Bialkin also identified areas for improvement, including expanding the use of new computer programs in the classroom and developing activities for use in the class (R-11 to R-14, R-18). In preparing annual evaluations, Mr. Bialkin considered the totality of job performance, including what a teacher does with students out of class; for example, meeting with them to provide help, and the teacher's role in the department. While he utilizes the observation report he does not rely entirely on it in preparing evaluations. In addition, Mr. Bialkin informally visits classes on occasions for ten minutes or so.

Mr. Bialkin acknowledged the evaluations he prepared on Mr. Mamunes used identical language year after year in some areas, particularly in the area of Areas of Strength and Pupil Progress even though different classroom observations occurred each year and the observations contained different recommendations than included in the evaluations. He explained that he reached conclusions regarding Mr. Mamunes' strengths in March 1988 and that his strengths remained the same through to 1998 even though classroom observations were different. In one classroom observation in 1991, Mr. Bialkin observed that Mr. Mamunes appeared impatient at one point during the class (P-15). This was not noted in his annual evaluation for that school year (P-14). Mr. Bialkin

explained that the observation had no effect on Mr. Mamunes' annual evaluation because there is no relationship between the two. Moreover, the recommendations contained in the observations are for a specific lesson rather than annual recommendations. As to the Pupil Progress portion, Mr. Bialkin explained that Mr. Mamunes used techniques to gauge pupil progress which did not change over the years.

Mr. Bialkin prepared an evaluation of Mr. Mamunes for the 1997/1998 school year in which he wrote that, *inter alia,* Mr. Mamunes "continues to exhibit strong skills . . . [w]ith emphasis on student centered activities . . ." (R-6). Mr. Bialkin met with Mr. Mamunes to discuss the evaluation and then forwarded it to Principal Sapienza at the end of February or early March 1998. He never received the evaluation back from the Principal and therefore it was never signed (R-17). The evaluation period is based on the preceding twelve months, i.e. from the end of February to beginning of March. Therefore, anything that may have occurred in class after February 1998 was not included in R-6. Moreover, since Mr. Bialkin was not aware of any incidents, the evaluation does not reflect any of the incidents included in the tenure charges.

In the district's World History classes they utilize multi-cultural teaching in which Asian, Middle Eastern and African cultures are studied to find commonality with our western culture. Mr. Bialkin described Mr. Mamunes as "terrific" in locating data that demonstrates commonality.

Mr. Bialkin described the difference between inductive and deductive teaching. Inductive teaching forces students to think; it is student-directed and requires a lot of student interaction. Deductive teaching is teacher-directed; it consists mainly of lectures in which students are given information and requires less student interaction. Mr. Mamunes is an inductive teacher and some students who have never had an inductive teacher before the ninth grade have difficulty adjusting. Mr. Bialkin also described the levels of higher order thinking based on Bloom's Taxonomy as follows: (1) knowledge; (2) comprehension; (3) analysis; (4) synthesis and (5) evaluation. The last three reflect the highest orders of thinking. Evaluation is very difficult, especially for ninth grade students but Mr. Bialkin did observe analysis and synthesis occurring in Mr. Mamunes' classes, which is the goal of inductive teaching.

Mr. Mamunes uses a teaching technique known as "devil's advocate" which Mr. Bialkin described as a very common technique. When this technique is used, it is very important to explore the students' reactions. A teacher must explain what he or she said or did and why so that students do not leave the lesson thinking the teacher really believes what he or she said. Another common teaching technique used by Mr. Mamunes is paraphrasing what a student has said.

Mr. Bialkin defined "closure" as bringing an activity to an end and a debriefing of students concerning what they have learned from the class. When a teacher raises a controversial subject, he or she can expect a lot of student debate and discussion. To ensure that students achieve the educational benefit from the exercise, a teacher needs to ascertain what the students learned from the lesson. Mr. Bialkin acknowledged that a student can react the wrong way to teacher comments but that should be evident during the lesson. When closure is done depends on the teacher's objective. Closure can be done at the end of a class period or after several class periods. Although Mr. Bialkin does not utilize the technique, a teacher could also accomplish closure through the use of a quiz.

Mr. Bialkin received some calls from parents who were concerned that their children were not doing well in Mr. Mamunes' class. In such instances, Mr. Bialkin advised the parents to speak with Mr. Mamunes and that if they still had questions, he would schedule a meeting. In the past, Mr. Bialkin did meet with some parents along with Mr. Mamunes. While Mr. Bialkin could not say whether all the parents left these meetings happy, they did have a better understanding of Mr. Mamunes' teaching style. Mr. Bialkin never received a complaint of racism or sexism about Mr. Mamunes and was not involved in these tenure charges. Rather, Dr. Sapienza called Mr. Bialkin into her office and advised him that he would need to find a long-term substitute for Mr. Mamunes. When Mr. Bialkin asked why, Dr. Sapienza told him she could not say. Mr. Bialkin had no knowledge of the complaints which was unusual since he had always been involved in other cases regarding teachers he supervised. It was very frustrating for Mr. Bialkin because he had no idea what was happening.

While Mr. Bialkin had no knowledge of the nature of the complaints against Mr. Mamunes, he agreed that it is not appropriate to utter racist or sexist comments in the classroom and if such comments were made, it would be a concern to him. Mr. Bialkin was aware that the district has an

Affirmative Action office headed by Mr. Burek and that Burek would investigate allegations of racist and/or sexist issues. He agreed that if a student came to him with a racist or sexist complaint he would refer the student to the AA office. While it was reasonable for the district to refer the allegations to Mr. Burek, it would also have been reasonable for the administration to discuss the matter with him. Although Mr. Bialkin has never been involved in investigating AA issues, the principal has called him to her office to discuss teacher comments that could be defined as sexist, although none of such comments could be defined as racist.

Mr. Bialkin agreed that it is not proper to use profanities in class and he would refrain from using vulgarities also, although he is aware that younger teachers may use vulgarities. "School sucks" has come into the jargon of students and is a term used everyday by them. Mr. Bialkin does not see the comment as appropriate in school but is aware that some younger teachers use the phrase. As to a teacher denigrating education, Mr. Bialkin felt there would have to be "one hell of a good reason" for a teacher to do so. It would never be appropriate for a teacher to make fun of a student's infirmities or to refer to a student's weight in class. It may sometimes be appropriate to make fun of a student in connection with something the student said in response to a lesson but only if the student is then built up again. Mr. Bialkin also felt that it may be appropriate to single out a student based on race to ask a question but only in the context of a lesson. If there is a close relationship between students and the teacher, it could be appropriate to fool around with a student in front of the class but only if the student and the rest of the class understand what is happening. Mr. Bialkin could not imagine making any joke of racial nature. Students look to their teachers to provide leadership and guidance on issues such as race and it is a very big responsibility.

While Mr. Bialkin and Mr. Mamunes attended college together, Mr. Bialkin denied any current or recent personal relationship with Mr. Mamunes. For a few years after college, they and their wives went out together socially but eventually lost contact with each other when Mr. Bialkin left Pascack Valley to become a department head at Pascack Hills. When they were colleagues teaching in the district they would have a drink together occasionally but not with their wives and this was before Mr. Bialkin became Mr. Mamunes' supervisor. Mr. Bialkin's prior friendship with Mr. Mamunes did not affect his evaluation of Mr. Mamunes.

Louis Cassella testified on behalf of Mr. Mamunes. While I found some of Mr. Cassella's testimony concerning appropriate conduct and/or comments for a teacher to be troubling, his demeanor was forthright and he was an otherwise credible witness. Accordingly, unless a factual dispute is specifically noted below, I adopt his following testimony as **FINDINGS OF FACT.** Mr. Cassella taught History in the Pascack Valley regional school district for 27 years before he retired in 1986. In 1964, Mr. Cassella became a supervisor and he eventually hired Mr. Mamunes for the 1971-1972 school year. He supervised Mr. Mamunes for fifteen years thereafter. In the course of supervising Mr. Mamunes, Mr. Cassella observed him teaching three to four times a year, for two to three consecutive days on each observation. Between 1972 and 1986, Mr. Cassella completed numerous classroom observations and annual evaluations on Mr. Mamunes (R-46 to R-62). Over the years, Mr. Cassella found that Mr. Mamunes' courses were always well planned, that the students were attentive and that Mr. Mamunes had a good teacher/student rapport with his students.

In 1974, Mr. Cassella observed a class in which Mr. Mamunes was teaching some controversial environmental issues (R-47). During this class, Mr. Mamunes was effective in teaching students to utilize critical thinking. His inductive, rather than deductive, teaching style was somewhat radical at that time. Mr. Mamunes frequently used the Devil's Advocate technique and Mr. Cassella learned that technique from him. In a 1978 observation, Mr. Cassella noted that Mr. Mamunes related well to the class in a "manner that reflects a good sense of humor, an awareness of the students' abilities and . . . a good sense of their feelings" (R-48). He also noted in this observation that Mr. Mamunes' summary technique was excellent (R-48). Mr. Cassella agreed that a "summary technique" is important when a teacher plays Devil's Advocate because a controversial topic should not be left in an open-ended way. A teacher sometimes does not know if students have reached a conclusion or what that conclusion may be and it is important for the students to critically assess the Devil's Advocate statement or at least to question their own positions. While a summary technique is an important goal, a teacher sometimes cannot reach it due to time constraints. However, bringing a topic to closure while it is fresh in the students' mind is beneficial.

In 1979, Mr. Cassella observed a class in which role-playing was being used in the context of an illegal immigrant family (R-50). Mr. Cassella found the students to be enthused and involved and that there was a great deal of effective teaching going on (R-50). Mr. Mamunes frequently used this

role-playing technique. In Mr. Cassella's 1980 annual evaluation of Mr. Mamunes he noted Mr. Mamunes' role in developing the Minorities in America mini course (R-51), which role Mr. Cassella described as "key" in his testimony. Mr. Cassella also noted Mr. Mamunes' use of the Devil's Advocate technique which can be risky but provokes students to think and concluded that Mr. Mamunes's "ability to deal with controversial issues and situations [is] excellent" (R-51). While Mr. Cassella was not comfortable with all of Mr. Mamunes' teaching techniques, this was not because the techniques were wrong but rather that they were not compatible with Mr. Cassellas' personality.

In a March 13, 1981 observation, Mr. Cassella noted that Mr. Mamunes' responses to students were always constructive, that he frequently complimented students, and that he found good qualities in student contributions whenever he pointed out a weak element (R-52). Mr. Cassella noted that whenever he observed Mr. Mamunes, he would provide constructive comments to his students. Mr. Cassella would accept "putting a student down" if it was done while a teacher was playing the Devil's Advocate. If this is done, however, the teacher should bring the issue to closure by the end of the class to make the student feel better because a student's self esteem in class is important. Mr. Cassella has pulled over an Indian student, for example, and asked "where is your dot" but the student knew he was kidding because of what Mr. Cassella taught in class. Mr. Cassella has also used "trigger" words such as nigger and whop in class but only in the context of a lesson. Such words should not be directed at a student unless done in the context of the lesson. When Mr. Cassella taught immigration, he played the role of an immigration officer and made comments such as "hey, you wonk, get over here." While he acknowledged that such statements pose a risk, Mr. Cassella does not think he ever offended a student and he never received any complaints. If he found out that a student was offended by a remark, he would never repeat it to the student.

On one occasion, Mr. Cassella made a comment to a female student he was coaching on the lacrosse team to "get some of that off" and he does not think she was offended. He recognizes, however, that some people are sensitive about their weight but believes it is impossible to know the sensitivities of every student. Mr. Cassella could envision himself saying to a student "close the door, you need the exercise more than I do" but he would not have said it in reference to the student's weight. After he made such a comment, it may have occurred to him that the comment could be taken the wrong way and that he should not have said it.

When Mr. Cassella evaluated Mr. Mamunes in 1981, he praised his ability in motivating students to think critically and to contribute to class discussions (R-53). In a 1983 observation, Mr. Cassella noted a teaching manner that stimulated student effort in a relaxed classroom in which students were at ease in expressing their feelings and concerns (R-55). When he evaluated Mr. Mamunes in 1983, Mr. Cassella noted Mr. Mamunes' efforts in "teaching the teachers" and his continuing ability to motivate students to question and think critically (R-56).

In January, 1984, Mr. Cassella observed Mr. Mamunes teaching the Minorities mini course (R-57). He described this as involving a controversial issue because many students have prejudices which both Mr. Mamunes and Mr. Cassella felt should be brought into the classroom. Mr. Mamunes would accomplish this by inviting representatives from the American Indian Movement (AIM) and the Civil Rights movement to speak to his classes. In his 1984 annual evaluation of Mr. Mamunes, Mr. Cassella found Mr. Mamunes to be an excellent teacher and a model of professionalism (R-58). In a November 1984 classroom evaluation, again of the Minorities unit in the United States History course, Mr. Cassella commended Mr. Mamunes for his "sensitivity to the need for positive teacher feedback in the classroom setting" (R-59). Mr. Cassella explained that Mr. Mamunes was a master of dealing with situations where, for example, a student would use the word "nigger."

In his 1985 annual evaluation of Mr. Mamunes, Mr. Cassella stated that Mr. Mamunes "continues to display the qualities of teaching that exemplify the highest expectations of a professional teacher" (R-60). In fact, this was Mr. Cassella's experience with Mr. Mamunes throughout the years he supervised him. According to Mr. Cassella, Mr. Mamunes is a "master teacher" who holds a passion for teaching. Mr. Cassella's 1986 annual evaluation of Mr. Mamunes found his performance as a classroom teacher to be commendable and that he displayed a "great deal of enthusiasm in delivering a lesson" (R-61). In the last classroom observation that Mr. Cassella completed on Mr. Mamunes, he noted as particularly useful the comparison Mr. Mamunes introduced between the civil rights activities of Malcolm X and Martin Luther King, Jr. (R-62). This technique of compare and contrast requires students to draw their own conclusions. Over all the years that Mr. Cassella supervised Mr. Mamunes he found him to be very impressive in his broad knowledge of the subject matters he taught.

During the fifteen years that Mr. Cassella supervised Mr. Mamunes he never received a call from a parent complaining about Mr. Mamunes. While parental complaints could have gone to a guidance counselor, they would have been investigated and Mr. Cassella would have become aware of them. Three or four students did ask to be transferred out of Mr. Mamunes' class because they were not doing well. Mr. Cassella concluded that Mr. Mamunes' conduct at other times was consistent with what he observed during his observations because he never received any student complaints about inappropriate comments by Mr. Mamunes. Mr. Cassella found that Mr. Mamunes was not an easy teacher to supervise because he was never a "yes" man and when he disagreed with Mr. Cassella he would confront him with that disagreement.

When Mr. Cassella gave a test in class, he always tried to relax students by indicating that the test was not that important by saying something like "aren't tests stupid?" In recognition that some students will not make it to college, Mr. Cassella had discussions about the dignity of students who do not go on to college. He has also spoken to his students about the "absurdity" of some portions of the educational structure and told them to "go home and tell your parents to invest all the money you saved for college in a mutual fund." Mr. Cassella has heard students say that school sucks in class and he finds the phrase to be very common and inoffensive to him. He has even heard a priest use the term "sucks." He himself, however, would not use the phrase because of his age and because in the 1950's and 1960's the phrase had a different meaning than it has now.

Respondent George Mamunes testified on his own behalf. Mr. Mamunes' overall credibility was difficult to assess. During most of his testimony, his demeanor was sincere and forthright. At other times, he gave non-responsive answers and seemed reluctant to provide a straight answer without drawing absurd fine lines and "splitting hairs." He also appeared evasive at times and some of his testimony, particularly regarding the comment to C. A., strains credulity and came across as an after-the-fact attempt to provide justification for an ill-considered comment. Since overall, he was a credible witness, his following testimony is adopted as **FINDINGS OF FACT** unless otherwise noted.

Mr. Mamunes graduated from Montclair State College in 1960 with a degree in Social Studies and English and is certified to teach in those subjects. Over two summers he took courses in American Studies on fellowships at Bucknell University and the University of Hawaii. In 1967 he received a Masters degree in American History from Montclair State College after attending evening classes. Between 1960 and 1964 Mr. Mamunes taught social studies at Dumont High School and between 1964 and 1968 he taught American History at New Providence High School. In 1967 and 1968, Mr. Mamunes took evening courses at Middlesex County College. Between 1968 and 1971, Mr. Mamunes served as Chair of Social Studies at Whippany Park High School until the school board eliminated chairperson positions. From June 1970 to September 1971, Mr. Mamunes worked for the Herald News as its Education Coordinator. He started teaching in the Pascack Valley Regional High School District in September 1971 and continued to do so until he was suspended in April 1998.

From 1971 to approximately 1991, Mr. Mamunes taught at the Pascack Hills Regional High School. While there he primarily taught classes in United States History, World History and Economics. He also taught other courses on occasion such as Minorities in America, You in the Law, Sociology, Human Behavior and Environment and Planning. In addition, he introduced two new courses, American Indian and American Civilization. For these courses he wrote the curriculum and ordered the materials. Mr. Mamunes also created a twenty-page African and Asian Studies Manual that was distributed nationwide to classroom teachers by the New York Times. Between 1991 and 1993, Mr. Mamunes volunteered to teach as a "swing" teacher, i.e. he taught at both Pascack Hills and Pascack Valley. From 1993 until his suspension, Mr. Mamunes taught full-time at Pascack Valley High School. He taught in two areas primarily: US History II, an eleventh grade course, and World History, a ninth grade course. In addition, Mr. Mamunes specializes in teaching students with learning disabilities. During the 1997/1998 school year, Mr. Mamunes taught three classes of college preparation World History and two classes of World History in the Learning Center.

Over the years, Mr. Mamunes has been active in various areas involving civil rights and he believes he submitted this information to the district's Board of Education when they were considering these tenure charges (R-16). He submitted such information to show the Board that he

is neither a racist nor a sexist person nor one who would make racist or sexist remarks. Examples of Mr. Mamunes civil rights activities include an African, Asian and Middle East curriculum at Whippany Park High School that he designed in the 1960's. During the 1970s when he was working for the Herald News, Mr. Mamunes created a booklet titled "Women's Liberation" which was distributed to teachers for 25 cents for use in their classes. While at Pascack Hills High School, Mr. Mamunes taught an eighteen-week course in Minorities in America for several years and established the first American Field Service Club at the school that was instrumental in bringing over the school's first foreign exchange students. He also wrote a unit on the Role of American Woman for the United States History course which unit he revised and taught for twenty years. This unit begins in 1848 and covers topics such as the right to vote, eclipse of the women's liberation effort in the 1920's and its revival in the 1960's (R-16).

Other activities in which Mr. Mamunes engaged during the 1970's include teaching English as a volunteer to ex-officers of the South Vietnamese Army; serving as President of the American Field Service for three years; creating and teaching a North American Indian course; designing and teaching Irish-American and Japanese Relocation units for U. S. History; and creating a bi-lingual "deportation hearing" in which U. S. History and Spanish students act out roles of immigration officials and Hispanic illegal aliens (R-16). Mr. Mamunes read Toni Morrison's "Beloved" and found it to be an extremely important work and Ms. Morrison to be a sensitive writer about the pain felt by blacks resulting from slavery and Jim Crowism. Mr. Mamunes created a Martin Luther King Day presentation that he presents in class every year on Martin Luther King Day and during which he sings and explains three songs reflecting Black history in the United States. After his presentation, the students discuss Dr. King and other civil rights leaders in the context of these songs.

During the 1980's and 1990's Mr. Mamunes organized trips by his Sociology classes to the Fortune Society where students spoke with ex-convicts about why they were incarcerated and how they were trying to go "straight." Mr. Mamunes described this as a "risky" thing to do but explained that he likes to take risks. He also conducted a workshop to "kick off" the year for Jewish educators in Bergen County during which he received a " Classroom Covenant." The Covenant has provisions such as students have the right to be treated with kindness; that no one will laugh at them, ignore them or hurt their feelings and that they will not be treated unfairly because they are fat or thin, fast

or slow, or boy or girl (R-16). Mr. Mamunes usually stapled the Covenant on his classroom walls and he and his students would sign the Covenant. Additionally, a committee would be established and any committee member could stop what was going on in class if it violated the Covenant by saying "Covenant." However, for personal reasons which Mr. Mamunes did not wish to discuss, the Covenant was not hung in his classrooms during the 1997/1998 school year, a committee was not formed and the students were not asked to sign the Covenant. While he did not expect his students to subscribe to the Covenant during the 1997/1998 year, Mr. Mamunes testified that he continued to follow the Covenant's provisions since they are a statement of his beliefs and he tried to act at all times consistently with the provisions and ideals of the Covenant.

Mr. Mamunes organized an Ethiopian Relief Drive at Pascack Hills that raised $2700 in student contributions in one week. He has taught summer graduate education courses to inner city teachers for eighteen years for Performance Learning Systems, a for profit corporation; has taught a Saturday workshop on multicultural values for teachers; wrote and taught a unit comparing world religions for World History students and served as faculty advisor to the Amnesty International Club.

Mr. Mamunes has been a member of the Unitarian Church for twenty-five years, which follows these general principles: (1) all religions have worth; (2) tolerance is the key to understanding and (3) each individual has worth and responsibility. Mr. Mamunes tries to live by these principles. Membership in the Church is open without regard to race, national origin, gender, age, sexual orientation or physical challenge (R-25).

Mr. Mamunes described his philosophy of teaching as incorporating all levels of Bloom's Taxonomy. A particular lesson can be started at any level. For example, the Martin Luther King lesson starts at the analysis level. He generally, however, starts a lesson at a lower level and makes sure that the class reaches the higher levels before completing the lesson. Mr. Mamunes describes the process as one of problem solving rather than as one of higher-level thinking. His teaching methodology uses primarily inductive teaching methods in which he encourages class participation and rarely lectures.

According to Mr. Mamunes, students can have four reactions in class: fear, attention, comfort and boredom. It is important to keep the students reacting with attention and in comfort. In his words, Mr. Mamunes wants the students to be comfortable with him and slightly uncomfortable with the curriculum. For this reason, he tells his students they can call him "Mr. M." Mr. Mamunes also described two types of students. The "self-limiting" students usually prefer the lower levels of thinking because they are easier and the students can show success quicker. The "mastery-oriented" students have to engage in hard thinking and require creativity and courage. "Self-limiting" students may move from comfort into boredom. If this happens, Mr. Mamunes may put a little "fear" into the situation, for example, by playing Devil's Advocate. He feels that he has to train students to be less self-limiting. In doing so, he acts as their guide; i. e., an expert but not an authoritarian. In this regard, he disagrees with Dr. Sapienza's description of ninth grade students as "putty in need of careful molding." Rather, he views these students as having opinions and values of their own. Rather than molding them, Mr. Mamunes guides them and they mold themselves. Mr. Mamunes does not want students who just try to please the teacher because they are not being authentic when they do so. He agreed that he occasionally fell a little short of all his teaching goals as pointed out in one comment on a classroom observation (R-20) and welcomed these observations as a way to improve his teaching.

Mr. Mamunes has taught the Project T.E.A.C.H. summer course for Performance Learning Systems Inc. fifteen times since the 1970's. The manual for this course is called "Teach/Teacher Effectiveness and Classroom Handling" (T.E.A.C.H.) which is given to all the teachers taking the course (R-26). In his classes Mr. Mamunes has tried all the teaching techniques discussed in T.E.A.C.H. to determine which techniques work. He has "internalized" some of the techniques and uses them reflexively. Examples of the techniques he uses include asking open-ended questions and using confirmatory paraphrases and leading paraphrases and playing Devil's Advocate. The Devil's Advocate technique involves taking a position to stimulate deeper thinking by someone who may hold a different position. Mr. Mamunes also described various types of statements such as approval, empathy and support statements that he uses to break through resistances to learning such as pride, emotional resistance and intellectual resistance. He also utilizes positive phrasing, tone of voice and body language to eliminate any suggestion of sarcasm and/or ridicule. Other techniques utilized by Mr. Mamunes and discussed in T.E.A.C.H. include giving a student a "Hobson's Choice" or a

Contingency Action Proposal (CAP) (R-26). He sometimes also does an irrelevant maneuver such as singing to students "it's home room time" to the tune of Howdy Doody.

At the beginning of each school year Mr. Mamunes gives every student a handout captioned "Participating in Class Well" which provides the students with advice on how they should participate in class (R-27). For example, participating in class includes asking questions of all kinds; listening with empathy; laughing at the teacher's jokes; challenging the teacher's point of view and showing concern for classmates (R-27). The handout also lists playing the Devil's Advocate as one way to participate in class and Mr. Mamunes' 1997/1998 third period World History class did use that technique in class. One third of a student's grade in Mr. Mamunes' classes is based on class participation.

As indicators of the atmosphere he develops in his classes, Mr. Mamunes cited to several classroom observations prepared by his then supervisor, Vincent Sausto. In an observation dated December 9, 1994, of a World History Learning Center class, Mr. Sausto noted that "[I]t is obvious that the comfort level is very high for everyone assigned to this class" and that there were several acts of kindness by students to each other that are "example[s] of the kindness and interest that Mr. Mamunes has created in this classroom" (R-7). In an observation dated March 1992 of a Social Studies class, Mr. Sausto noted that Mr. Mamunes' "work with his students has been commendable" and that he is "a very cooperative professional who is on top of the teaching-learning process" (R-28).

Late in the day on March 27, 1998, a school secretary gave Mr. Mamunes a sealed envelope. In the envelope was a memo from Dr. Sapienza advising Mr. Mamunes that an official complaint had been registered with Mr. Burek, the Affirmative Action Officer, by a student and that the allegation concerning inappropriate comments would be discussed at a meeting on March 30 at 3 p.m. in Dr. Sapienza's office (R-15). Mr. Mamunes was concerned and went to Dr. Sapienza's office to speak with her. However, he was told that Dr. Sapienza was not in the building. He waited and eventually Dr. Sapienza spoke with him. Mr. Mamunes asked what the complaint was about and Dr. Sapienza replied that she could not tell him. He told Dr. Sapienza that he believed the union contract required that he be given the names of the complainants. They went to the school library and

reviewed the terms of the contract. However, Dr. Sapienza then told him that she believed the Affirmative Action rules applied and they superseded the contract.

On March 30, 1998, at 9 a.m. Mr. Mamunes filed a grievance. At 1:30 p.m. Dr. Sapienza told him that their meeting was cancelled because the "lawyers are looking into things." The following day, April 1, 1998, Mr. Mamunes was suspended with pay. Dr. Sapienza told him that she could not give him an explanation for the suspension at that time and asked him to turn in his grade book. Mr. Mamunes did not know the specific nature of the complaint at that time, only that it involved comments of a sexist and racist nature. On April 20, 1998, Mr. Mamunes attended a Board meeting and asked for an explanation for his suspension but received no response from the Board. On April 22, 1998, Mr. Mamunes received the letter from Dr. Willett scheduling a meeting for April 24, 1998 and attaching the signed copies of the students' written statements (P-6).

On April 24, 1998, Mr. Mamunes, his wife and his attorney attended the meeting in Dr. Willett's office. Dr. Willett, Dr. Sapienza and the Board's attorney were also present. According to Mr. Mamunes, he responded to all the charges during this meeting. He subsequently attended another Board meeting and told the Board that the charges made no sense in light of his teaching methods in which he challenges his students to engage in higher level thinking and to clarify their values. Mr. Mamunes explained to the Board that he wants to empower his students to be powerful thinkers and researchers and not just act to please the teacher. His teaching methods would not work if he belittled his students. On May 18, 1998, the Board voted to approve the appointment of a long-term substitute "for the Social Studies teacher at PVHS who is on leave" (R-32). Mr. Mamunes found this wording "curious" and it upset him because he had actually been suspended.

Mr. Mamunes testified concerning the charges against him. As to Charge 1, in late November 1997 a Friday afternoon pep rally was held in the gym. Mr. Mamunes led his eighth grade class to the assembly in the gym where his class sat up high in the bleachers. Mr. Mamunes has a hip problem that was bothering him that day. Accordingly, he asked another teacher to watch his class and he stood on the gym floor. Mr. Mamunes described himself as thinking about the weekend and being in a "reverie." When the dance team came on the floor, he thought he recognized A. S. and J. M. and reminded himself to compliment them on Monday since the entire team's

performance had been very good. J. D. had been a student of Mr. Mamunes' a few years earlier. Mr. Mamunes acknowledged that J. D. and J. M. do not look like each other and that J. M.'s skin is "somewhat darker" than J. D.'s skin. However, he thought their hairstyles are similar, although he acknowledged he does not know much about hairstyles. On Monday morning, A. S. and J. M. were sitting next to each other as they always did. Mr. Mamunes told them that he had never seen the dance before and that it was terrific. J. M. stiffened, looked up and told Mr. Mamunes that it was not she on the dance team but J. D. Mr. Mamunes was embarrassed and exacerbated with himself and thought of himself as a jerk. He put his hands up and said "now I'm getting colored people mixed up." He really meant it as a joke on himself and was trying to "whisk" his error out of the classroom. Mr. Mamunes thought that J. M smiled after his comment and he apologized two or three times during class and again at the end of class. J. M. responded "no problem." Mr. Mamunes apologized to J. M. because he had caused her embarrassment by mixing her up with J. D. and not for making the statement about "colored people".

Mr. Mamunes does not view his statement as offensive because it was not made to J. M. but rather to himself and to the "world at large." Mr. Mamunes did not consider the impact the comment would have on J. M. because he intended that she would see the comment as a joke on himself. He wanted to relieve his and her embarrassment and go forward with the class. He also intended the same impact on the rest of the class, i.e. that they would view the comment as a joke on himself. It did not occur to him that other students would be offended by the comment. In Mr. Mamunes' opinion the comment was "absolutely" not a racist comment and contends that it did not say that all African Americans look the same. He believes that no two students look alike. I do not accept Mr. Mamunes' characterization of his comment for the reasons discussed *infra* in the Legal Discussion portion of this decision.

Mr. Mamunes believes the comment was appropriate for what he was trying to accomplish, which was to bring closure and to go forward with the class. Since his intent was not to hurt J. M. or any other student he does not view the comment as in conflict with his classroom covenant nor with his guidelines for classroom participation which state that students should "sho[w] concern for classmates" (R-16, R-27). Mr. Mamunes provides "Promoting Creativity" guidelines to his student teachers and he subscribes to the principles contained therein (R-42). One of the guidelines is

"accept[ing] and develop[ing] pupils' feelings" (R-42). He does not consider his comment to J. M. as violative of this principle because he was not trying to hurt J. M. or any other student but rather to relieve J. M.'s embarrassment. Mr. Mamunes acknowledged that there are risks associated with using humor in the classroom as discussed in the Project T. E. A. C. H. manual (R-26, page 157). However, he believes he avoided those risks because he delivered his statement without sarcasm or a put-down (R-26, page 157, paragraph 4). Nor did he believe that the comment reflected a topic that was too serious to laugh about (R-26, page 157, paragraph 1) because he did not think it was a very serious problem that he mixed up two students; the laughter was directed at him and, to him, the phrase "colored people" is a neutral term. Mr. Mamunes acknowledged that he could have used other humorous phrases such as "I'm out to lunch" and that, in retrospect, such phrases might have been a more effective and appropriate teaching technique to handle the situation. However, while "pedologically" the statement may have been ill chosen, Mr. Mamunes believes it was not inappropriate because the term "colored people" is a part of every day usage.

Mr. Mamunes does not view "colored people" as a racist statement. For example, the word "colored" is included in the NAACP's title. In his World History class, Mr. Mamunes teaches about how the NAACP was founded and he is aware that its charter is for all non-white people and not just black people. To Mr. Mamunes, "colored" is an everyday term and he thinks it is outrageous to compare "colored" with the word "nigger." In support of his position, Mr. Mamunes cites to the definitions of the two words in Webster's New World Dictionary (R-33) and Webster's Third International Dictionary (R-34). Both dictionaries define "nigger" as being an offensive term while "colored" is defined as a group other than the Caucasoid (R-33, R-34). One of the dictionaries includes "Negro" as part of the definition of "colored" (R-34). However, Mr. Mamunes does not use the word "Negro" in his teaching because that term "harkens back to slavery" and all its horrors. He uses the term "colored people" in his curriculum only when he teaches about the NAACP and *Brown v. Board of Education*. Mr. Mamunes is aware that in the 1950's and 1960's the terms "white" and "colored" were used by restaurants., water fountains and other facilities to separate whites and blacks. Nevertheless, he views "colored" as a common non-derogatory term used to refer to African Americans since they arrived in the United States.

According to Mr. Mamunes, there has been "an evolution of fashions" and regional differences over time in referring to African Americans. In the Northeast, the more fashionable term became "black," while in the South the term became "colored." Mr. Mamunes cited to an article written in 1996 by Henry Louis Gates, Jr., the W. E. B. DuBois Professor of the Humanities at Harvard University, in which Professor Gates states that among the phrases African-American, people of color and colored, he likes "colored" best because it evokes memories of his mother and his childhood in rural West Virginia (R-37). Mr. Mamunes agreed that Professor Gates' opinion is based on his own life experiences and his relationship with his mother and that Mamunes had no way of knowing whether J. M. and her mother share Professor Gates' feeling toward the term "colored people." Before making the comment, Mr. Mamunes did not consider how J. M. would view the statement in light of her life's experiences. He did not research the use of the term, as described above, until after Dr. Willett equated the term "colored people" with "nigger" during his testimony.

Mr. Mamunes acknowledged that the term "colored people" is not common in New Jersey in referring to African Americans and that he does not generally use the term but explained that the term "black" did not fit the situation because J. D. has lighter skin than J. M. I found this explanation to be ridiculous. Mr. Mamunes does not make an immediate connection between the civil rights movement and the term "colored people" and testified that he has no way of knowing what term specific African Americans would find objectionable. Some may object to the term "African American." Accordingly, it did not come as a big surprise to him that some African Americans would find the term "colored people" objectionable because of its relationship to the issue of segregation. He did not take this into account when he made the comment to J. M. although he usually does consider how students will perceive a statement by him because some students will perceive comments differently. Mr. Mamunes did not take that perception into account in this instance because he did not intend in any way to offend J. M. when he used the phrase "colored people". Rather, he felt "lousy" and "stupid" and wanted to address the tension he had created in the class by making what he saw as a self-deprecating remark. No one ever complained to him about the remark until the tenure charges were filed in April 1998.

As to Charge 2, Mr. Mamunes explained that Martin Luther King Day was on a Monday in 1998 and he did his usual class presentation honoring Dr. King. J. M. was not in school that day. The following day Mr. Mamunes asked J. M. where she had been and she replied she had been at her church with her family honoring Dr. King. J. M. was beaming and was obviously very proud. Mr. Mamunes wanted to show his support of J. M.'s decision to the entire class. Accordingly, he told J. M. that she should be proud of Martin Luther King. His intent was to show that he approved how she spent the day; to bring closure to the prior day's lesson and to include J. M. in that lesson. He did not say it sarcastically in any way and he observed no reaction in the class. During his testimony, Mr. Mamunes could not recall whether he stressed any particular word in his comment to J. M. but felt that if he did so, he would have stressed the word "should." In an affidavit he submitted to the Board in June 1998, Mr. Mamunes indicated that he stressed the word "should" (R-31, page 6). Prior to April 22, 1998, Mr. Mamunes had no idea that there was a problem with his comment and never "in his wildest dreams" did he think the statement would be interpreted negatively. Six to seven weeks elapsed between the two comments to J. M. During that time period no one told Mr. Mamunes that J. M. was having a problem with his "colored people" comment and that comment was not in his mind when he complimented J. M. on her decision to honor Dr. King. He does not believe he is racially insensitive in any way.

Mr. Mamunes honors Dr. King in his class every year because he is awe of Dr. King and what he accomplished through his teachings. Dr. King's ability to mobilize people effectively in non-violent protest is an important lesson for everyone. Mr. Mamunes agrees that all Americans, and not just African-Americans, should be proud of Dr. King and he spent the entire class on Martin Luther King Day conveying this message. In his comment to J. M. he used "you" instead of "we" because his intent was to show support for J. M. His intent was not to say that only J. M. should be proud of Dr. King.

Regarding Charges 3 and 4, Mr. Mamunes testified that he had a good relationship with A. K. and that they saw each other at lunchtime. Sometimes A. K. finished lunch early and would leave the cafeteria and speak with Mr. Mamunes who was on hall duty. They spoke about class work, A. K.'s life in India and his ability to speak several languages. Several times, A. K. asked Mr. Mamunes for extra help. In fact, on the day he was suspended, Mr. Mamunes was giving A. K. extra

help and he delayed going to Dr. Sapienza's office for twenty minutes so he could help A. K. As a result of the extra help, A. K.'s papers were improving and his preparation for tests was better. Mr. Mamunes also helped A. K. following an incident in which A. K. broke another student's calculator. Mr. Mamunes spoke to the other student on A. K.'s behalf. While A. K.'s testimony indicated that he received less help from Mr. Mamunes than Mr. Mamunes testified to, A. K.'s testimony did not refresh Mr. Mamunes' recollection such that he could say whether A. K. was correct in his testimony.

Mr. Mamunes described A. K. as a student who wants to be liked by the other students. A. K. handed out candy to other students while attendance was being taken, joked with other students and bantered with them quite a bit. During the taking of attendance, A. K. and the other students made jokes about his father's store including references to Penthouse and Playboy. Mr. Mamunes usually ignored this bantering because he did not want to call undue attention to it. However, Mr. Mamunes was concerned that A. K. believed handing out candy was making him friends and felt that A. K. should think about that issue. Mr. Mamunes was also concerned about A. K.'s "buddies." Students this age are always "razzing" each other and they would do so when A. K. handed out candy. Mr. Mamunes felt that these students should also think about what they were doing and saying. Accordingly, Mr. Mamunes sometimes used a leading paraphrase, see page 12 of the Project T.E.A.C. H. Manual (R-26), to stop the bantering and to get class started. His intent was to crystallize the comments of the students so that A. K. would see what the reaction was to his handing out candy and the other students would realize what they were saying. This was an issue that Mr. Mamunes dealt with throughout the school year in that he was attempting to get the students to rethink their values and go against a deep cultural and ingrained pattern of razzing and trying to buy friends. I found this explanation of why he used leading paraphrases with A. K. to be unrelated to the actual comments he made to A. K. and thus confusing at best.

The leading paraphrase that Mr. Mamunes recalled using was in reference to A. K. handing out candy. He did not remember ever telling A. K. that his father's store was a porn shop although Mr. Mamunes acknowledged that he could have said something like "you're saying that A. K.'s father runs a porn shop" as a leading paraphrase to other students who made such a comment. Similarly, Mr. Mamunes did not remember making comments to the effect that A. K. did not need to

to college because he could run his father's porn shop, that A. K. did not need an education or that the only reason A. K. reads the newspaper is because he unpacks the papers at his father's store. According to Mr. Mamunes, if he made such comments he did so in the context of using a leading paraphrase to bolster A. K.'s self-esteem while other students were "bantering" with him during the taking of attendance. For example, if A. K. or one of his friends said that A. K. did not have to go to college, Mr. Mamunes testified that he might have responded by putting out a hand and saying "A. doesn't have to go to college" in a nonjudgmental way and would follow up with a statement that A. K. was doing better in class.

Mr. Mamunes never intended to demean A. K. in any way. Rather, any use of leading paraphrases was intended to crystallize the students' thinking while at the same time putting an end to the comments. If Mr. Mamunes made such statements he would have make them regardless of how other students would interpret them but would be on the alert for a negative student reaction to A. K. According to Mr. Mamunes, there was never a verbal or non-verbal reaction to any comment made to A. K. No one complained about any comments he made to A. K. prior to April 20, 1998. While he is concerned that some students felt he made derogatory and negative comments, he believes that any comments he made were appropriate and not derogatory or negative.

The written statements of the students and their testimony, including A. K.'s statement and testimony that the comments were made to him, did not refresh Mr. Mamunes' recollection as to whether he ever made the comments to A. K. attributed to him by the students and A. K. He has given the matter great thought since the charges were filed against him but he simply does not recall making such comments. Since he cannot recall the comments, he has no way of knowing whether the students are telling the truth or whether their testimony is accurate or not. Mr. Mamunes had no knowledge or information, however, that would indicate why the students, including A. K., would give inaccurate or false statements. Nor did Mr. Mamunes have any recollection of making the comment regarding newspapers to A. K. after A. K. answered a question during class as testified to by the students rather than during attendance.

Moreover, Mr. Mamunes disagrees with Drs. Willett and Sapienza that a comment like the porn shop statement is racial. In his experience, many Indians are Caucasian and skin color is one of

the lesser qualities used by anthropologists to define a race. He teaches his students that skin color is not an important indicator of race. Nor does Mr. Mamunes stereotype convenience store owners as Asian-American and has no knowledge as to whether a high percentage of Asian Americans of Indian descent own convenience stores. In his experience, storeowners come from a variety of cultures. During the 1997/1998 school year Mr. Mamunes went out of his way to purchase items at A. K.'s father's store in order to tell him good things about A. K.

Mr. Mamunes denied ever making a derogatory comment to C. A. concerning her weight as alleged in Charge No. 5. He explained that C. A. sat in the first seat of the first row which was adjacent to the door and that he did occasionally ask her to close the door if, for example, a movie was being shown in a near-by classroom. He also asked students in other classes to close the door and would sometimes joke to the student in each class who sat nearest the door to "get the door, please-you need the exercise more than I do" (R-31, page 12). While Mr. Mamunes did not deny making such a statement to C. A., he could not recall ever making a statement that she needed exercise in connection with asking her to close the door. However, he testified that if he did make such a comment to C. A., it would have been a self-mocking reference to his hip problems which prevent him from exercising.

It never occurred to Mr. Mamunes that there was anything "loaded" about such an "exercise" comment because the comment had nothing to do with a student's weight. He never considered the impact of such a statement on a student because the only intended impact was to get the door closed. Mr. Mamunes agreed that a teacher should be concerned with how his comments are perceived by students and that teachers should anticipate the effect of their comments on the class. However, he was not concerned about the impact of any statement he may have made that a student needed exercise because it would not have been a comment regarding the students' weight but rather a reference to his own hip problems. In making such a statement, Mr. Mamunes used tonality and body language to tell the students that he regretted asking them to close the door so frequently because of his physical problem. If Mr. Mamunes was aware that a student was the butt of jokes about a particular matter, he would not make any comments that could be perceived as adding to a pattern of abuse because a teacher should never make a remark that would cause distress to a student. If he had been aware that C. A. was perceived by other students as overweight, he would not have

made the comment about exercise. If he had known that C. A. perceived herself as overweight he may have made the comment anyway if it would help to treat her like everyone else. He would not have made the comment if it would only lead to ridicule of C. A.

According to Mr. Mamunes, he did not think of C. A. as overweight because he claims he does not know what "overweight" means. To him, "overweight" is more a state of mind than a fact in that it is a judgmental term that says a person weighs more than he or she should. Mr. Mamunes testified that he has no way of judging whether a student is overweight because he does not compare his students by weight. While Mr. Mamunes described "obese" as an adjective without a judgmental overtone, he nevertheless also refused to say whether C. A. is obese because it is not a word in his vocabulary. He testified repeatedly that he could not decide if a person is overweight or obese because he avoids putting people in such categories. Because he does not put people in these categories, Mr. Mamunes also could not say whether any specific student was sensitive about her weight, although it would not surprise him if some students were sensitive regarding their weight. In Mr. Mamunes' words, he "treats the intellect and doesn't see the clothes or weight." Mr. Mamunes' insistence that he has no concept of what overweight means simply does not ring true. In preparing his affidavit to submit to the Board, Mr. Mamunes reviewed the written statements submitted by the students. Even though the written statements referred only to an "obese girl" (P-1), Mr. Mamunes' affidavit identified the girl specifically as C. A. (R-31, pages 10, 11 and 12). He explained that he did not identify C. A. from the "obese" description but rather because she was the student he asked to close the door in that class. He would never say anything to embarrass or ridicule C. A. and it would be unthinkable to him to mock her because of her weight. Rather, he had a good student-teacher relationship with C. A. and gave her extra help when she asked for it. After C. A. received the top score on one test, Mr. Mamunes noted it in class and asked the class to give her a round of applause. He described C. A. as a quiet, reflective student who wants to do well in class and who does not interact frequently with the other students.

Regarding the charge that he made sexist comments during the "Not Without My Daughter" videotape, Mr. Mamunes explained that he was teaching a unit on the Middle East which covered many aspects, including fundamentalist Islam and the role of women in the Middle East. He provided information to the students regarding the role women play in that culture such as the

prohibition on them attending college or working or leaving the home without a male escort and the clothing restrictions placed upon them. Mr. Mamunes taught this information "inductively," by which he means that he provided data to the students so they could think about it, discuss it and then crystallize the information in their minds.

After discussing the various ways that women are treated under Islam, Mr. Mamunes showed the video so that students would think about the issues raised and he instructed them to take notes. Mr. Mamunes has shown this video in World History class for approximately ten years and it is shown over four class days. During the course of showing the video to his third period class, Mr. Mamunes discussed the video with his student teacher, Mr. McKenna, because Mr. Mc Kenna was showing the video in the classes he was teaching. He explained to Mr. Mc Kenna the nature of the film and what he wanted the students to get out of it. Mr. Mamunes also told Mr. Mc Kenna that the third period class was focusing on the mother's escape attempts and thus the students were not paying attention to the issues raised in the film concerning the Islamic culture. Accordingly, Mr. Mamunes told Mr. Mc Kenna that he intended to play the Devil's Advocate to get the students to focus on the issues rather than the escape. He was also concerned that the students may have gotten the wrong impression that abuse is a tenet of the Islam faith.

Mr. Mamunes recalled that, as a Devil's Advocate, he made comments during the film to the effect that it was unfortunate the mother was not given the opportunity to learn the beauty of Islam; that she should try harder to see the beauty of her husband's religion and that she might have avoided abuse by being more submissive to her husband. The comments made by him as set forth in Charge 6 were not intended to be sexist remarks but rather a Devil's Advocate attempt to get the class to focus on the cultural aspects of the movie. There was no response or reaction from the class to any of the comments made by Mr. Mamunes during the video because they were so wrapped up in the film that they "didn't take the bait." He concluded that his attempt to foster discussion had failed. Mr. Mamunes did not recall whether he stopped the video at any point to foster discussion when he made his comments but did recall stopping the video for the last five minutes of class several times in order to discuss the video, although he did not remember if this occurred on the days he played Devil's Advocate. During these discussions, Mr. Mamunes did not bring up the comments he made

during the video because he concluded there had been no reaction to them and the Devil's Advocate technique had failed.

Mr. Mamunes flatly denied being sexist and cited to his curriculum vitae as showing that his beliefs are centered on the belief of equality between races and sexes. As further evidence of his position on other cultures, Mr. Mamunes cited to an essay question he includes on his World History exam which advises students that World History is partially designed to make students less ethnocentric and asks them to identify two times when they traded in their ethnocentrism for a more balanced understanding of a non-American culture group (R-43).

After the showing of the video, the students were mainly concerned with a research paper that was due the following week. Since this was a complicated project, several class days were spent in the library. In addition, one class day was used to review for an upcoming test. Mr. Mamunes did not want to do "closure" on the video and his remarks at this point because several students were working on papers on the Middle East and he did not want to tell them what to think. Rather, he intended to do a "cognitive" closure on the video when he did closure for the entire Middle East unit. He did not see any need for closure on an emotional basis right after the video because there had been no reaction to his comments from the students. In support of this decision, Mr. Mamunes cited a handout he received from another teacher on promoting creativity in the classroom (R-42). One of the suggestions in the handout is that a teacher who does not seek instant closure promotes creativity (R-42). Mr. Mamunes explained that suspending closure allows students to think and analyze and come to their own conclusions rather than having the teacher wrap up the ideas for them or tell them what is right or wrong. Suspending closure is thus consistent with inductive teaching while instant closure reflects deductive teaching. Mr. Mamunes believes that when teaching inductively, closure best occurs at the end of a unit rather than at the end of a class. He views suspending closure as compatible with the sixth and seventh levels of Bloom's. His intent was to accomplish closure at the end of the entire Middle East unit but he was suspended before this occurred.

Mr. Mamunes agreed that some students could have internalized his comments during the video and thought about them without showing any outward reaction. While he did not know it at the time, he now realizes that some students did internalize his comments and were upset by them.

At the time, he did not feel immediate closure was needed because he felt the students had not absorbed his comments and also because they had seen him in class for over half a year and knew that he would not ridicule someone based on sex or race. He thought he had "earned their trust." There is always a risk in playing Devil's Advocate that some students will take his comments literally. Knowing in hindsight that four students found his comments objectionable, Mr. Mamunes still believes that his comments were appropriate without immediate closure at the time. He regrets that the students did not bring up their objections for discussion and feels that the issue could have been resolved if P. W. simply asked him what he meant by his comments. He "blames" the school culture for not fostering in students a willingness to question teachers. In the future, Mr. Mamunes would still take the risk of playing Devil's Advocate but would do it in a more sophisticated manner. He would work to change the school culture so that students will feel free to bring problems to their teachers for discussion. In addition, he would "rethink" his decision to forego immediate closure. He recognizes that there is always room for improvement in applying techniques such as the Devil's Advocate and would take steps to avoid what occurred during the playing of "Not Without My Daughter".

Mr. Mamunes acknowledged that he asked his students to say "school sucks" on more than one occasion, as alleged in Charge 7, but denied that the comment disrupted order or discipline in the class. Rather, he explained that he first heard the comment in the late 1960's or early 1970's and that it seemed to be a mantra for students. He decided to incorporate the statement into class as a tension-releasing device and to relieve disappointment after a test. For example, he would say to the students the following: "some of you didn't do too well on the test and you may go yell at your next teacher or kick your dog.... To save the next teacher or your dog I'm going to allow one quiet, unified 'school sucks' and then we'll go on to the next chapter." Mr. Mamunes did not require any student to make the statement and the students do not stand nor shout. Generally, at least half the class makes the comment. He did close the classroom door as a courtesy to fellow teachers because of the noise caused by 16 students talking all at once.

Mr. Mamunes described the "school sucks" technique as an "irrelevant maneuver" as discussed in the T.E.A.C.H. manual (R-26, page 158). He has used the technique three or four times a year for the past ten to twelve years and no one complained about it before the 1997/1998 school

year. In fact, he used the technique during one class when a state evaluator was present and after the class, the evaluator told Mr. Mamunes that it had been a "nice class." Mr. Mamunes does not view this technique as encouraging students to defy authority nor as being in derogation of education but rather as a humorous demonstration that a teacher relates to the students' fears and emotions. According to Mr. Mamunes, the students knew that he is not anti-education nor anti-school and that he does not believe school sucks. Rather, they knew that he was merely interjecting a little joke to allow the class to let out steam. In the context in which he used this technique, Mr. Mamunes described it as having a positive and therapeutic impact, allowing the students to laugh while referring to a disappointing environment which was causing a sense of frustration. Mr. Mamunes clarified that he never told the students it was okay or fine to use the phrase but rather that he would "permit" it in class on several occasions. In his mind this was different from approving use of the phrase.

Mr. Mamunes believes that the word "sucks" is not inappropriate in itself but rather it depends on the context in which the term is used. In certain circumstances, Mr. Mamunes testified that he would even let the students say "Mr. Mamunes sucks" but would not allow them to say "Dr. Sapienza sucks" because it would be inappropriate in that context. He also agreed that it would be inappropriate for students to tell a guidance counselor or Dr. Sapienza that "school sucks" when asked why they failed a test or to tell the guidance counselor or Dr. Sapienza that Mr. Mamunes told them it was okay to respond in such a manner. He would consider that a breach of trust between him and the students and of the understanding between them that the phrase would be used only in a limited way in class. In such a situation, use of the phrase would constitute a disrespect for the counselor and Dr. Sapienza while using it in the classroom context as he did was merely a "bit of humor." Mr. Mamunes saw no purpose for his students using the term indiscriminately with other school administrators, although he never specifically told the students not to use the phrase outside of class. Rather, he assumed that ninth grade students would know where to use the phrase appropriately. Mr. Mamunes acknowledged that teachers are authority figures and role models for students and that what teachers say and do impacts on students.

Mr. Mamunes views the charges against him as a personal affront and described how he and his wife took extra steps to ensure that their children were exposed to many cultures and that as a

family they have always been open to all cultures. He was especially careful to provide assertiveness training to his daughter because historically women have not been allowed to be aggressive.

Three students from Mr. Mamunes' 1997/1998 ninth grade World History class testified on his behalf, P. H., M. M. and C. E. Based on their demeanor, I reject the Board's contention that these students showed obvious bias in favor of Mr. Mamunes and therefore their entire testimony should be disregarded. However, to the extent that their accounts of incidents in the class differs from those of the five students testifying on behalf of the Board, I found the Board witnesses' testimony more convincing since some of them were the direct recipients of comments (J. M. and A.K.) and others had memorialized Mr. Mamunes's comments, either in interviews or written statements in March 1998, while the comments were fresher in their minds than in December 1998 when P. H., M. M. and C. E. testified. Accordingly, I adopt the following as **FINDINGS OF FACT** except where otherwise noted.

P. H. testified that Mr. Mamunes encouraged his students to use their brains and not to just memorize facts. One of Mr. Mamunes' favorite sayings was "figure it out yourself." P. H. felt comfortable in Mr. Mamunes' class. He found Mr. Mamunes' class to be a nice environment, one of mutual respect. He liked the way Mr. Mamunes taught because P. H. felt he had to use his brain and it allowed him to excel. P. H. got a lot from the discussions in Mr. Mamunes' class and he actively participated in them. Mr. Mamunes always offered extra help to the students and never poked fun at any student or made racist remarks. As the marking periods progressed, P. H. did better in Mr. Mamunes' class than in his other classes and he did poorer in World History after Mr. Mamunes left school in March 1998. P. H. liked Mr. Mamunes a lot and not having homework from his class but denied being a "teacher's pet."

According to P. H., J. M. "sort of laughed" or "snickered" after Mr. Mamunes' comment about mixing up his "colored people." I do not accept this characterization since it is inconsistent with the testimony of the other students. P. H. did not believe Mr. Mamunes made the comment in a racist manner. No student laughed at J. M. because of Mr. Mamunes' comment. It was not meant to be a funny comment but rather a comment that Mr. Mamunes had confused two students because they were black. P. H. did not speak to J. M. about the comment during class or thereafter and did

not know whether Mr. Mamunes ever apologized to her for the comment. A. S. "made a big deal" of the comment by making a gesture and saying something to the effect of "oh, My God." P. H. viewed this as a gesture of surprise and shock by A. S. but did not know why she reacted that way. P. H. was not sure if referring to J. M.'s skin color was a sign of mutual respect by Mr. Mamunes, but he was sure that Mr. Mamunes was not putting J. M. down by making the comment because Mr. Mamunes is not a racist person. P. H. might use the term "colored people" or "African American" but the issue does not usually come up because Pascack Valley is mostly a white school. After being shown yearbook pictures of J. M. and J. D., P. H. agreed that they did not look like each other and that J. D.'s skin color is lighter than J. M.'s. P. H. recalled the second comment to J. M. as "you should be proud of your heritage" rather than a specific reference to Dr. King. I reject P. H.'s testimony in this regard as inconsistent with the testimony of the other students. He also did not think this comment was racial. P. H. could not recall the class discussion held on Martin Luther King Jr. Day.

P. H. is a friend of A. K. He confirmed that A. K. brought candy into class every day and that A. K. and his friends were always joking around, although P. H. testified he was not part of this bantering. These jokes included references to A. K.'s father's store as a porn shop. A few times, Mr. Mamunes said something to A. K. to the effect that his father owned a porn shop. These comments were made sarcastically only after A. K. had repeatedly referred to his father's store as a porn shop and A. K. was not offended by them. P. H. thought Mr. Mamunes was testing A. K. by making these sarcastic statements. P. H. recalled once, at the beginning of class, Mr. Mamunes said to A. K. that he had stopped by "your Dad's porn shop and got a newspaper." On this occasion, P. H. was with A. K. and there was no joking going on in the class. There were some other students present who could have heard the comment but P. H. could not remember how many or who they were. At times, A. K. would say that he did not need an education and Mr. Mamunes would respond sarcastically with comments such as "yeah, what do you need a college education for." Mr. Mamunes, however, never told A. K. that he did not have to go to college. I reject this testimony as inconsistent with the testimony of the other students. P. H. never heard Mr. Mamunes say anything bad about A. K. and denied hearing any comment regarding A. K.'s reading of newspapers. P. H. was aware that there is a stereotype of Indians owning convenience stores.

P. H. did not recall Mr. Mamunes ever making nasty remarks to C. A. and specifically did not think Mr. Mamunes ever told C. A. to "close the door, you need the exercise." P. H. was absent for only two days during the applicable time period. He agreed that C. A. is overweight and that if such a statement had been made to her, it would not reflect mutual respect between student and teacher. He also agreed that Mr. Mamunes did ask C. A. to get up and close the door whenever he wanted the door closed.

During the video "Not Without My Daughter," P. H. recalled Mr. Mamunes making a few comments such as "she should try learning the culture before she wants to leave." He did not recall any statements to the effect that "she should listen to her husband" or "she's getting what she deserves." I reject this testimony as inconsistent with the testimony of the other students. P. H. did not observe any students being upset about these comments. The lights were off during the video although there was sufficient light from the windows to take notes. There was no discussion during the video or at the end of each class about any comments made by Mr. Mamunes. At the end of the movie, however, there was a discussion about the video initiated by Mr. Mamunes as part of the teaching plan for that day. During this discussion, the students had the opportunity to ask questions and express opinions if they wanted. P. H. did not recall anything specific from this discussion beyond a discussion of why the mother could not go to the American embassy for help since it had been taken over by the Iranians.

On several occasions after some tests, Mr. Mamunes did tell the class "if you want, you can say school sucks." However, Mr. Mamunes did not require the students to make this statement. P. H. thought this showed that Mr. Mamunes could relate to his students and this fostered a nice environment in which to learn. P. H. views "sucks" as a curse word and agrees that it would not be appropriate to tell the principal that school sucks. The door was always closed when the class made this statement and P. H. thought it was because Mr. Mamunes did not want others to hear what they were saying and that other teachers may not have approved of his teaching method.

P. H. testified that P. W. did not like Mr. Mamunes and that she and her friends would snicker and make fun of him. They would insult Mr. Mamunes, although P. H. could not remember exactly what they said. Although P. H. was not friends with P. W., he did have conversations with

her in English class during which she said she did not like Mr. Mamunes. He did not recall why P. W. said she did not like Mr. Mamunes but remembered that she never mentioned any of his comments until after Mr. Mamunes left. She then told P. H. that his comments to J. M. were racist. J. M. and A. S. said they hated Mr. Mamunes and his teaching and that it made no sense to them. In English class, A. S. also commented that she did not like Mr. Mamunes or the way he taught and that "he is a joke." She made these comments early in the school year before Mr. Mamunes made any of the comments contained in the charges against him. A. S., J. M. and P. W. also complained about the grades they received in Mr. Mamunes' course and did not agree with the way he taught. A. S., J. M. and R. L. were rude to Mr. Mamunes. They were always talking in class and when Mr. Mamunes would say "girls, the class is up here," they would laugh. P. H. was not friends with A. S., J. M. or R. L. He was not interviewed by the school administration regarding Mr. Mamunes' class. I reject P. H.'s testimony as to when the four students starting complaining about Mr. Mamunes and the nature of those complaints as inconsistent with their testimony and unsupported by any other testimony or evidence in this record.

M. M. was also in Mr. Mamunes' 1997-1998 ninth grade World History class. She described the class as a lot different from what she was used to. It was a "laid back" and relaxed course with a lot of class participation during which students could say things without feeling stupid and a lot was taught. Mr. Mamunes did not stress memorization in any way.

After Mr. Mamunes made the comment about mixing up his colored people, M. M. recalled that he apologized to J. M. and A. S. several times. J. M. did not appear affected by the comment, although M. M. did not have any discussion with J. M. or anyone else regarding the comment. M. M. does not usually refer to people by their skin color and does not usually find it appropriate to do so, especially in their school because there are so few minority students. Although she may use the term "colored people" if it applied, she would probably use the term "African-American." M. M. would not have made such a comment to J. M. and she agreed that she could not relate exactly to how J. M. would feel about the comment. During class on Martin Luther King Day, Mr. Mamunes led a class discussion on Dr. King. It was the only class M. M. had in which such a discussion was held.

M. M. recalled A. K. always giving candy and gum out in class and that he and one his friends referred to his father's "porn shop". A. K. also said that he did not have to go to college because he would take over his Dad's business. When A. K. made such a comment, Mr. Mamunes would say something like "we know you don't need education but this is history class" in order to get class started. Mr. Mamunes only made such statements to A. K. in response to a similar statement made by A. K. M. M. did not recall any comment to A. K. regarding why he read newspapers, although she recalled Mr. Mamunes saying that he got the newspaper at A. K.'s store and A. K. saying that he worked at the store. She is aware of a stereotype of Indians owning convenience stores.

M. M. never heard Mr. Mamunes tell C. A. that she needed exercise but agreed that he asked C. A. to close the door because her desk was closest to the door. M. M. described C. A. as overweight but did not know if C. A. was sensitive about her weight since M. M. knows many overweight people who are not sensitive about their weight.

During the showing of "Not Without My Daughter," Mr. Mamunes would stop the movie and discuss it if necessary. For example, Mr. Mamunes explained what the women were wearing. M. M. did not hear Mr. Mamunes say words to the effect that it was the wife's fault and she should listen to her husband. If he did make such a comment, he was playing Devil's Advocate with the students which he did on occasion. At the end of the movie, there was a discussion which summed up the movie and related it to what they were learning at the time.

Every once in a while, Mr. Mamunes would tell the class "okay, you can say school sucks" and then he would start the class. He did this sometimes when the students were angry with their English teacher. Mr. Mamunes did not require any student to say "school sucks."

M. M. liked the World History class and Mr. Mamunes. He made the students think instead of just memorizing which M. M. views as a waste of time. He also gave M. M. a lot of extra help and she received B and B+ grades in Mr. Mamunes' class. M. M. also liked that they did not have a lot of written homework, although the papers assigned to them took a long time to complete. She felt very comfortable in World History class and never heard Mr. Mamunes make a racist or sexist

comment. In contrast, J. M., A. S., P. W. and R. L. did not like Mr. Mamunes. In English class they said things about his class and they never "attached" to his manner of teaching because they were used to memorizing. I reject M. M.'s testimony as the nature of the four students' discontent with Mr. Mamunes as inconsistent with their testimony. M. M. is not friends with P. W. and admitted to not liking her. They just never got along. M. M. does speak with A. S. and J. M. and they get along although they are not best friends.

M. M. did not know why Mr. Mamunes had left school and she found it very frustrating. She and another student, C. E., went to Dr. Sapienza and asked her what was going on and if they could do anything. M. M. and C. E. are best friends and have known each other since they were born. Dr. Sapienza would not say anything and merely told them not to be late for their next class. She did not ask either of the students any questions about their World History class.

C. E. was a student in Mr. Mamunes' 1997-1998 ninth grade World History class. She enjoyed the class very much because she found there was more learning and comprehension and not just memorizing of facts. C. E. liked the fact that there was no homework but the papers they were assigned did take a lot of work. She received a B+ in Mr. Mamunes' class. Regarding the dance team incident, C. E. recalled Mr. Mamunes telling J. M. that he had gotten her mixed up with J. D. C. E. did not remember any reference to "colored people" during this conversation. She recalled that during class on Martin Luther King Jr. Day, there were songs and that the next day Mr. Mamunes asked J. M. where she had been and then said to her that she should be proud of Dr. King. J. M. seemed fine after this comment and no one else seemed upset. C. E. never spoke to J. M. about the Dr. King or dance team comments and has no personal knowledge regarding J. M.'s reaction to those comments.

There was a lot of kidding around in class with A. K. because of his father's store and his handing out of candy. A. K. himself did a lot of this kidding around. In contrast to P. H.'s testimony, C. E. recalled that P. H. also kidded with A. K. C. E. did not recall any comments about a porn shop or Mr. Mamunes telling A. K. that he did not need a college education. According to C. E., Mr. Mamunes never told C. A. to close the door because she needed the exercise. C. E. described

C. A. as overweight but did not know if C. A. is sensitive about her weight. She does know that teenagers can be sensitive about being overweight.

C. E. went with M. M. to see Dr. Sapienza who told them she could not give them any information and they should go back to class. Dr. Sapienza did not ask them any questions about how the World History class was run by Mr. Mamunes. As with M. M., C. E. does not get along with P. W.

Robert McKenna testified on behalf of Mr. Mamunes. Mr. McKenna was a credible witness and I adopt the following as **FINDINGS OF FACT.** During the 1997-1998 school year Mr. McKenna was a senior at Montclair State University and student taught at Pascack Valley High School under Mr. Mamunes. During the first semester, Mr. McKenna spent two weeks observing classes. During the remaining twelve weeks of the program, starting on February 1, 1998, he taught four of Mr. Mamunes' classes which did not include the third period World History class. During this period Mr. McKenna met with Mr. Mamunes throughout the school day as Mr. Mamunes mentored him and provided guidance. Mr. McKenna found that Mr. Mamunes had a great rapport with the students. He was constantly in motion and was well liked and respected by the students. The students enjoyed Mr. Mamunes as a person and Mr. McKenna observed no negative reaction to Mr. Mamunes from the students. Mamunes would use body language, tone of voice and humor to relax and engage the class and did not talk down to the students. The research projects assigned the students by Mr. Mamunes were interesting and challenging but also fun. Mr. McKenna describes Mr. Mamunes as "an exceptional mentor whose primary concerns were student learning and my own personal growth as an educator" (R-41). Mr. McKenna never heard Mr. Mamunes make a racist or sexist remark or demean any student.

Mr. McKenna was scheduled to show the "Not Without My Daughter" video to one of the classes he was teaching. Prior to showing the film, Mr. Mamunes discussed with Mr. McKenna how he was going to show the movie in the third period class. He told McKenna he intended to play Devil's Advocate with the students and make almost outrageous statements to get the students to think about the important parts of the film and not just focus on the action aspects. One comment that Mr. Mamunes discussed was one he planned to use after a scene of domestic violence in which

he would say to the students that the wife "would be much better off if she would just learn to cooperate with her husband" (R-41). Mr. McKenna did not use this technique when he showed the film because it is not his style. But he thought it would grab the students' attention and let them know that the video was not just entertainment but about issues they were studying in class. McKenna understood that at the end of the film, there would be a discussion on the video and Mr. Mamunes' comments. He felt it imperative that this "debriefing" be done with such an entertainment type of film to make sure that the students were getting what they should from the film about issues such as the role of women, religion, culture and the United States government in Iran. Mr. McKenna submitted a statement to the Board when it was considering these tenure charges in which he stated that Mr. Mamunes had told him about the comments he intended to make and that such comments were, in Mr. McKenna's opinion, "made with the express intent of gaining a response of disbelief from students who would then be forced to view the film with a critical eye" (R-41). Mr. McKenna was not in the third period class every day and was not there when the video was shown so he has no personal knowledge of what Mr. Mamunes actually said during the movie.

Mr. McKenna was told only that there was a personnel issue when Mr. Mamunes stopped teaching. He was interviewed by Dr. Sapienza and Mr. Burek a few weeks after Mr. Mamunes left the school. McKenna was asked if he had ever heard Mamunes make racist or sexist remarks and replied that he had not. He was not asked about any specific comment. Mr. McKenna was also asked about the video and replied that he was not in the classroom when Mamunes showed the film.

Mark August Convoy testified on behalf of Mr. Mamunes. Mr. Convoy was a credible witness and I adopt the following as **FINDINGS OF FACT.** Mr. Convoy has been a teacher in the Pascack Hills High School for thirteen years and student taught under Mr. Mamunes in 1986. He knows Mr. Mamunes very well and frequently observed Mamunes teaching, both as a student and later as a teacher. The two traded resources, talked about techniques and became close. Mr. Convoy described Mr. Mamunes as an inductive teacher who begins lessons with concrete experiences of students and then builds on those experiences. Mr. Convoy acknowledged that he is not a supervisor and never assessed Mr. Mamunes in light of evaluation criteria but he did do so informally based on his many years of experience as a teacher.

While Mr. Convoy was certainly not in Mr. Mamunes' class every day and thus could not testify as to what occurred when he was not there, Mr. Convoy never heard Mr. Mamunes make a racist or sexist remark or joke, either in class or in social situations. He knows that Mr. Mamunes is a member of the Unitarian Church and that racist and/or sexist comments are not part of his life style. Mr. Convoy described Mr. Mamunes' reputation as a very tolerant teacher and, based upon his personal knowledge of him as a friend and teacher, characterized him as a "champion of tolerance." An illustration of this tolerance is the Minorities in America course which Mr. Convoy taught as a student teacher under Mr. Mamunes' supervision. Among other topics, this course covered black spiritual songs and taught the students that minorities are part of the fabric of our country.

Personally, Mr. Convoy does not use the phrase "colored people" because it is an old-fashioned term which offends some blacks. The term is a vestige from the times of segregation in our country and he would not use it in speaking to a student in his class. Instead, Mr. Convoy uses the terms "black" or "African-American" although he is aware that some blacks are offended by either term. In teaching his classes, Mr. Convoy is cognizant of not offending students and is aware of the sensitivities of overweight students. He would not deliberately make a statement regarding the physical characteristics of a student which would embarrass the student. On his best days, Mr. Convoy would probably not say "close the door, you need the exercise" to an overweight student because such a comment would probably offend the student. However, a teacher can sometimes offend unintentionally or inadvertently, although if such offense occurs more than once it cannot be seen as unintentional.

Mr. Convoy is aware of a common stereotype in our culture that links Indian Americans with ownership of convenience stores and that this stereotype is a comical theme on the Simpsons television show. He would not make any comments in class to perpetuate such a stereotype because students should not be encouraged to believe in these stereotypes and he would discourage students from engaging in any discussions which would lead them to do so. Mr. Convoy also would not make a reference to a store owned by a student's father as a porn shop because to do so would be disrespectful of the student, put him in a negative light and perpetuate a stereotype. .Mr. Convoy believes it is important for a teacher to reinforce the importance of education and would not tell a student that he or she does not need an education. It is also important to encourage student

participation in class and Mr. Convoy would not denigrate a student's response even if it were incorrect. He would not tell such a student that the only reason he reads newspapers is because he unpacks them at his father's store.

Mr. Convoy has a technique called a "silent scream" which he uses to relieve student stress. He tells the students to contort their faces and pretend they are screaming. Mr. Convoy described a series of posters that were sold ten to twelve years ago which contained a series of vignettes taken from school life with a caption that said "school sucks." The posters were very common and may have been distributed by an educational company. Mr. Convoy has three of the vignettes in his class by the pencil sharpener. Mr. Convoy has never told his class they could say "school sucks" and was not sure whether he ever would. To Mr. Convoy, it is an issue of style which depends on the circumstances. However, he does not think the phrase is inappropriate in class because usage of the term is fairly common.

Mr. Convoy uses the Devil's Advocate technique to stimulate discussion in his classes. Sometimes a teacher has to be provocative to get a response or reaction from the students. Using the technique can be risky because it is challenging the students' point of view by espousing unpopular opinions and some students are more sensitive to their point of view being challenged. It is an effective technique but Mr. Convoy does not use it often. Usually when this technique is used, the teacher will know the students' reaction immediately. Mr. Convoy would want to know if the technique had any effect on the students. If they did not react to his comment, he would want to know why they did not react. In the ideal world, the teacher would know whether the students took the comment literally. Freshmen students are prone to taking everything literally and thus it is trickier to use the Devil's Advocate technique with them. It is important that students find out that the comment made is not the teacher's opinion and thus Mr. Convoy believes it is important to "get a handle" on how students have interpreted information in a lesson. The way to do this after playing Devil's Advocate is through closure, which is commonly done at the end of a unit at the discretion of the teacher, or through "debriefing" shortly after the comment is made. If there is no opportunity for discussion immediately after playing Devil's Advocate, a debriefing at the end of class is the most likely technique used because it is important to do it while the statement is fresh in their minds.

Debriefing may have to occur the next class day if time runs out. If students are silent however, you may never know their reaction to the Devil's Advocate statements.

Stuart Hollis has been a Social Studies teacher in the Pascack Valley Regional School District for thirty-one years. Mr. Hollis was a credible witness and I adopt the following as **FINDINGS OF FACT.** Mr. Hollis knows Mr. Mamunes as a colleague and a friend. Twenty years ago, Mr. Hollis and Mr. Mamunes taught a series of "mini" courses on the Soviet Union, Minorities, Constitutional Law and the History of Art. Mr. Hollis observed Mr. Mamunes teaching the Minorities course for three to four days a week during a ten-week period before Mr. Hollis taught the course the following semester. He described Mr. Mamunes as a creative, brilliant teacher who creates his own lesson plans to get students to think which can make some students uncomfortable. Mr. Mamunes' teaching techniques are different from other teachers who rely solely on textbooks.

An example of a technique used by Mr. Mamunes was the use of colored cards which he handed out to students. Mr. Mamunes then asked the students if they agreed with a statement such as "do you think woman should be in the work place and be in management positions" and they would vote by using the appropriate card for agree or disagree. This technique put students "on the spot" and forced them to speak their mind. Six weeks of the Minorities course was spent on Black History. During this portion of the course, Mr. Mamunes taught about slavery and gave readings to the class on W. E. B. Du Bois and the creation of the NAACP. He also taught the students about Booker T. Washington who urged Blacks to assimilate and the views of Martin Luther King Jr. and Malcolm X. Mr. Mamunes led discussions among the students on which points of view were the best. He also taught about the differences between urban and rural black cultures and included black spirituals in the class materials. Mr. Mamunes challenged the students with a forceful and dynamic presentation which provided more depth and understanding to the students and made them work hard in class.

The Minorities course observed by Mr. Hollis occurred twenty years ago when Mr. Hollis was not a supervisor. While no one told him to incorporate Mr. Mamunes' techniques, he did incorporate some of them. Mr. Hollis did not incorporate other techniques used by Mr. Mamunes because he has a different teaching style and likes to avoid confrontation. During the 1997-1998

school year, Mr. Hollis and Mr. Mamunes both taught at the same school and Mr. Hollis observed Mr. Mamunes' classes periodically for 15 to 25 minutes and saw his lesson plans that year.

Ellen M. Dougherty testified on behalf of Mr. Mamunes. Ms. Dougherty was a credible witness and the following is adopted as **FINDINGS OF FACT.** She is the Administrative Manager and Corporate Secretary for Performance Learning Systems Inc. (Performance) located in Emerson, New Jersey. The firm provides graduate courses for teachers, has offices throughout the country and works with school districts throughout the country. The instructors employed by the firm must have a master's degree and seven years of recent classroom experience. They are supervised by Performance and by various colleges which grant credit to teachers who take the courses. Colleges which grant such credits include Seton Hall, Drexel and Western Maryland.

Performance has employed Mr. Mamunes for twenty years, although he was not currently teaching for them at the time of this hearing. During the course of this twenty years, Mr. Mamunes taught approximately 1000 teachers, including minority teachers, in various states including Massachusetts, Virginia, Alabama, Ohio and Pennsylvania. Every participant in Performance course fills out an evaluation form. Mr. Mamunes' evaluations were above average. Performance has received no complaints about Mr. Mamunes concerning racist, sexist or other inappropriate comments. Ms. Dougherty described Mr. Mamunes as an above average instructor whom she feels comfortable sending to any area of the country to teach. She did acknowledge that she has no personal knowledge of his performance or any comments he made in class. Rather, her opinion is based on the evaluations submitted by Performance's students. Those students do let the firm know if inappropriate comments are made by instructors. Ms. Dougherty agreed that Performance does not teach adolescents and she has no knowledge of Mr. Mamunes effectiveness in teaching adolescents or of his effectiveness in implementing the techniques described in the T.E.A.C. H. manual used by Performance instructors.

Carol Patterson testified on behalf of Mr. Mamunes. Ms. Patterson was a credible witness and the following is adopted as **FINDINGS OF FACT.** She is employed as a teacher of children with learning disabilities by the Ridgewood public school system. Ms. Patterson has known Mr. Mamunes for over twenty years because her children and his children went to school together and

they have both been members of the Unitarian Church. They are also members of the same Book Group in which they read authors from other countries and of all races and ethnicity. Some examples include the works of Toni Morrison and the books "Color of Water" and "Gandhi's Truth." The member of the group who selects the book is responsible for leading the discussion but Mr. Mamunes often contributes a lot to the discussion because of his history background. In all the years she has known him, Ms. Patterson has never heard Mr. Mamunes make a racist, sexist or improper ethnic remark or conduct himself in any such manner. Ms Patterson and her husband submitted a written statement to the Board setting forth their knowledge of Mr. Mamunes (R-45). Ms Patterson acknowledged that she has never seen Mr. Mamunes teach and thus does not know how he interacts with his students and that she has no knowledge of his activities in the school district or in the classroom.

J. M. testified in rebuttal for the Board. Based on her credibility, I adopt the following as **FINDINGS OF FACT.** The World History class was assigned to do a research paper from a list of topics provided by Mr. Mamunes. J. M. decided to research a poet, Sappho. When she told Mr. Mamunes, he told J. M. that Sappho was a lesbian. Mr. Mamunes made no other comment about Sappho to J. M. J. M. was not aware that Sappho was a lesbian; she became embarrassed and did not want to do the paper. She was uncomfortable doing the research because other students saw her. Although J. M. thought Mr. Mamunes' comment was inappropriate and she was embarrassed, she spoke with her mother and decided to do the paper anyway because she wanted to be mature enough to finish the project. J. M. received an "A" on this paper.

J. M. described P. H., M. M. and C. E. as teacher's pets of Mr. Mamunes. There was a baby picture of P. H. on the bulletin board for the entire year. No other baby pictures were on the bulletin board, although J. M. acknowledged that students were free to post whatever they wanted on the board. Mr. Mamunes and P. H. are both Greek and J. M. thought that explained why he favored P. H. Mr. Mamunes always picked M. M. and C. E. as his assistants and favored them. While J. M. did assist Mr. Mamunes later on during the school year by writing down topics on the board, she did not consider herself a teacher's pet because, in her opinion, Mr. Mamunes favored the three other students. While I credit J. M.'s testimony that she viewed these three students as "teacher's pets," I

make no finding that in fact Mr. Mamunes displayed any favoritism towards them since I found J. M.'s testimony in this regard too vague to reach such a conclusion.

J. M. denied that she had any conversations with P. W., A. S. or R. L. in which she said she did not like Mr. Mamunes before he made the comments to her. She disliked him after he made the comments to her and the other students. Before those comments, J. M. had no problem with Mr. Mamunes. A. S., R. L. and P. W. also did not like Mr. Mamunes because of the comments he made to J. M. and the other students.

Mr. Mamunes argues that the testimony of the four students who testified on behalf of the Board should be entirely disregarded because the four are friends who, in effect, conspired to get rid of Mr. Mamunes because they did not like him or his teaching methods. I find nothing in this record to support anything approaching the conspiracy that Mr. Mamunes describes. There is no doubt that J. M. and A. S. are the closest of friends but R. L. only occasionally socializes with them and P. W. seldom does. Moreover, both J. M. and P. W. spoke with their mothers about their concerns contemporaneously with at least some of Mr. Mamunes' comments which upset them, a strong indicator that it was the comments they disliked and not him personally or his teaching style. The demeanor of all four students while they testified showed not even a hint of personal animosity towards Mr. Mamunes and there is nothing in their prior history or records that would support a conclusion that they would go to such lengths to get rid of a teacher simply because they did not like him. Accordingly, I reject entirely Mr. Mamunes' contention that there was an unjustified conspiracy against him which resulted in these tenure charges.

LEGAL DISCUSSION

Preliminarily, I address several legal arguments advanced by Mr. Mamunes concerning the investigation of the charges against him and whether an adverse inference should be drawn against the Board for its failure to preserve notes of some interviews that provided supportive evidence for Mr. Mamunes or to call as witnesses other students in Mr. Mamunes' third period World History class. Relying on some of the Board's answers to interrogatories and the testimony of Drs. Willett and Sapienza and Mr. Sullivan, Mr. Mamunes faults the Board's investigation because allegedly the

administrators did not search out witnesses that would provide evidence in support of him and did not record such evidence when they did receive it. However, whether the Board's investigation could have been conducted in a different manner or even a better manner does not establish that its investigation was tainted nor does it negate the credible testimony of J. M., R. L., P. W., A. S. and A. K. *See,Tthomas v. Morris Twp. Board of Education,* 89 *N. J. Super.* 327, 332 (App. Div. 1965), aff'd 46 *N. J.* 581 (1966); *Quinlan v. North Bergen Board of Education,* 73 *N. J. Super.* 40, 46-47 (App. Div. 1962)(the Commissioner will not substitute his or her judgment for the local board of education's unless it was arbitrary, capricious or unreasonable).

Nor do I find that the instant matter contains the appropriate circumstances for drawing an adverse inference against the Board. While it is true that the Board administrators either did not take notes or discarded them of interviews that provided favorable evidence to Mr. Mamunes, that evidence was provided through the testimony of the Board's administrators who acknowledged its existence. Nor does the fact that the Board did not call all the other students in the class to testify support a negative inference. A negative inference cannot be drawn against one side if the witnesses are available to both sides. *State v. Lamumba,* 253 *N. J. Super.* 375, 395-396 (App. Div. 1992). Mr. Mamunes argues that the other students were not available to him because the Board refused to provide him with their names and addresses pursuant to *N.J.A.C.* 6:3-6.3(a) and that the undersigned upheld this determination. As I previously ruled, the Board was obligated to take this position under the cited regulation. Mr. Mamunes had the option of seeking a court order to obtain the names and addresses or appealing the interlocutory order. He exercised neither option. I am not aware of any case law supporting a negative inference in such circumstances. Moreover, Mr. Mamunes called three of the other students, strongly suggesting that he knew how to get in contact with the remaining students. Accordingly, Mr. Mamunes' arguments that the charges should be dismissed and/or a negative inference should be drawn against the Board are rejected.

Turning to the substantive legal discussion, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et. seq.*, governs the filing of tenure charges against tenured teaching staff members of the State's public school system. *N.J.S.A.* 18A:6-10 provides in relevant part that no tenured teacher "shall be dismissed or reduced in compensation" unless "inefficiency, incapacity, unbecoming conduct, or other just cause" is shown after a hearing held pursuant to the statute. In a tenure

proceeding under the statute, the Board has the burden of demonstrating by a preponderance of the credible evidence that the tenure charges are supported in the record as a whole. *In the Matter of the Tenure Hearing of Fargo,* 1990 *S.L.D.* (Commissioner of Education, November 15, 1989), motion to vacate denied, 1991 *S.L.D.* 2548 (State Board, November 6, 1991).

The Commissioner of Education and the State Board of Education have repeatedly recognized the important influence that teachers have on their students. As the Commissioner stated in *In the Matter of the Tenure Hearing of Tordo,* 1974 *S.L.D.* 97, 98-99 (Commissioner of Education, January 16, 1974):

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher. When a teacher deliberately and willfully violates the law . . . and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set forth by the Commissioner.

Moreover, the Commissioner has recognized that "[a]dolescents are especially vulnerable to the influences of their teachers, who serve as role modes and help to shape how youngsters actually view themselves." *In the Matter of the Tenure Hearing of Johnston,* 95 *N. J. A.R. 2d* (EDU) 439, 443.

There are numerous cases in which the Commissioner and the State Board have sustained tenure charges of unbecoming conduct against teachers who have uttered racist and or sexist remarks to students. *See, e.g., Burg v. State Operated School District of the City of Newark,* OAL Dkt. No. EDU 3291-97, Commissioner of Education (December 18, 1997) (slip op. at 19); *Princeton Regional School District Board of Education v. Campbell,* 93 *N. J.A. R. 2d* (EDU) 196, 224, *aff'd* 93 *N.J.A.R. 2d* 604 (State Board 1993), *aff'd* 95 *N. J.A.R. 2d* (EDU) 211 (App. Div. 1995), certif. denied, 142 *N. J. 518* (1995); *In the Matter of the Tenure Hearing of Sheridan,* 92 *N. J. A. R. 2d* (EDU) 257, 262-63; *In the Matter of the Tenure Hearing of Blasko,* 1980 *S.L.D.* 987, 999 (Commissioner of Education, August 28, 1980), *aff'd in part, rev'd in part,* 1981 *S.L.D.* 1392 (State Board, April 1, 1981); *In the Matter of the Tenure Hearing of Matcki,* 1971 *S.L.D.* 566, 575 (Commissioner of Education, November 18, 1971), *aff'd* 1973 *S.L.D.* 773 (State Board, February 7, 1973), *aff'd* 1973 *S.L.D.* 773 (App. Div. November 28, 1973).

In the instant matter, four of the charges brought against Mr. Mamunes allege that he uttered racist, inappropriate ethnic and or sexist remarks to his students (P-1, Charges 1, 2, 3, and 6). As to Charge 1, Mr. Mamunes admits that he made the comment to J. M. about getting his "colored people mixed up." He argues, however, that the remark was not racist because the term "colored people" is acceptable to at least some African-Americans, is not the same as the term "nigger" and he made the comment as a joke in disparagement of himself and to ease J. M.'s embarrassment. Mr. Mamunes further argues that the comment was not racist because J. M. did not react adversely to it and never told him that the remark bothered her. I reject all of Mr. Mamunes' arguments in this regard.

Neither the dictionary definitions introduced into evidence by Mr. Mamunes, the article by Professor Gates nor the use of the word "colored" in the name of the NAACP are sufficient to remove the sting of this comment to J. M. As was evident from her testimony and that of her mother, the comment was extremely hurtful to J. M. and to her entire family. This testimony was supported by the credible testimony of A. S. that J. M. was extremely upset by the comment. Even several of Mr. Mamunes own witnesses testified that they would not have made this comment to J. M. M. M. does not usually refer to people by their skin color and would not have made the comment to J. M. Mark Convoy does not use the phrase "colored people" because it is an old-fashioned term which offends some blacks and is a vestige from the times of segregation in our country. Mr. Mamunes himself is aware that in the 1950's and 1960's the terms "white" and "colored" were used by restaurants, water fountains and other facilities to segregate the races. He is also aware that "colored people" is not a common term in New Jersey and testified that he does not generally use the term, negating the impact of Professor Gates' article which is based on his life experiences in the rural south. Moreover, Mr. Mamunes' testimony that the term "black" did not fit the situation because J. D. has lighter skin than J. M. is absurd. Importantly, Mr. Mamunes' position that "colored" is not the same as "nigger" ignores the fact that, regardless of the term he used, he was in effect telling a student that he cannot tell members of her race apart.

Based on his apparent sincerity during this part of his testimony, I credit Mr. Mamunes' testimony that he intended the comment as a disparaging joke on himself and not as a put down of J. M. However, even humorous discriminatory remarks are inappropriate and use of humor simply

shows a teacher's lack of "sense and sensibility." *Sheridan, supra,* 92 *N.J.A.R. 2d* at 259, 262; *Blasko, supra,* 1980 *S.L.D.* at 999. Finally, that J. M. did not appear to Mr. Mamunes to react adversely to the remark does not eliminate its discriminatory impact. It is not unusual that a ninth grade student would feel too intimidated to challenge a teacher's remark. This conclusion is supported by the testimony of J. M. that she feared retaliation and that of A. S. that J. M. was uncomfortable even talking about the incident with A. S.'s mother. Perhaps most problematic in this regard is Mr. Mamunes' insistence, even after hearing about the impact on J. M. of his remark during this hearing, that the remark was not inappropriate in the context of what he was trying to accomplish. This indicates that Mr. Mamunes is not concerned with the feelings of his students or their reactions to comments he might make. Based on the foregoing, **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct as alleged in Charge No. 1.

As with Charge No. 1, Mr. Mamunes does not deny that he said to J. M. "you should be proud of Martin Luther King," as alleged in Charge No. 2. He argues, however, that this was not a racist comment because it was not said sarcastically; his intent was to provide positive reinforcement to J. M.; neither J. M. nor anyone else in the class appeared to react negatively to the comment and no one complained to him about the remark. Even though J. M. and some of the other students thought that Mr. Mamunes made this comment in a sarcastic manner, I credit his testimony that he did not intend sarcasm but rather a positive reinforcement for J. M. I found his testimony sincere in this regard and consistent with his history of special class presentations on Dr. King on the anniversary of his birthday every year. Nevertheless, the fact remains that, as testified to by J. M.'s mother and Dr. Willett, the comment had the effect of singling out J. M. based on her race and conveying to the entire class that only African-Americans benefited from Dr. King's accomplishments and should therefore be proud of him. While this was not Mr. Mamunes' intent, his continued insistence that the remark was appropriate, even after hearing of its impact on J. M., her family and other students, and his testimony that he is proud he made the statement and did not consider how J. M. would react to it, indicate a troubling insensitivity on his part and support a conclusion that Mr. Mamunes, however unintentionally, made a statement to J. M. which had a discriminatory impact upon her and others in the class. For the same reasons as with Charge No. 1, the fact that J. M. did not complain about this comment to Mr. Mamunes or anyone in administration

until she was asked about his comments in March 1998 does not negate the discriminatory nature of the comment. Based on the foregoing, **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct as alleged in Charge No. 2.

Charges 3 and 4 contain allegations that Mr. Mamunes told A. K. his father owns a porn shop; A. K. does not need to go to college because he will take over his father's porn shop; A. K. does not need an education and the only reason A. K. reads newspapers is because he unpacks the newspapers at his father's store. There are some discrepancies in the testimony of the students concerning Mr. Mamunes' comments to A. K. J. M. recalls that Mr. Mamunes told A. K. his father owns a porno shop and A. K. did not have to go to college because he could work in the store like his father. R. L. recalled that Mr. Mamunes told A. K. his father owns a porn shop and A. K. did not have to go to college and did not need an education because he will take over his father's shop. R. L. also recalled that Mr. Mamunes told A. K. that the only reason A. K. reads the paper is because he unpacks the newspapers at his father's store. P. W. recalled that Mr. Mamunes told A. K. he did not have to go to college because his father's shop would keep him alive and that J. M. told her that Mr. Mamunes told A. K. his father owns a porn shop on a day when P. W. was absent from class. A. S. recalled that Mr. Mamunes told A. K. his father's shop is a porn shop; A. K. does not have to go to college and the only reason he reads newspapers is because he unpacks them at his father's store.

M. M., who testified on behalf of Mr. Mamunes, recalled that when A. K. made a comment to the effect that he did not have to go to college because he would take over his Dad's business, Mr. Mamunes would respond with something like "we know you don't need an education but this is history class" in order to get the class started. C. E., who testified on behalf of Mr. Mamunes, did not recall any such comments made by Mr. Mamunes to A. K.; she recalled that only students made such comments. P. H., who also testified on behalf of Mr. Mamunes, recalled a few times when Mr. Mamunes said something to A. K. to the effect that his father owned a porn shop but only after A. K. first repeatedly referred to his father's store as a porn shop. P. H. also recalled one time when Mr. Mamunes told A. K. he had stopped by his Dad's porn shop and got a newspaper and that this comment was not made in reference to any joking in the class. P. H. further recalled several times when Mr. Mamunes sarcastically responded to A. K. "yeah, what do you need a college education for" after A. K. had said that he did not need an education. According to P. H., Mr. Mamunes never

told A. K. that he did not have to go to college and made no comment to A. K. regarding why he read newspapers.

A. K. recalled that Mr. Mamunes once said his father owned a porn shop and agreed that his friends have kidded him about his father owning a porn shop. A. K. also recalled that during a class discussion about attending college, Mr. Mamunes told him he did not have to go to college because he would take over his Dad's store. A. K. agreed he has joked with his friends that he does not have to go to college because he can work at home. A. K. testified as to a third comment made by Mr. Mamunes when the class was discussing a current event and A. K. said something about it. Mr. Mamunes told the class that A. K. only reads papers because he unpacks them at his father's store.

Mr. Mamunes could not remember making any of the remarks attributed to him by the students. However, he acknowledged that he could have made them, or similar remarks, in the context of using a leading paraphrase to bolster A. K.'s self esteem when other students were bantering with A. K. during the taking of attendance. According to Mr. Mamunes, if he made such remarks, they were not derogatory or negative comments but were appropriate in the context of what he was trying to accomplish in class.

For the following reasons, **I CONCLUDE** that Mr. Mamunes made the four comments to A. K. as alleged in Charges 3 and 4. As noted above, I found the four students who testified on behalf of the Board to be very credible witnesses who had no reason to fabricate stories against Mr. Mamunes. They all recalled at least several of the comments made to A. K. as alleged in the charges. While there are some discrepancies in the specific words spoken by Mr. Mamunes and the number and type of remarks he made to A. K., those discrepancies can be explained. Some of the students simply may not have been listening to Mr. Mamunes when he made one of the remarks or may have been absent from class on that particular day. Moreover, I cannot credit these students with making up or imagining comments of this nature. In addition, A. K. confirmed that all the comments were made to him and P. H., who testified on behalf of Mr. Mamunes, confirmed that two of the comments were made to A. K. In this regard, I reject Mr. Mamunes' argument that A. K.'s testimony must be discredited because he had earlier denied to Mr. Burek and Mr. Sullivan that the comments were made. With the one exception noted above in the factual discussion, A. K.'s

demeanor while testifying about the comments made to him was credible. His testimony was also consistent with that of the other students. While A. K.'s earlier denial that the remarks were made would usually be troublesome, the Board's explanation that A. K. did not want to get involved at the time because of a recent disciplinary action against him makes sense. Nor do I find it troubling that P. W. may not have heard the porn shop comment first hand yet included it in her written statement. This does not suggest a "conspiracy" to get Mr. Mamunes but rather is completely consistent with a student (i.e., J. M.) discussing what has happened in class with a fellow student who was absent (i.e., P. W.).

Mr. Mamunes argues that even if he made the comments, they do not constitute unbecoming conduct because he would have done so in the context of joking with leading paraphrases which used A. K.'s own words to bolster A. K.'s self esteem and to get the class back on track. Firstly, since Mr. Mamunes testified that he cannot remember making the comments, it is difficult to accept his testimony regarding the context in which they would have been made, especially in light of the majority of the students' testimony that they did not think Mr. Mamunes was joking. Secondly, Mr. Mamunes' attempt to relate any comments he made to A. K.'s tendency to bring candy to class simply does not make any sense because the comments testified to by the students had nothing to do with candy or attempting to "buy friends". Thirdly, that a teacher's comments may have been taken out of context is not a defense to a charge of unbecoming conduct based on those comments. *See, Sheridan, supra,* 92 *N. J. A. R. 2d* at 261-63. Finally, even if A. K. and/or his friends made similar comments, that does not justify a teacher perpetuating and/or repeating demeaning remarks to a student.

The Board contends that the comments made to A. K. constitute unbecoming conduct because they played on a stereotype of American Indians owning convenience stores and thus demeaned A. K.'s ethnicity. The Board also argues that the comments constitute unbecoming conduct because they demeaned A. K.'s academic abilities and his family's occupation. Although there is support in the record for a stereotype that convenience stores are owned by Indian Americans and it is undisputed that A. K. was the only Indian American in the World History class, there is little or no indication that either A. K. or the other students thought Mr. Mamunes was singling out A. K. because he is Indian American or because of a stereotype. Rather, as testified to by the students

called by the Board, what they found troublesome about the comments was the denigration of A. K.'s academic abilities and Mr. Mamunes' seeming disregard for the benefits of a college education. In fact, A. K., unlike J. M., was not troubled by any alleged racist thrust to the comments, but merely thought the comment about his father's "porn" shop was inappropriate. As for the rest of the comments, A. K. was not troubled by them because he thought Mr. Mamunes was joking. Unlike the "colored people" and Dr. King remarks, the remarks made to A. K. are not inherently racist since they contain no reference to skin color or to a particular race. Based on the foregoing, **I CONCLUDE** that the remarks made to A. K. were not racist in nature.

However, I also **CONCLUDE** that the comments did denigrate A. K.'s academic abilities, his family and the educational process. Telling the entire class that A. K. only reads newspapers because he unpacks them at his father's store has the effect of demeaning A. K. in the eyes of his classmates even though A. K. may not have realized that was the case. The comments that A. K. does not need an education and does not need to go to college were interpreted by the Board's witnesses as in derogation of education, a message that no teacher should convey to his students. Finally, the comment that A. K. father's store is a porn shop is completely extraneous to any educational purpose and made unnecessary and inappropriate fun of A. K.'s family. The public trust placed with teachers and the importance of teachers as role models to their students requires that teachers refrain from making fun of any student's academic abilities or his family's occupation or denigrating education in the minds of their students. *See, In the Matter of the Tenure Hearing of Tordo,* 1974 *S.L.D.* 97, 98-99 (Commissioner of Education, January 16, 1974). Comments such as those made by Mr. Mamunes to A. K. constitute "conduct directly antithetical to his role as a teacher and as a role model for the students in his classes." *Sheridan, supra,* 92 *N.J.A.R.* 2d at 262-63. Accordingly, **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct by making inappropriate comments to A. K. that denigrated his academic abilities, his family and the importance of education.

Charge 5 contains the allegation that Mr. Mamunes told C. A., an overweight student, to close the classroom door because she needed the exercise. This remark was contained in the written statements of P. W. and R. L. but not in the written statements of J. M. and A. S. (P-1). However, during the hearing, all four students testified that Mr. Mamunes made this comment to C. A. J. M.

explained that she did not include the comment to C. A. in her written statement because she only included the comments that most affected her. A. S. explained that she did not include the C. A. comment in her written statement because she did not have a lot of time to complete the statement and she included only those comments she remembered at that time. P. W. testified that some of the other students laughed at this comment. None of the other three students testified as to either C. A.'s reaction or any reaction form the other students. A. K. testified the comment was that C. A. needed to work out. He further testified that C. A. looked mad and that most of the other students laughed at her. Because C. A. is overweight and has been the subject of ridicule due to her weight, all five students called by the Board testified that Mr. Mamunes should not have made the comment and that they would feel bad if a similar comment had been made to them. The three students who testified on behalf of Mr. Mamunes, P. H., M. M. and C. E., all testified that they never heard Mr. Mamunes make the "exercise" comment, although he sometimes did ask C. A. to close the door. All three agreed that C. A. is overweight and P. H. agreed that if Mr. Mamunes made such a comment to C. A. it would not be reflective of a mutual respect between teacher and student. When C. A. was interviewed by the school administrators she repeatedly denied ever hearing this remark, even after Dr. Sapienza made several calls to her mother to ask C. A. about the comment. Dr. Sapienza and Dr. Willett believe that C. A. continued to deny the remark had been made because C. A. is so sensitive about her weight that she simply cannot bear to discuss the issue with anyone.

Mr. Mamunes did not recall ever making the "exercise" remark to C. A., although he acknowledged that he sometimes did ask C. A. to close the door. Mr. Mamunes recalled that he may have made the remark, or one similar, to students in other classes. If he did so, it was a self-deprecating reference to his hip problem which made it difficult for him to exercise. Mr. Mamunes further testified at length that the terms "overweight" and "obesity" are meaningless to him because he does not evaluate his students in these terms and he repeatedly stated that he since he could not say whether C. A. is overweight or obese, he would not consider whether she was sensitive in this regard in making any comment to her, although he would never deliberately say anything hurtful to C. A. or any other student.

For the following reasons, **I CONCLUDE** that Mr. Mamunes told C. A., who is overweight, to close the door and added that she needed the exercise. As noted above, I found the testimony of J.

M., P. W., R. L. and A. S. to be credible and they all agreed that Mr. Mamunes made this comment and that C. A. is overweight. With one exception regarding A. K.'s testimony that he told Mr. Sullivan and Mr. Burek about Mr. Mamunes' comments to him, I found the testimony of A. K. to be credible and he also agreed that Mr. Mamunes made this comment. Moreover, A. K.'s testimony that students laughed at C. A. is corroborated by the testimony of P. W. As discussed above, I reject Mr. Mamunes' contention that J. M., P. W., R. L. and A. S. were all friends and out to "get him" because they did not like him or his teaching style. Mr. Mamunes has advanced no other plausible reason why these students would fabricate this comment. The three students who testified on behalf of Mr. Mamunes denied hearing the comment. However, their failure to hear the comment could easily be the result of the students just not listening to Mr. Mamunes at the time or because they were absent from the class at the time.

Further, I found Mr. Mamunes' testimony that he could not recall making the comment to C. A. but may have made it to students in other classes in a self-deprecating reference to his hip problem to be inexplicable. What would prevent him from making the comment to C. A., if, as he testified, he does not consider a student's weight when he makes comments to them? If this is true, how could Mr. Mamunes be sure he never made the comment to C. A.? Moreover, I found Mr. Mamunes' insistence that he is not aware of a student's weight and does not even know the meaning of overweight and/or obese to be disingenuous at best and an exercise in "hair-splitting." Finally, the denials by C. A. regarding this comment do not justify disregarding the testimony of five students that the comment was made. I credit the testimony of the students and Dr. Sapienza that C. A. is a shy student and sensitive about her weight. For such a student, it is not surprising that she would be reluctant to come forward and challenge a teacher and testify that the teacher had humiliated her in class. Dr. Sapienza's attempts to contact C. A. to obtain her testimony were just that and not, as alleged by respondent without any factual support, to coerce C. A. into giving false testimony.

The Board argues that the comment to C. A. constitutes unbecoming conduct. Verbal abuse of a student falls with the meaning of unbecoming conduct. *See, In the Matter of the Tenure Hearing of Cowan,* 224 *N. J. Super.* 737 (App. Div. 1988). A comment such as this to a shy, overweight student is, at best, insensitive and adversely affects the student's self esteem, a result which should be avoided at all costs by a teacher. Even if the teacher meant no intentional harm to

the student, and I credit Mr. Mamunes' testimony that he meant no harm to C. A., making such a remark in these circumstances reflects an unacceptable insensitivity to students' feelings. **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct when he told C. A. to shut the door and added that she needed the exercise.

Charge 6 contains allegations that while the wife was being beaten in the "Not Without My Daughter" video, Mr. Mamunes told the class that it was her fault her husband did this and she should just listen to him and that, when she did listen to her husband, Mr. Mamunes told the class that she was finally coming around. J. M., R. L., P. W. and A. S. all credibly testified that Mr. Mamunes made these comments, or ones similar in effect, during the video. Both P. W. and A. S. included these comments in their written statements while J. M. and R. L. did not (P-1). J. M. did not include these comments in her written statement because she wrote only of those comments that most affected her. R. L. just did not recall the comments when she wrote her initial statement. While there are some inconsistencies in the precise words used by the four students to describe Mr. Mamunes' comments, it is clear that all four had the definite impression that Mr. Mamunes was placing blame on the wife for the actions of her husband. Moreover, the inconsistencies in the students' testimony are minor in that they reflect different recollections of the precise words used by Mr. Mamunes and not the meaning of the comments he made. Neither the inconsistencies nor the absence of these comments in two of the written statements affects the veracity of the testimony of these four students. *See, In the Matter of the Tenure Hearing of Cooke,* 92 *N. J. A R.* 2d (EDU) 220, 226. As reasoned in *Cooke,* "[t]here are personal differences in an ability to recall, length of time needed for recall, impressionability, imagination and ability to discriminate in processing and understanding auditory and visual observations." *Id.* at 225-26. Indeed, if the students fabricated these comments it is likely that they would have ensured there were no inconsistencies. *Ibid.*

The three students who testified on behalf of Mr. Mamunes did not recall any comments made by Mr. Mamunes suggesting it was the wife's fault and she should listen to her husband. However, I reject their testimony as inconsistent with Mr. Mamunes' testimony that in fact he did make comments to this effect and as inconsistent with Mr. McKenna's testimony that Mr. Mamunes told him he planned to make a comment to the effect that the wife would be better off if she learned

to cooperate with her husband. I do not suggest that the three students were lying; merely that if they heard the comments they either did not comprehend the impact of the comments or have simply forgotten them. Such comments are, at least facially, overtly sexist. Accordingly, based on the foregoing, **I CONCLUDE** that during the filming of "Not Without My Daughter" Mr. Mamunes made sexist comments to his students to the effect that it was the wife's fault she was beaten and that she should listen to her husband.

While Mr. Mamunes does not deny making such comments or that such comments are facially sexist, he contends that they were an appropriate use of the Devil's Advocate technique. Based on Mr. McKenna's testimony I do not doubt that Mr. Mamunes made these comments while he was playing Devil's Advocate. However, his failure to provide closure or to debrief the class left these four students with the impression that he meant what he said. They felt demeaned and degraded as a result. In this regard I reject Mr. Mamunes' suggestion that he was not given time to bring closure to his sexist Devil's Advocate comments. There was ample time between the showing of the video and Mr. Mamunes' suspension for him to provide closure. Moreover, the contention that he had no time for closure before he was suspended is undercut by his testimony that he never intended to provide closure because he observed no reaction to his comments and thought that the students simply did not "rise to the bait."

Similarly, I do not find persuasive the argument that closure was not needed because Mr. Mamunes observed no reaction from the students. Mr. Convoy, who testified on behalf of Mr. Mamunes, indicated that if students show no reaction to the Devil's Advocate technique, it is incumbent on the teacher to find out why. Mr. Mamunes' attempt to place the blame on the students or the "school culture" for not coming to him with their concerns is misguided at best. It was his responsibility as the teacher using this technique and knowing its risks to ensure that no misunderstandings existed. In addition, both Mr. Bialkin, who testified on behalf of Mr. Mamunes, and Mr. Convoy, further testified that closure after using the Devil's Advocate technique should occur while the comments are fresh in the student's mind, ideally no later than the end of the class. Mr. Mamunes' failure to provide closure on his sexist comments left the students feeling just as degraded and demeaned as they would have felt had he really meant the comments. In such circumstances, the sexist comments should be given their plain and ordinary meaning. This charge is

not, as Mr. Mamunes characterizes it, merely a dispute about teaching techniques. Rather, his failure as a teacher to provide closure left four of his students feeling demeaned and degraded and reflects a very questionable lack of sensitivity to the impact of his remarks on students. It is undisputed that there is no place for sexist comments in the classroom. *Campbell, supra,* 93 *N.J.A.R. 2d* at 206-07, 221, 224. Based on the foregoing, **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct when he made sexist comments during the filming of "Not Without My Daughter."

Charge 7 contains the allegation that Mr. Mamunes' practice of requiring his students to say "school sucks" was disruptive of order and discipline in the classroom and undermined the integrity of the educational system. It is undisputed that on at least several occasions Mr. Mamunes either required or permitted the students to say "school sucks" in class and that he closed the classroom door when this occurred. However, it is disputed whether Mr. Mamunes required the students to make this statement. J. M. and R. L. testified that Mr. Mamunes required every student to say "school sucks." P. W. testified that when some of the students did not make the statement, Mr. Mamunes told them "come on, you're thinking it - say it with me." A. S. testified that if a lot of students did not say the phrase, Mr. Mamunes would have them repeat it. Both P. H. and M. M. testified that Mr. Mamunes did not require any student to say "school sucks" but rather it was permissive. Mr. Mamunes testified that he allowed, but did not require, the students to say "school sucks" as a tension releasing technique. I do not interpret the testimony of P. W. and A. S. as supportive of a finding that Mr. Mamunes required the students to make the statement. The greater weight of the evidence indicates that the statement was voluntary and I so **CONCLUDE.**

A teacher's permission to students to use vulgarities in their writing assignments and his use of vulgarities in front of parents has been found to be unbecoming conduct based upon its adverse effect on the school's operation. *In the Matter of the Tenure Hearing of Kane,* 1979 *S.L.D.* 528, 532, 534 (Commissioner of Education, October 5, 1979). Moreover, teachers have an obligation to promote education and avoid instilling negativity toward the educational process in students. *Pietrunti v. Board of Education of Brick Township,* 128 *N. J. Super.* 149 (App. Div. 1974) certif. denied 65 *N. J.* 573 (1974), *cert.* denied 419 *U. S.* 1057 (1974); *In the Matter of the Tenure Hearing of Johnston,* 95 *N. J. A. R. 2d* (EDU) 439, 443.

Mr. Mamunes contends, however, that "sucks" is not a vulgarity but rather a term that has come into general usage by teenagers to refer to anything that is a severe disappointment to them. I reject this argument. All of the Board administrators and J. M.'s mother, who is a teacher, strongly view the term as a vulgarity inappropriate for use in the classroom. While Mr. Mamunes' witnesses testified that they could envision a proper use for the term in class, the fact remains that not one of them has ever utilized it in class. I also find persuasive the testimony of Dr. Sapienza and Mr. Sullivan that a student using this phrase in school is subject to discipline. Even Mr. Mamunes was forced to acknowledge that the statement "court sucks" would not be appropriate. The testimony and common sense all support the conclusion that the term "sucks" is a vulgarity and therefore an inappropriate word to use in the classroom. Moreover, despite Mr. Mamunes' protestations to the contrary, it cannot be doubted that the phrase "school sucks" is a negative comment on the educational process. As such, it is an inappropriate method for a teacher to use in order to relieve stress. Regardless of whether Mr. Mamunes required the comment or merely permitted it by students, his actions in this regard constitute unbecoming conduct, *see Kane, supra.* Based on the foregoing **I CONCLUDE** that the Board has shown by a preponderance of the evidence that Mr. Mamunes engaged in unbecoming conduct when he invited his students to say "school sucks" in unison.

Having concluded that the Board has sustained its burden of proving all seven charges, the appropriate penalty must be decided. In determining the penalty to be imposed when tenure charges have been sustained, it is appropriate to consider the teacher's prior record in the District, the nature and gravity of the offenses under all the circumstances involved and any harm the teacher's conduct may have had on the proper administration of school system. *See, In re Fulcomer,* 93 *N. J. Super.* 404, 421-22 (App. Div. 1967). Based on these considerations, **I CONCLUDE** that, while at least some of Mr. Mamunes' comments were of a serious and unacceptable nature, the totality of the circumstances involved and his prior record support a reduction in pay rather than dismissal from his tenured position. The "colored people" comment was very hurtful to J. M. and her family and shocking to some of the other students. However, Mr. Mamunes' intent was not to hurt J. M. but rather to make a disparaging remark about himself. In choosing his words he exercised poor judgment and was insensitive to J. M.'s feelings but he did not intentionally make a racist comment

to her. Similarly, Mr. Mamunes' comment regarding Martin Luther King Jr. reflects a troubling insensitivity but was intended as positive reinforcement for J. M. and not as a racist remark. The comments to A.K. were not of a racist nature but did denigrate his academic abilities and demeaned his father's occupation. The comment to C. A. was insensitive and injurious to her self-esteem but Mr. Mamunes had no intent to hurt C. A. The sexist remarks made during the showing of "Not Without My Daughter" resulted from Mr. Mamunes' inadequate use of the Devil's Advocate technique rather than an intent to demean women. Finally, the "school sucks" incidents constitute a misguided attempt to relieve student tension and Mr. Mamunes did not require all students to make this statement. Given these circumstances and Mr. Mamunes' long and unblemished record in the District, the appropriate penalty is forfeiture of two months pay; forfeiture of the 120 days' salary withheld following certification of the tenure charges by the Commissioner and withholding of any merit increments until the end of the 2000/2001 school year. *See, In the Matter of the Tenure Hearing of Jason Burg,* 1997 *S. L. D.,* OAL Dkt. No. EDU3291-97 (Commissioner of Education, December 18, 1997).

ORDER

Based on the foregoing, **IT IS ORDERED** that respondent George Mamunes forfeit two months pay and forfeit 120 days pay withheld following the certification of tenure charges. Further **ORDERED** that merit increments be withheld from Mr. Mamunes until the end of the 2000/2001 school year.

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

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

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

5/5/00
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

5/12/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 12 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner

P-1 Written Statement of Evidence in Support of Tenure Charges

P-2 Page 44 of 1998 Pascack Valley High School Yearbook

P-2a Page 69 of 1998 Pascack Valley High School Yearbook

P-2b Page 62 of 1998 Pascack Valley High School Yearbook

P-3 Written statement of A. K. dated November 16, 1998

P-4 Handwritten notes of Douglass Burek dated March 25 to March 27, 1998

P-5 Letter dated April 1, 1998 from Richard Willett to George Mamunes

P-6 Letter dated April 22, 1998 from Richard Willett to George Mamunes

P-8 Affidavit of Dr. Richard Willett dated June 11, 1998

P-9 Pascack Valley Regional High School District School Calendar for 1997-1998

P-10 George Mamunes' Employee Attendance Record for 1997-1998

P-11 Annual Report on Staff Evaluation for George Mamunes dated March 2, 1993

P-12 Annual Report on Staff Evaluation for George Mamunes dated February 29, 1992

P-13 Classroom Observation Report on George Mamunes dated November 22, 1991

P-14 Annual Report on Staff Evaluation for George Mamunes dated March 7, 1991

P-15 Classroom Observation Report on George Mamunes dated January 18, 1991

P-16 Annual Report on Staff Evaluation for George Mamunes dated March 7, 1990

P-17 Classroom Observation Report on George Mamunes dated December 8, 1989

P-18 Classroom Observation Report on George Mamunes dated January 12, 1989

P-19 Annual Report on Staff Evaluation for George Mamunes dated March 9, 1988

P-20 Classroom Observation Report on George Mamunes dated February 11, 1988

P-21 Grievance Form submitted by George Mamunes dated May 6, 1998

P-22 Agreement between the Board of Education and Education Association for 1996-1999

P-23 Letter dated April 26, 1998 from Richard Willett to George Mamunes

P-24 Letter dated May 8, 1998 from Richard Willett to George Mamunes

For Respondent

R-2 Classroom evaluation completed by J. M.

R-3 Classroom evaluation completed by P. W.

R-4 Policy of Pascack Valley Regional High School District re: Sexual Harassment

R-5 Classroom evaluation completed by C. A.

R-6 Annual Report on Staff Evaluation for George Mamunes dated Spring 1998

R-7 Classroom Observation Report on George Mamunes dated December 9, 1994

R-8 Letter dated April 21, 1995 to George Mamunes from Joseph Toohey

R-9 Classroom Observation Report on George Mamunes dated December 5, 1997

R-11 Annual Report on Staff Evaluation for George Mamunes dated March 17, 1997

R-12 Annual Report on Staff Evaluation for George Mamunes dated February 7, 1996

R-13 Annual Report on Staff Evaluation for George Mamunes dated February 16, 1995

R-14 Annual Report on Staff Evaluation for George Mamunes dated March 14, 1994

R-15 Memo to George Mamunes from Barbara Sapienza dated March 27, 1998

R-16 Open Letter to Pascack Valley Regional High School Board of Education from George Mamunes

R-17 Handwritten memo from Ed B. to George re: copy of evaluation

R-18 Annual Report on Staff Evaluation for George Mamunes dated March 8, 1989

R-19 Classroom Observation Report on George Mamunes dated January 12, 1989

R-20 Classroom Observation Report on George Mamunes dated December 21, 1992

R-21 Classroom Observation Report on George Mamunes dated February 3, 1994

R-22 Classroom Observation Report on George Mamunes dated December 13, 1994

R-23 Classroom Observation Report on George Mamunes dated December 11, 1995

R-24 Classroom Observation Report on George Mamunes dated December 18, 1996

R-25 Order of Service for the Unitarian Society of Ridgewood

R-26 Project T.E.A.C.H. Manual

R-27 Participating in Class Well Handout

R-28 Annual Report on Staff Evaluation for George Mamunes dated February 28, 1992

R-31 Affidavit of George Mamunes dated June 25, 1998

R-32 Board of Education Agenda dated May 18, 1998

R-33 Webster's New World Dictionary, Third College Edition, pages 276 and 916

R-34 Webster's Third New International Dictionary, pages 449 and 1527

R-35 1997 Reuters News Release, "NAACP urges Webster to change 'nigger' description"

R-36 Washington Post October 8, 1997 article "Activists Seek to Drop or Redefine 'Nigger' in Merriam Webster Dictionary"

R-37 USIA August 1996 Article by Henry Louis Gates, Jr., "'Colored People' -- Reminiscences of Home"

R-41 Statement "To Whom It May Concern" from Robert S. McKenna

R-42 Promoting Creativity Handout

R-43 World History Final Test

R-45 Statement "To Whom It May Concern" from Carol and Michael Patterson

R-46 Classroom Observation Report on George Mamunes dated January 19, 1971

R-47 Classroom Observation Report on George Mamunes dated March 14, 1974

R-48 Classroom Observation Report on George Mamunes dated January 17, 1978

R-50 Classroom Observation Report on George Mamunes dated May 2, 1979

R-51 Annual Report on Staff Evaluation of George Mamunes dated March 20, 1980

R-52 Classroom Observation Report on George Mamunes dated March 13, 1981

R-53 Annual Report on Staff Evaluations of George Mamunes dated March 16, 1981

R-54 Annual Report on Staff Evaluations of George Mamunes dated March 16, 1982

R-55 Classroom Observation Report on George Mamunes dated March 4, 1983

R-56 Annual Report on Staff Evaluation of George Mamunes dated March 18, 1983

R-57 Classroom Observation Report on George Mamunes dated January 23, 1984

R-58 Annual Report on Staff Evaluation of George Mamunes dated March 15, 1984

R-59 Classroom Observation Report on George Mamunes dated November 29, 1984

R-60 Annual Report on Staff Evaluation of George Mamunes dated March 7, 1985

R-61 Annual Report on Staff Evaluation of George Mamunes dated March 10, 1986

R-62 Classroom Observation Report on George Mamunes dated January 21, 1987

WITNESSES

For Petitioner

Frank D. Sullivan

J. M.

N. M., mother of J. M.

R. L.

P. W.

Dr. R. W., mother of P. W.

A. S.

A. K.

Douglass Burek

Dr. Barbara Sapienza

Dr. Richard E. Willett

For Respondent

Edwin Bialkin

George Mamunes, Respondent

Ellen M. Dougherty

P. H.

Carol Patterson

M. M.

C. E.

Robert McKenna

Mark August Convoy

Stuart A. Hollis

Louis Cassella

OAL DKT. NO. EDU 7245-98N
AGENCY DKT. NO. 229-7/98

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MAMUNES,	:	
PASCACK VALLEY REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT, BERGEN	:	DECISION
COUNTY.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed.[1] The Board's exceptions and respondent's exceptions, as well as the replies thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.

The Board's exceptions contest the Administrative Law Judge's (ALJ) conclusion that the nature of the charges themselves and respondent's overall professional record do not warrant termination of employment. The Board argues, *inter alia*, that the ALJ erred in accessing the seriousness of respondents' statements to students, and that respondent's actions warrant the severest penalty of removal from his tenured teaching position.

In his exceptions, respondent asserts that Charge 3 should be dismissed because the ALJ made factual findings that respondent did not make stereotype or racial statements (Respondent's Exceptions at 1), that Charge 5 was not sustained by a preponderence of the credible evidence (*id.* at 14), and that Charges 2 and 6 do not rise to the level of unbecoming conduct (*id.* at 15, 16). Respondent contends that in reaching her determination, the ALJ relied

[1] Although hearings were conducted on November 23, 24, 25, 1998 and December 1, 9, 15, 17, 18 and 30, 1998, the only transcripts provided to the Commissioner were those of the December 15 and December 17 hearings and a partial transcript of the hearing on December 9, all of which were provided by the Board.

on inadmissible opinions expressed by the school's administrators, who were not qualified as experts in the fields of psychology or human behavior. (*Id.* at 3) Additionally, respondent challenges the credibility findings in the Initial Decision, alleging that the ALJ was unconcerned with the inconsistencies in the students' testimony and written statements. Respondent avers that if the students' statements were consistent, the ALJ found that they were telling the truth, but if the students' statements were inconsistent, the ALJ found that it showed that they didn't fabricate testimony because their ability to recall things is different. (*Id.* at 9-10)

In its reply exceptions, the Board argues that Charges 2, 3, 5 and 6 should be sustained and urges the Commissioner to modify the ALJ's recommended penalty to provide for respondent's immediate dismissal from the District. (Board's Reply Exceptions at 30)

Respondent's reply exceptions urge the Commissioner to adopt the findings of the ALJ with a modification of the penalty since respondent never intended to disparage or embarrass anyone or to hurt their feelings. Respondent further requests that his long and honorable teaching career, as well as his record of promoting tolerance and civil rights as noted by the ALJ, be taken into consideration in determining penalty. (Respondent's Reply Exceptions at 11-12)

Having conducted a careful and independent review of the record in this matter, including the arguments advanced by the parties, the Commissioner finds no cause to disturb the credibility determinations and factual findings rendered by the ALJ. The Commissioner is satisfied, based upon the record before him, that the ALJ appropriately measured the plausibility of content in deciding the credibility of witnesses and the proper weight to assign to testimony in reaching her factual findings and conclusions.

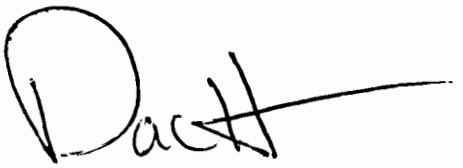
Accordingly, the Commissioner concurs that the Board has sustained its burden of proving all seven charges of conduct unbecoming a teacher by a preponderence of credible evidence.

As to the appropriate penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically on respondent the seriousness of his conduct and his need for greater control and sensitivity in dealing with his students. The Commissioner agrees with the ALJ that, in view of all the facts in this matter, the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also agrees that respondent's use of inappropriate language is a serious infraction deserving a harsh penalty. The Commissioner, therefore, concurs with the ALJ that the appropriate penalty is respondent's forfeiture of the 120 days of pay withheld following the certification of tenure charges, the forfeiture of an additional two months' salary, and the withholding of increments until the end of the 2000-2001 school year.[2] In so determining, the Commissioner also notes that, although he is without authority to compel respondent to attend training classes designed to address and prevent insensitive conduct in the classroom, it would be appropriate for the Board to do so within the confines of respondent's tenure and contractual rights. *See In the Matter of the Tenure Hearing of DiPillo, School District of the Township of Randolph, Morris County*, 95 *N.J.A.R.*2d (EDU) 206, 208.

[2] It is noted that respondent has no entitlement to receive a salary amount that includes an award of an increment during his suspension following the Board's certification of tenure charges. *See In the Matter of the Tenure Hearing of Anthony Castaldo, School District of the Union County Regional High School No. 1,* decided by the State Board, 1986 *S.L.D.* 3026.

Accordingly, the Initial Decision in this matter is adopted for the reasons expressed therein.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: JUN 26 2000

Date of Mailing: JUN 26 2000

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

208-00

EDU # 07245-98N
C # 208-00
SB # 42-00

IN THE MATTER OF THE TENURE :

HEARING OF GEORGE MAMUNES, : STATE BOARD OF EDUCATION

PASCACK VALLEY REGIONAL HIGH : DECISION

SCHOOL DISTRICT, BERGEN COUNTY.:

Decided by the Commissioner of Education, June 26, 2000

For the Petitioner-Appellant, Fogarty and Hara (Rodney T. Hara, Esq., of Counsel)

For the Respondent-Respondent, Springstead and Maurice (Harold N. Springstead, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Daniel J. P. Moroney recused himself.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 09 2000

209-00

IN THE MATTER OF THE DIVISIONAL :

REALIGNMENT BY THE NORTHERN :

NEW JERSEY INTERSCHOLASTIC :

LEAGUE. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, six parochial school members of the Northern New Jersey Interscholastic League (NNJIL), sought reversal of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee's decision upholding a divisional realignment by the NNJIL which established two public school divisions and one nonpublic school division. NNJIL is a voluntary league comprised of 13 large public schools in Bergen, Essex and Passaic Counties and six parochial schools in Bergen County, and is one of the 21 leagues and conferences under the jurisdiction of the NJSIAA. On June 3, 1999, the NNJIL adopted an Amendment to Article VII of its Constitution establishing a third division comprised solely of nonpublic schools. Petitioners alleged that by NNJIL establishing a separate division segregating the parochial schools, the public schools had discriminated against the parochial schools and had denied them full membership in the League. Petitioners filed suit in Bergen County Superior Court against the 13 NNJIL public schools but the NJSIAA intervened and the Superior Court enjoined the NNJIL from implementing the new divisional alignment pending the NJSIAA's full and final review and further order by the Court.

Following a hearing, issuance of a Report, a subsequent meeting and work session by the NJSIAA's Special Committee, the Committee issued a Supplemental Report finding that the new divisional alignment was an acceptable method of addressing the League's competitive imbalance (the dominance of the nonpublic schools since 1988) while providing all member schools full membership in the League and a full and fair schedule of athletic competition. On Janurary 12, 2000, NJSIAA's Executive Committee heard oral argument on the Special Committee Reports and voted 33-0 to adopt the Reports.

As set forth in *N.J.A.C.* 6A:3-7.4, the Commissioner's review in NJSIAA determinations is an appellate one. Having conducted an independent review of the 500-page record of the proceedings, including transcripts of the hearings and meetings and the parties' submissions on appeal, the Commissioner was persuaded that petitioners have been accorded the due process to which they were entitled, that the Special Committee's findings and conclusions were well-grounded in the record and that petitioners failed to establish that the NJSIAA's determination upholding the divisional realignment of the NNJIL was arbitrary, capricious or unreasonable. The Commissioner found petitioners' contention that because there is an absence of a rational basis or legitimate State purpose to be served by the divisional realignment, that the NNJIL violated petitioners' constitutional rights under the Fourteenth Amendment, Equal Protection Clause, was without merit. The Commissioner found that the record supported the conclusion that a rational basis exists to limit the League's organization to public schools because: 1) parochial schools were found to be dominating League competition creating a competitive imbalance and 2) parochial schools have an enrollment advantage since they are able to enroll students from a wide geographic area and are able to offer financial aid to their student-athletes. Moreover, the Commissioner found petitioners' allegations that the realignment contravened their rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution to be without merit. Petitioners were not excluded from the benefits of membership, maintain full voting rights, continue to compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. The Commissioner also found that the realignment did not in any way advance or inhibit the exercise of religion, nor did it violate the Law Against Discrimination, noting that the Special Committee could not find evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any "anti-Catholic bias." The Commissioner affirmed the NJSIAA's decision.

AGENCY DKT NO. 71-2/00

IN THE MATTER OF THE DIVISIONAL	:	
REALIGNMENT BY THE NORTHERN	:	COMMISSIONER OF EDUCATION
NEW JERSEY INTERSCHOLASTIC	:	DECISION
LEAGUE.	:	

For Petitioners Parochial School Members of the Northern New Jersey Intersholastic League, Paul J. Giblin, Esq. (Giblin & Giblin)

For Respondents Public School Members of the Northern New Jersey Interscholastic League, Cherie L. Maxwell, Esq. (Sills, Cummis, Radin, Tischman, Epstein & Gross)

For Respondent New Jersey State Interscholastic Athletic Association, Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

BACKGROUND AND PROCEDURAL HISTORY

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on February 15, 2000, and amended on March 3, 2000, by the six parochial school members of the Northern New Jersey Interscholastic League (NNJIL). Therein, petitioners seek a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee, dated January 13, 2000, adopting the July 22, 1999 and January 3, 2000 determinations of the Special Committee on Leagues and Conferences (Special Committee), upholding a divisional realignment by the NNJIL which established two public school divisions and one nonpublic school division. Petitioners seek reversal of NJSIAA's decision as being a violation of petitioners' rights as guaranteed by the U.S. Constitution, Amendment XIV; New Jersey Constitution, Article 1, paragraphs 1 and 5; and

the provisions set forth at 42 *U.S.C.* sec. 1981 (sic) *et seq.* Petitioners submit that they have suffered and will continue to suffer irreparable harm by being excluded from full membership in the league because of the NJSIAA's failure to provide petitioners with a full and fair schedule, and that, further, petitioners will suffer harm and damages by the discriminatory acts as they pertain to women's high school sports in violation of their civil rights. (Petition of Appeal at 2)

On March 21, 2000, respondent NJSIAA filed its Answer to the Petition of Appeal, along with the Statement of Items Comprising the Record and the attached two-volume Record before the NJSIAA. On March 28, 2000, respondents, public school districts of the NNJIL, filed their Answer to the Petition of Appeal. By letter of March 30, 2000, the Director of the Bureau of Controversies and Disputes established a briefing schedule. Petitioners subsequently filed a brief in support of their appeal on April 17, 2000,[1] and respondents, public school districts and NJSIAA, filed briefs on April 27, 2000 and May 9, 2000, respectively, whereupon the record in this matter was closed.[2]

NNJIL is a voluntary league comprised of 13 large public schools in Bergen, Essex and Passaic Counties and six parochial schools in Bergen County, and is one of the 21 leagues and conferences under the jurisdiction of the NJSIAA. Prior to the adoption of an Amendment to Article VII of its Constitution on June 3, 1999 by the NNJIL establishing a third division comprised solely of nonpublic schools, NNJIL was structured into two divisions, the Atlantic Division and the Pacific Division. Bergen Catholic was in the Atlantic Division with

[1] Along with their brief, petitioners submitted a Certification of the Athletic Director of Bergen Catholic High School, Angela Hickey, and several athletic schedules. These additional documents submitted by petitioners were not before the NJSIAA and not previously made a part of the record. In accordance with *N.J.A.C.* 6A:3-7.2(d), these additional submissions were, therefore, not considered by the Commissioner in rendering his decision.

[2] On June 2, 2000, petitioners filed Certifications of Anthony Karcich and Susan Liddy. These certifications were not before the NJSIAA and not previously made a part of the record. In accordance with *N.J.A.C.* 6A:3-7.2(d), these additional submissions were, therefore, not considered by the Commissioner in rendering his decision.

the larger public schools, and the five other parochial schools were in the Pacific Division with the smaller public schools. (Petitioners' Brief at 5)

As a result of the amendment, the three divisions were designated as follows:

LARGE PUBLIC

	Enrollment
Clifton	1,997
Passaic	1,562
Eastside	1,441
Kennedy	1,367
Bloomfield	1,158
Hackensack	1,114

SMALL PUBLIC

	Enrollment
Montclair	1,121
Ridgewood	1,049
Belleville	987
Teaneck	964
Barringer	962
Paramus	870
Nutley	798

NON-PUBLIC

	Enrollment
Bergen Catholic	1,140*
Don Bosco Prep	1,026*
St. Joseph	688
Paramus Catholic	652
Immaculate Heart Academy	1,130*
Holy Angels	800*

*Enrollment is doubled for single-sex schools
(*Id.* at 6)

On June 10, 1999, the six parochial school members of the NNJIL filed suit against the 13 NNJIL public schools in Bergen County Superior Court, alleging that, by

segregating the parochial schools in a separate division, the public schools had discriminated against the parochial schools, and had denied them full membership in the League. The NJSIAA intervened and requested the Superior Court to permit NJSIAA to hold hearings and investigate the complaint. (NJSIAA's Brief at 1, 2) The Superior Court's decision on August 17, 1999 enjoined NNJIL from implementing its new divisional realignment pending the NJSIAA's full and final review and further order by the Court. The Court further ordered that the injunction would not apply to the NNJIL's 1999-2000 football schedule as it had been agreed to by the parties. (Superior Court Decision at 2)

On July 7, 1999, the Special Committee of the NJSIAA held a hearing at which all parties appeared with counsel for the purpose of considering the parochial schools' complaint. The Special Committee issued its report of its findings and conclusions on July 22, 1999. (NJSIAA's Brief at 2)

The Findings of Fact determined by the Special Committee in its July 22, 1999 report were as follows:

1. The NNJIL consists of nineteen schools: thirteen large public schools in Bergen, Essex and Passaic Counties and six parochial schools, located in Bergen County. Three of the parochial schools: Bergen Catholic, St. Joseph's Regional and Don Bosco are all boys schools; two of the parochial schools, Immaculate Heart and Holy Angels Academy, are all girls schools; and the remaining parochial school, Paramus Catholic, is co-educational.

2. In 1982, five of the six parochial schools were added to the NNJIL by the NJSIAA as part of the first statewide realignment.

3. After the first realignment, the NNJIL consisted of a Bergen Division and an Essex-Pacific Division. Since the 1988-89 school year, the NNJIL was divided into the Atlantic Division, consisting of Bergen Catholic and the larger NNJIL public schools, and the Pacific Division, comprising the five remaining parochial schools and the smaller NNJIL public schools.

4. Since the 1988-89 school year, parochial schools have won both the boys and girls All Sports Championship in each division in which they have competed.

Immaculate Heart Academy has won the Pacific Division All Sports Championship for girls for nine straight years; Don Bosco has won it for boys for nine of the last ten years; and Bergen Catholic has won its boys division title for thirteen of the last fourteen years. The only division title regularly won by public schools is the Atlantic Division Girls, where no parochial schools compete.

5. In their most recent football game, St. Joseph's was beating Paramus 46-0 in the first quarter, when St. Joseph's substituted their junior varsity team in for their varsity. Such lopsided games do not foster healthy competition.

6. Although all NJSIAA schools are subject to the Association's eligibility rules, parochial schools operate under different admissions policies and are able to draw student-athletes from a wide geographic and population base. Public schools are generally restricted to admitting students from the local school district.

7. While some public schools admit tuition-paying students, it is not the norm, and there is no evidence that such students have had an impact on athletic competition.

8. Bergen Catholic, as an example, accepts students from throughout Bergen County, outside Bergen County, and outside New Jersey.

9. Parochial schools also differ from public schools because they are able to offer financial aid to student-athletes who qualify.

10. In the fall of 1998, Dr. Charles Khoury [Principal, Paramus High School] initiated a proposal to amend the NNJIL Constitution to create a public school division and a non-public school division. The public school division would be divided based on enrollment. He convened a meeting of public school principals on November 4, 1998 to discuss this initiative. Parochial schools were not invited to that session.

11. Dr. Khoury sent his proposed constitutional amendment to Mr. John Job, the Principal of St. Joseph's High School, who was then serving as the President of the NNJIL. It was thereafter distributed to all of the nineteen schools in the League. He submitted the amendment at the December 3, 1998 league meeting.

12. On March 11, an NNJIL meeting was convened, at which time Dr. Khoury again advanced his proposal for the new divisional alignment. Representatives of the parochial schools in attendance opposed this proposal, which was deferred for consideration until the June 3, 1999 meeting of the NNJIL.

13. In mid-April 1999, George Middleton, the Athletic Director of Bloomfield High School, prepared a schedule for the 1999 football season. The schedule requires each team to play the rest of the teams in its division; honors prior contracts schools have for games against non-conference teams; and fills out the remainder of the schedule with intra-divisional crossover games. The crossover games were scheduled based on the competitive strengths of the respective teams.

14. The League voted to adopt this schedule 17-1, with all the parochial schools accepting the schedule while reserving their right to object to the new division alignment. The only school to dissent was Clifton.

15. As crafted, the football schedule provides the parochial schools with a full and fair opportunity for athletic competition. The schedule assures that the parochial schools are not excluded from the League, and provides for competition with other League members.

16. On June 3, 1999, the NNJIL adopted Dr. Khoury's constitutional amendment by a 13 to 6 vote, with every parochial school opposed.

17. The parochial schools have charged that they were shut out from the process by which the League amended its Constitution, and were therefore denied due process. Their chief complaint was that the public schools had secretly met without them to discuss the proposal, and also met with an NJSIAA staff member who recommended the new alignment.

18. Dr. Khoury testified that NJSIAA Associate Director James Loper did not meet with the public school representatives, which was confirmed by Mr. Loper.

19. Dr. Khoury admitted that the public schools had met, at his invitation, for lunch at his school to discuss whether the schools shared a common concern about the lack of competitive balance in the League, and if so, to discuss how to address the problem. While it certainly would have been preferable to include parochial school members, there was nothing improper about this meeting.

20. The amendment was debated twice and voted upon in an open forum in which all NNJIL members, public and parochial alike, were present. At the June 3, 1999 NNJIL meeting, the amendment garnered the required two-thirds majority for passage. There was nothing about the process that would invalidate the result.

21. On June 5, 1999, the six parochial schools instituted a lawsuit against the NNJIL and its public school members, contending that the constitutional amendment deprived them of the full benefits of League membership.

22. The Committee finds that the NNJIL constitutional amendment was not motivated on religious grounds. It was rather advanced because of the domination of the League competition by the parochial schools and desire by the public schools to require more competitive balance within the League. The amendment recognized that the parochial schools could draw a wider enrollment of student-athletes, without consideration to geographic attendance zones.

23. The Committee finds that the aforesaid reasons for adopting the constitutional amendment were both legitimate and rational and came only after years of domination of intra league competition by Bergen Catholic in the Atlantic Division and Don Bosco and Immaculate Heart in the Pacific Division.

24. The NNJIL has not changed any schedules for the 1999-2000 school year other than the football schedule. In turn, the football schedule, which was approved by the parochial schools, provides for a full schedule of nine contests for each of the four parochial football teams and was approved by the parochial schools themselves in April 1999.

25. The Committee could not find any evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any "anti-Catholic bias."

26. Except for the meeting on November 4, 1998, all of the meetings of the NNJIL, beginning in December 1998 leading up to the adoption of the constitutional amendment in June 1999, were open to all members of that League. The amendment was adopted after early notice to all schools and after open and free discussions among League members.

27. Despite allegations to the contrary by the parochial schools, there is no evidence that the NNJIL will discount contests played by its public school members against parochial school opponents in determining divisional and league champions.

28. Although arranging the divisions on the basis of enrollment or attendance zones is rational, the impact on the parochial schools raises substantial concerns. In particular, a division of three girls' programs does not provide an adequate competitive framework for divisional championships. (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 8-11)

Based on the above Findings of Fact, the Special Committee reached the following conclusions and recommendations:

1. The amendment to Article VII of the NNJIL Constitution on June 3, 1999 was based upon an attempt by that League to provide greater competitive balance among its member schools. It was also based upon a decision to arrange three divisions; two public divisions based on enrollment, and a non-public division, which recognized that these schools had a much wider enrollment pool. That decision was founded on a decade or more of experience with parochial schools dominating intra league competition.

2. Placing parochial schools in a separate division can be a reasonable method of redressing competitive imbalance in a league. In this case, a competitive imbalance was found to exist, and it was not unreasonable to require that non-public schools, all of which operate with similar admissions policies, be required to play each other in the same division. The decision was not based upon any "anti-Catholic school" sentiment and did not deprive the parochial schools of either full membership in the League or complete interscholastic sports schedules for the future.

3. Having found that the decision to require the non-public schools to compete against each other was rationally based, the Special Committee nevertheless recognizes that significant problems continue to exist with this particular alignment:

   First, the non-public school division contains only four schools competing in boys sports and three schools competing in girls sports. League and conference divisions in New Jersey generally consist of five or more schools. Without any question, a girls' division of three teams is far too small.

   Second, the League has not yet addressed how divisional championships will be awarded. When it does, results from public-parochial contests should be given the same weight as results from other games.

   Third, future League schedules should be similar to the existing football schedule, which takes into account the relative strengths of the teams and continues to schedule publics against parochials.

   Fourth, as is the prevailing practice for most conferences, adjustments in divisional alignments could be made every two years.

4. The Special Committee recommends that the NNJIL schools meet to review its new divisional alignments, taking into account the issues set forth in this decision.

5. The Special Committee directs that the NNJIL report by November 1, 1999, as to action taken consistent with this decision. It is the hope of the Special Committee that the NNJIL will resolve these concerns itself, amicably, without resorting to further litigation. (*Id.* at 11-12)

On October 22, 1999, Joseph O. White, President of the NNJIL, filed a response to the Special Committee's July 22, 1999 decision. The Special Committee met on November 8, 1999 and decided at that time to invite the involved parties to a December 8 work session for discussion purposes.[3] (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 2) On January 3, 2000, the Special Committee issued its Supplemental Report. The following are the findings and conclusion in that report:

> **FINDINGS**
> The Special Committee is satisfied that the NNJIL has taken substantial steps to meet the concerns expressed by the Special Committee in its July 22, 1999 decision. While not perfect, the new divisional alignment appears to be an acceptable method of addressing the League's competitive imbalance while providing all member schools with full and fair athletic schedules.
>
> The Special Committee's first concern was that the parochial divisions were too small: four parochial schools compete in boys sports and only three parochial schools compete in girls sports. The NNJIL addressed this concern in two ways. First, the League attempted to expand its membership by merging with other regional conferences. The hope was that the parochial division could thereby be increased with parochial schools from nearby conferences. Those attempts were unsuccessful. Second, the schedule devised by the League insured that, for purposes of competition, the parochial schools would not be isolated in the parochial division. Parochial schools will compete against schools from the two public school divisions as well as against the parochial schools in the non-public school division. The parochial-public games will carry the same weight in the division standings as parochial-parochial games. Therefore, the disadvantages of a small division--playing the same teams over and over again and having a limited number of games from which to draw a division champion--will not be present. Although there are only three schools competing with girls programs in the parochial division, those schools will play a full schedule of games against schools throughout the NNJIL, and their division champion will be determined based on the results of all of their NNJIL games.
>
> A benefit of the new alignment is that the League will award more division championships. Division champions will be named for three divisions instead of just two, and All Sports Banners will be awarded for all three divisions.

[3] League representatives and parochial school representatives were invited to attend. George Middleton, Executive Secretary of the NNJIL, attended, as well as nine other public school representatives, but no representatives from the parochial schools attended the work session. (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 2, 3)

The Special Committee's second concern was that at the time of the July 1999 hearing, the League had not finalized how it would designate division champions. The Committee recommended that the League accord results from inter-divisional play the same weight as results from intra-divisional play. As noted above, the League accepted the Committee's recommendation and as a result, division champions will be selected based on all the regular season games a team plays against NNJIL schools, not just on games played against division rivals.

The Special Committee's third concern was that future scheduling take into account the relative strength of a school's athletic program for each sport and continue to schedule public schools against parochial schools in the future. To meet that concern, NNJIL schedulers divided the League into three sections, based on the strength of a school's athletic program for each sport over the last five years. Inter-division, or "crossover" games were then scheduled between programs of similar strength. Scheduling in this manner, based on strength of program, insures that the League will maintain a competitive balance that is healthy for all schools. It also has the added benefit of allowing schools to play games against a wider variety of opponents. As the strength of a school's program rises or falls each year, the school's opponents will change accordingly.

The new schedule also gives all NNJIL schools an opportunity to play each other. Under the old two-division format, teams from the Atlantic Division rarely met teams from the Pacific Division. Bergen Catholic, for example, played just two regular season football games against parochial schools in the five seasons from 1994 through 1998.

Certain aspects of the old scheduling system remain in effect. As in the past, all schools will have an opportunity to schedule their own non-League games. Public and parochial schools will continue to compete against each other. Most importantly, the new League schedules demonstrate that both parochial and public schools will enjoy a full schedule of League competition, just as they did under the old system.

Finally, the Special Committee recommended that adjustments in divisional alignments could be made every two years. In response, the NNJIL noted that the Constitutional amendment establishing the public and non-public divisions stated, in part, that "divisions shall be established every two years." According to the League, adjustments to the manner of division alignments could be made every two years on any basis that is agreeable to the membership, as long as the change has the necessary votes for adoption.

CONCLUSION

The NNJIL has satisfactorily addressed the concerns raised by the Special Committee in the July 22, 1999 report. The League's scheduling assures that the

parochial schools will not be denied full membership in the League, and that they will receive a full and fair schedule of athletic competition. (*Id.* at 3-6)

On January 12, 2000, the Executive Committee of the NJSIAA heard oral argument on the two Special Committee reports and voted 33-0 to adopt the reports.[4] (Statement of Items Comprising the Record, Exhibit 42)

PETITIONERS' POSITION

Initially, petitioners argue that the realignment is improper because the parochial schools will be deprived of the benefits of full competition and conference play. Since the non-public division contains only four schools competing in boys' sports and three schools competing in girls' sports, petitioners contend that the configuration is inconsistent with other New Jersey leagues and conference divisions, which generally consist of five or more schools. Petitioners aver that the fact that the parochial schools would enjoy a full schedule misses the point, because it is simply improper to maintain a division of three teams in the NNJIL, and that permitting a three-team division is potentially precedent setting. Citing Bergen Catholic High School as an example, petitioners submit that the number of games scheduled in several sports for Bergen Catholic are fewer in number for the 2000 season than were scheduled in 1999 under the previous division alignment. Petitioners further argue that parents of Bergen County Catholic school students still have to pay taxes to finance public school athletic stadiums, sports equipment, coaches, *etc.*, but their children will be unable to play in a division which would allow them to engage in direct competition for the division championship with those schools. (Petitioners' Brief at 8-10)

[4] The NNJIL parochial schools chose not to attend this meeting. (Statement of Items Comprising the Record, Exhibit 42)

Further, petitioners assert, *inter alia,* that there is no rational basis to segregate the parochial schools into their own division, as set forth by the Supreme Court in *Christian Bros. Inst. v. No. N.J. Interschol. League,* 86 *N.J.* 409, 418 (1981), and that the false purpose of fostering competition is merely a pretext for the discriminatory intent of the public schools to segregate the parochial schools into their own division. Despite the findings of the Special Committee, which concluded that the parochial schools dominated the pubic schools in athletic competition, petitioners point out that two of the parochial schools, Don Bosco and Paramus Catholic, have not faired well against either the public schools or the other parochial schools. Since public schools, such as Barringer, Belleville, and Paramus have also not faired well against other public schools, petitioners suggest that segregating the parochial schools into their own division will do little to improve competitiveness. (*Id.* at 11-13)

Petitioners continue by arguing that their rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution have been violated. Petitioners assert that they have been denied the privileges of full membership in the NNJIL and will experience scheduling difficulties because they have been segregated into a separate division solely due to their religious affiliation. Citing *Sorbino v. New Brunswick,* 43 *N.J. Super.* 554 (Law. Div. 1957), *Kerr v. Kerr,* 129 *N.J. Super.* 291 (App. Div. 1974), *State v. Levine* 109 *N.J.S.* 503 (1932) and *Robinson. v. Cahill,* 118 *N.J. Super.* 223 (Law Div. 1972), petitioners further argue that they have been denied equal protection as guaranteed by the State Constitution as a result of the discriminatory manner in which they have been treated. Petitioners assert that religious beliefs should not bar petitioners or any of its students from the equality of rights which the law affords to others. (*Id.* at 14-18)

Additionally, petitioners seek damages and injunctive relief pursuant to 42 *U.S.C.* sec. 1983, contending that there is a cause of action because segregation of the League, without just reason and with harm to petitioners, violates the equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution. Petitioners emphasize that no specific purpose is alleged for the deprivation of their federal rights, but that it is claimed that petitioners have not been treated similarly with the other members of the League. Petitioners contend that a State Court has the power to hear the matter and that it has been held that an action based on 42 *U.S.C.* sec. 1983 can be properly brought before a State Court as State and Federal Courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, except in exceptional circumstances. *See Luker v. Nelson,* 341 *F. Supp.* 111 (D.C. Ill. 1972) and *Long v. District of Columbia,* 469 *F.*2d 927 (D.C. Cir. 1972). Petitioners submit that *Wright v. Arkansas Activities Assoc.,* 501 *F.*2d 25 (8th Cir. 1974) held that "a voluntary association consisting of public and parochial schools in a state which maintains competitive athletic programs qualifies as a 'person' under 42 U.S.C. 1983." Therefore, the League is a "person" under the statutory meaning of the word. (*Id.* at 19-21)

Citing *Gabaldon v. United Farm Workers Organizing Committee,* 111 *Ca. Rptr.* 203 (1973), *Sykes v. California Dept. of Motor Vehicles,* 497 *F.*2d 197 (9th Cir. 1974), *Ward v. Kentucky State University Board of Regents,* 360 *F. Supp.* 1179 (D.C. Ky. 1973) and *Parish v. National Collegiate Athletic Assoc.,* 361 *F. Supp.* 1214 (D.C. La. 1973), petitioners argue that League members and everyone of its individual members acted through the authority derived from the State and therefore acted "under color of state law." Petitioners further argue that the courts have the power and duty to fashion affirmative relief under the statute so as to

provide a more effective remedy for violation of the Federal Law. *See Johnson v. Capital City Lodge No. 74, Fraternal Order of Police,* 477 *F.*2d 601 (4th Cir. 1973). (*Id.* at 21-24)

Recognizing that the Fourteenth Amendment of the U.S. Constitution does not protect an individual against wrongs committed by other individuals, petitioners submit that the crucial factor in determining the existence or non-existence of Fourteenth Amendment protection is the interplay of governmental and private action. Petitioners assert that discrimination by the creation of a nonpublic league is rendered possible by the "State Authority" lodged in respondents and is a violation of the Fourteenth Amendment Equal Protection Clause. Arguing that, in the absence of a rational basis or reasonable explanation why petitioners are continuously treated differently from other members or a legitimate State purpose to be served by petitioners' segregation into a nonpublic division, that petitioners Constitutional Rights of Equal Protection have been violated. (*Id.* at 25-27)

Finally, petitioners assert that their rights as protected by the New Jersey Law Against Discrimination set forth in *N.J.S.A.* 10:5-12(f), were violated when they were segregated from the rest of the League without any reasonable justification or explanation. Petitioners contend that the statute applies in this instance, because the NNJIL qualifies as a "place of public accommodation" as settled in *Nat. Org. for Women v. Little League Baseball,* 127 *N.J. Super.* 522 (App. Div. 1974). As a "public accommodation," NNJIL has withheld its facilities, its advantages and its privileges, petitioners aver, and has, therefore, acted in an illegal and discriminatory manner. (*Id.* at 28-30)

RESPONDENTS NNJIL PUBLIC SCHOOLS' POSITION

Initially, respondents state that the scope of review by the Commissioner in NJSIAA determinations is limited. Citing *Board of Educ. of the City of Camden v. NJSIAA,* 92 *N.J.A.R.*2d (EDU) 182, 188; *Dam Jin Koh and Hong Jun Kim v. NJSIAA,* 1987 *S.L.D. 259;* and *B.C. v. Cumberland Regional School Dist.,* 220 *N.J. Super.* 214, 231-32 (App. Div. 1987), the Commissioner may not overturn an action by NJSIAA, absent a finding that NJSIAA acted in a patently arbitrary, capricious, and unreasonable manner, even if the Commissioner would have decided differently in a *de novo* hearing. Respondents aver that NJSIAA's divisional realignment decision resulted from a desire to foster competition and to eliminate competitive imbalance, was not based on religious affiliation or beliefs, did not violate NJSIAA rules and did not deprive petitioners of a full and fair opportunity to participate in interscholastic athletics. Respondents, therefore, urge the Commissioner to affirm NJSIAA's reasonably and legitimately based determination upholding the divisional realignment. (Respondents' Brief at 5-7)

Respondents submit that the divisional realignment at issue does not contravene petitioners' rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution. In *Christian Bros., supra,* they argue, the New Jersey Supreme Court expressly addressed Bergen Catholic's claim that denial for admission into the NNJIL constituted a violation of its State and Federal constitutional rights, ruling that a *rational basis, i.e,.* that the action taken is rationally related to a legitimate public end, would be sufficient to withstand any challenge under Article I, paragraphs 1 and 5 of the New Jersey Constitution. *See Barone v. Department of Human Servs.,* 107 *N.J.* 355, 366 (1987); *Board of Educ. v. Borough of Englewood Cliffs,* 257 *N.J. Super.* 413, 469 (App. Div. 1992), *aff'd* 132 *N.J.* 327, *(cert. denied),* 510 *U.S.* 991 (1993). Further in *Valencia v. Blue Hen Conference,* 476 *F. Supp.* 809 (D. Del. 1979), *aff'd without*

opinion 615 *F.*2d 1355 (3rd Cir. 1980), respondents contend the trial court found that a classification limiting membership in an interscholastic athletic organization to public schools would be supportable if it was motivated by legitimate interests in preventing athletic recruiting and in maintaining a competitive balance among schools within the association. (Respondents' Brief at 8, 9)

Respondents aver, *inter alia,* that *Sorbino, supra*, which petitioners cite in support of their equal protection argument, is clearly distinguishable as complainants were property owners, not members of an athletic association. Respondents also observe that *Sorbino* inferentially undermines petitioners' position in that the Law Division expressly noted therein that "[W]here reasonable justification exits for separate classification, legislation that treats all persons within a class reasonably selected for regulation in a like or similar manner satisfies the requirements of the State and Federal Constitutions." (Respondents' Brief at 10, citing *Sorbino* at 19) Since the nonpublic schools in the NNJIL have dominated athletic competition within the League for the past decade and the NNJIL's decision was motivated by a rational purpose, *i.e.,* to foster competition, NNJIL's realignment of the divisions in a procedural proper manner did not violate petitioners' constitutional rights. Respondents also argue that petitioners' reliance on *Kerr, supra,* is inappropriate because *Kerr* is inapposite, holding in the context of a divorce proceeding that protective privilege of communication between a psychologist and his client was not a violation of the equal protection clause. (*Id.* at 10, 11)

Respondents state that petitioners cannot meet their burden of showing that NNJIL has advanced or inhibited the exercise of religion in violation of Article I, Paragraph 3 of the New Jersey Constitution. Respondents assert that there is not a single fact in evidence to suggest that the majority vote of the League's members amending its Constitution to establish a

nonpublic school division was done for any reason other than a secular legislative purpose, nor have petitioners shown that the primary or even incidental effect of the realignment will advance or inhibit religion. (*Id.* at 12)

As a voluntary association, the NNJIL's decision to realign its League into public and nonpublic groupings was private conduct, not state action, respondents argue. Citing *NCAA v. Tarkanian,* 488 *U.S.* 179, 197 n.18 (1988) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 545 (1987)), (where an athletic association speaks collectively through its member institutions to govern the manner in which member schools may compete and where it does so independent of state law, its conduct cannot be deemed "state action"), and *Arlosoroff v. National Collegiate Athletic Ass'n,* 746 *F.*2d 1019, 1021 (4th Cir. 1984), (where the NCAA's adoption of bylaws limiting player's eligibility was private conduct, not state action), respondents assert that petitioners have no cause of action against the NNJIL under the equal protection clause of the Federal Constitution or under 42 *U.S.C.* sec. 1983 because the realignment of the League's divisions does not constitute "state action." Even assuming *arguendo*, that the NNJIL's action amounts to State action, however, respondents claim that the majority of Courts have determined that rules and decisions by state and local athletic associations analogous to those posed here are subject to the rational basis standard. *See Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 *F.*2d 121 (3rd Cir. 1978). Respondents argue that in *Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Ass'n, Inc.,* 643 *N.Y.S.*2d 928, 931 (N.Y. 1996), a case with facts similar to those herein, the Court of Appeals found that among the legitimate goals which persuaded the Court to adopt a rational basis standard were the association's interest in preserving the character of its competition by excluding private schools that are able to offer

financial incentives and differentiating admission incentives to their students. The Court also rejected the Catholic High Schools' argument regarding its Fourteenth Amendment right to equal protection, finding that this "narrowly targeted argument is untenable because the unequal treatment of which it complains is discriminatory between *public* and *nonpublic* schools, not anything of a religious nature and not even anything within the entire class of nonpublic schools. ([*Archbishop Walsh*] at 930)" (emphasis in text) (Respondents' Brief at 13-17)

Additionally, respondents aver that petitioners' claim that NNJIL's decision to realign the divisions within the League contravened the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-3, is without merit. Although the Legislature did not expressly address whether a nonprofit athletic organization falls within the LAD's coverage as a "place of public accommodation," the statute has been construed to permit reasonable restrictions which promote reasonable government functions, even where the functions are overtly religious in nature. *See In re Katherine Frey Dickerson,* 193 *N.J. Super.* 353, 372 (Ch. Div. 1983). (Respondents' Brief at 22)

Finally, respondents explain that both the Special Committee and the Executive Committee of NJSIAA found that the concerns raised by the Special Committee in its first report have been sufficiently addressed. In response to the concern regarding how championships would be awarded, NNJIL determined that all interdivisional and intradivisional contests would count equally in determining championships and that each division would award championships and select all-division teams, increasing by 50% the number of championships awarded and the number of athletes recognized. The NNJIL also agreed to schedule public schools against nonpublic schools with consideration to the strengths and weaknesses of the respective teams, and to make adjustments to divisional alignments every two years. In response to the Special

Committee's concern about the size of the nonpublic schools' women's teams, the NNJIL devised a schedule whereby the nonpublic schools'women's teams would participate in a full and fair schedule by competing with the public schools. Respondents conclude, therefore, that petitioners' allegation that NNJIL did not adequately address the Special Committee's concerns is meritless, and they, therefore, urge affirmance of the Special Committee's and Executive Committee's findings. (*Id.* at 24-27)

RESPONDENT NJSIAA'S POSITION

Respondent NJSIAA argues that the legal standard for the Commissioner's review of its decisions is set forth in *N.J.A.C.* 6A:3-7.4, which provides that if NJSIAA has granted petitioners due process and its decision is supported by sufficient credible evidence in the record, the Commissioner shall not overturn the NJSIAA's application of its own rules, absent a demonstration by petitioners that such rules were applied in an arbitrary, capricious, or unreasonable manner. In that regard, NJSIAA submits that the due process afforded petitioners was extensive, allowing both the public and parochial school members ample opportunity to present their arguments, as follows:

> (1) within one month of the filing of petitioners' complaint in Superior Court, NJSIAA held a hearing before its eleven-member Special Committee with all interested parties;
>
> (2) the Special Committee prepared a 12-page written decision within 15 days of the hearing setting forth its findings of fact and conclusions and its concerns, and directing the NNJIL to respond to its concerns by November 1, 1999;
>
> (3) upon receipt of the NNJIL response to its concerns, the Special Committee met in executive session to consider the response and then met again

> at a work session at which all the parties were invited to participate;
>
> (4) less than one month after the work session, the Special Committee issued its Supplemental Report; and
>
> (5) on January 13, 2000, the Special Committee presented its two reports to the Executive Committee at a meeting where all NNJIL schools were invited to participate, and at which the Executive Committee voted to adopt the Special Committee's conclusions. (NJSIAA's Brief at 15-17)

NJSIAA further argues that its decisions were based on the record, which showed that the public schools had not unconstitutionally discriminated against the parochial schools, and that there was a rational basis for placing the parochial schools in a "non-public'" division because the League had indeed experienced a lack of competitive balance. NJSIAA contends that there was nothing about the process of the NNJIL's realignment which would invalidate the result, and that the evidence further showed that the realignment was not motivated by religious bias, but rather by the fact that the parochial schools had dominated the League championships since 1988 in all sports except the Girls Atlantic Division in which no parochial schools competed. NJSIAA submits that the statistics provided by petitioners actually prove that there was a need for some action, since those statistics show that overall the parochial schools were 99-32 against public schools in football from 1994-98, and that the Bergen Catholic football team was 42-1 against public schools from 1994-98, while St. Joseph's football team was 26-2. Yet these two parochial powerhouses never met during that period of time because they were in different divisions. (*Id.* at 17, 18)

NJSIAA points out that the record shows that parochial schools operate under enrollment policies different from those of public schools, enabling parochial schools to draw

student-athletes from a wide geographic and population base and enabling them to provide financial aid to qualifying student-athletes. NJSIAA asserts that its decision addressed both (1) the concerns of the public schools that their competition with the parochial schools was inherently unequal, by ensuring that the parochial powerhouses would compete against each other, as well as the strongest public schools, and (2) the parochial schools' fear of exclusion, by ensuring that parochial schools would continue to play public schools, and that such interdivisional games would carry equal weight with the intradivisional games in the League standings. (*Id.* at 18, 19)

NJSIAA avers that petitioners' argument that the 2000-2001 schedules do not provide full scheduling are without merit. NJSIAA points to the fact that in a League with an odd number of schools, no schedule will be symmetric, as demonstrated by the 1999-2000 basketball schedule wherein Paramus Catholic had 17 league games, while several public schools had 14 league games and the rest of the schools averaged 16 league games. (*Id.* at 20)

NJSIAA disputes petitioners' claim that its realignment decision will set a precedent for other leagues, stating that the controversy within NNJIL was due to a unique set of circumstances and that any such issue brought before the NJSIAA would be addressed on its own merits. NJSIAA also asserts that its decision does not have the effect of *stare decisis* and that petitioners' contention that leagues will create one-team divisions is speculative. (*Id.* at 20)

Further, NJSIAA argues that participation in interscholastic athletics is a privilege, not a right, and that privilege can be circumscribed by rules such as those found in the NJSIAA Constitution, Bylaws, rules and regulations. *See Burnside v. NJSIAA,* unpublished decision of the Appellate division dated Nov. 15, 1984 (Docket No. A-625-8477), *Camden City Bd. of Ed. v. NJSIAA,* unpublished decision of the Appellate Division dated February 18, 1992

(Docket No. A-2802-91T2), and *Bd. of Ed. of the City of Camden v. NJSIAA,* 92 *N.J.A.R.*2d (EDU) 182, 188. Even if there were a fundamental right to participate, NJSIAA further argues, an interscholastic league limitation of its membership to public schools does not result, per se, in a denial of equal protection if there is a rational basis, such as in this instance, where nonpublic schools were found to be dominating League competition creating a competitive imbalance, attributable to their ability to enroll students from a broad geographic base and their ability to offer scholarships. *Christian Bros., supra.* In contrast, the public schools are limited to enrolling those students living within the district and cannot offer scholarships. (NJSIAA's Brief at 20, 21)

Finally, NJSIAA concludes that the NNJIL's new alignment takes a strong first step toward restoring competitive balance within the League and has not deprived the parochial schools of any competitive opportunities. NJSIAA takes issue with petitioners' argument that they have been excluded from the League, reasoning that the parochial schools remain members of the NNJIL, have full voting rights, still compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. (*Id.* at 21, 22)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the

member schools, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

As set forth in *N.J.A.C.* 6A:3-7.4, the Commissioner's review in NJSIAA determinations is an appellate one. *Camden City Bd. of Ed., supra.* That is, the Commissioner may not overturn an action by NJSIAA in applying its rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C., supra.* Nor may the Commissioner substitute his judgment for that of NJSIAA, *even if he were to decide differently in a de novo hearing*, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Koh, supra.* Further, the burden of proof rests with the person challenging the decision. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 297 (App. Div. 1960).

Having conducted an independent review of the approximately 500-page record of the proceedings below, including the transcripts from the Special Committee and Executive Committee hearings and meetings, and the parties' submissions on appeal, the Commissioner is persuaded that petitioners have been fully accorded the due process to which they are entitled, that the Special Committee's findings and conclusions are well-grounded in the record, and that petitioners, therefore, have failed to establish that the NJSIAA's determination upholding the divisional realignment of the NNJIL was arbitrary, capricious or unreasonable.

Initially, the Commissioner notes that the record substantiates NJSIAA's contention that extensive due process was afforded petitioners. After Dr. Khoury sent his proposed amendment to realign the divisions in the NNJIL to Mr. John Job, Principal of St. Joseph's High School, who was then President of the NNJIL, the proposal was distributed to all 19 schools in the League. The proposed amendment was subsequently discussed at League

meetings on December 3, 1998 and March 11, 1999, and adopted on June 3, 1999 with the required two-thirds majority for passage.[5] On July 7, 1999, the Special Committee of the NJSIAA held a hearing on petitioners' complaint that the public schools had discriminated against the parochial schools by denying the parochial schools full membership in the League when it segregated them into a separate division. At the complaint hearing on July 7, the Special Committee took testimony under oath and reviewed numerous documents. The proceedings were recorded and transcribed, and all sides were represented by counsel and had the opportunity to present evidence and cross-examine witnesses. (Tr. 7/7/99 at 2-4)

The Special Committee issued a Report of its findings and conclusions on July 22, 1999 indicating some concerns with the realignment, which the NNJIL addressed in a response filed on October 22, 1999. The Special Committee subsequently met in executive session on November 8, 1999, and thereafter invited all parties to their December 8, 1999 work session for discussion purposes. On January 3, 2000, the Special Committee issued its Supplemental Report, and the Executive Committee heard oral arguments on the two Special Committee Reports at an open public meeting on January 12, 2000, at which time the Executive Committee voted 33-0 to adopt the Special Committee's Reports.

In approving the NNJIL divisional realignment, the Special Committee specifically found that:

> the NNJIL constitutional amendment was not motivated on religious grounds. It was rather advanced because of the domination of the League competition by the parochial schools and desire by the public schools to require more competitive balance within the League. The amendment recognized that the parochial schools could draw a wider enrollment of student-athletes, without consideration to geographic attendance zones.

[5] The amendment passed by a vote of 13 to 6, with all parochial schools opposed.

> The Committee finds that the aforesaid reasons for adopting the constitutional amendment were both legitimate and rational and came only after years of domination of intra league competition by Bergen Catholic in the Atlantic Division and Don Bosco and Immaculate Heart in the Pacific Division. (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 11)

The record supports the Special Committee's conclusion that NNJIL has experienced a lack of competitive balance with the parochial schools' domination of the League Championships since 1988 in all sports except the Girls Atlantic Division in which no parochial schools competed. Immaculate Heart Academy has won the Pacific All Sports championship for girls for nine straight years; Don Bosco has won it for boys for nine of the last ten years; and Bergen Catholic has won its boys division title for 13 of the last 14 years. (NJSIAA's Brief at 17, 18 and Exhibit 14, T-1 to T-9) As the Special Committee noted, parochial schools operate under less restrictive enrollment policies than public schools whereby parochial schools enroll student-athletes from a wide geographic area and, unlike the public schools, are able to provide financial aid to student-athletes who qualify. Therefore, the Special Committee's conclusion affirming NNJIL's divisional realignment for the purpose of fostering a competitive balance by placing nonpublic schools, all of which operate under similar admissions policies, in the same division, is reasonable and rational. *See Christian Bros., supra,* and *Valencia, supra.* Further, the Commissioner's painstaking review of the record in this matter *found no basis whatsoever* to support petitioners' allegations of discriminatory intent or that the parochial schools have been segregated into a separate division solely due to their religious affiliation. (Petitioners' Brief at 13)

With respect to petitioners' claim that the realignment will deprive the parochial schools of the benefits of full competition and conference play, the Commissioner finds that the Special Committee and NNJIL have adequately addressed those concerns by ensuring that parochial schools would continue to play public schools, based on strength of athletic program, and that such interdivisional games will carry equal weight with the intradivisional games in division standings. Additionally, adjustments to the division alignments can be made every two years on any basis that is agreeable to the membership, as long as the change has the necessary votes for adoption. (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 5) The Executive Committee of the NJSIAA also noted on the record at its January 12, 2000 meeting that NNJIL schedules would be reviewed on a year-to-year basis by NJSIAA as part of its oversight to assure equity of athletic schedules. (Tr. 1/12/00 at 39-42)

Further, the Commissioner finds petitioners' allegations that the NNJIL's divisional realignment contravenes petitioners' rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution are without merit. Article I, Paragraphs 1, 3 and 5 read as follows:

> Paragraph 1
>
> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

> Paragraph 3
>
> No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry,

> contrary to what he believes to be rights or has deliberately and voluntarily engaged to perform.
>
> Paragraph 5
> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry, or national origin.

There is no support in the record for petitioners' assertions that they have been excluded from the benefits of membership, and, therefore, that their state constitutional rights have been violated under the above provisions. Initially, petitioners have not demonstrated that they have been excluded from the benefits of membership by the realignment of the divisions within NNJIL. Under the provisions of the division realignment, as approved by NJSIAA, the parochial schools remain members of NNJIL, have full voting rights, continue to compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. (NJSIAA's Brief at 21, 22) *See Christian Bros., supra,* at 416-418, where, in an action brought by Bergen Catholic High School in 1981 contending that its denial for admission to the NNJIL violated its rights under Article I, Paragraphs 1 and 5 of the New Jersey Constitution, the New Jersey Supreme Court concluded that a *rational basis* would be sufficient to withstand any challenge under Article I, Paragraphs 1 and 5 in circumstances limiting membership by classification similar herein where the "classification was supportable by legitimate interests in preventing athletic recruiting and maintaining a competitive balance within the association." In the Commissioner's view, therefore, NJSIAA's finding that a rational basis existed for the NNJIL divisional realignment, is supported by the record.

With respect to petitioners' assertion that their state-protected right of religious freedom stated in Article I, Paragraph 3 above has been violated, petitioners have not demonstrated that NNJIL has in any way advanced or inhibited the exercise of religion by its divisional realignment. In *In the Matter of the New Jersey Interscholastic Athletic Association's Proposed Realignments of Athletic Leagues and Conferences,* 1982 *S.L.D.* 544, 562, the Administrative Law Judge observed that "athletic activities and contests which NJSIAA oversees have no direct relationship to the content of the instructional program in member schools. Nor are those athletic activities such that they foster the establishment of religion. As such, they do not violate the principles enunciated by the United States Supreme Court***." *See also Everson v. Ewing Board of Education,* 330 *U.S.* 1 (1946) and *School District of Abington Township, Pennsylvania, et al v. Schempp,* 374 *U.S.* 203 (1963).

Similarly, the Commissioner finds petitioners' contention that because there is an absence of a rational basis or legitimate State purpose to be served by the divisional realignment, that NNJIL violated petitioners' constitutional rights under the Fourteenth Amendment, Equal Protection Clause, is without merit. As stated above, the record clearly reflects that a rational basis existed for the divisional realignment, since NNJIL athletic competition had been dominated for years by the parochial schools and since the parochial schools enjoyed an advantage by their less restrictive enrollment policies. As articulated in *Christian Bros., supra,* at 418, "a rational basis can exist for an interscholastic league limited to public schools and that such a limitation does not result *per se* in a denial of equal protection under the Federal Constitution.***" It is further noted that classifications differentiating between public and nonpublic schools on similar reasonable grounds designed to mitigate uneven competition between public and non-public high schools as affected by recruitment opportunities geared

toward student athletes have been upheld by the Fifth and Sixth Circuits. *See Denis J. O'Connell High Sch. v. Virginia High Sch. League,* 581 *F.*2d. 81, 85 (4th Cir. 1978), *cert. denied,* 440 *U.S.* 936 (1979) and *Louisiana High Sch. Athletic Ass'n,* 616 *F.*2d. 16. Additionally, to sustain a cause of action under the Equal Protection Clause or under 42 *U.S.C.* sec. 1983, petitioners must demonstrate state action. Even assuming, *arguendo,* that NNJIL's decision to amend its Constitution to permit the divisional realignment was "state action" sufficient to raise a claim, however, decisions by state and local athletic associations analogous to those posed here have been found to be subject to the rational basis standard. *See Christian Bros., supra, at 416-417; Moreland, supra; and Archbishop Walsh, supra.* In the Commissioner's view, NJSIAA's determination that a rational basis existed for the divisional realignment is amply supported in the record.

The Commissioner also finds no basis for petitioners' assertion that the divisional realignment by the NNJIL violated the Law Against Discrimination as set forth in *N.J.S.A.* 10:5-1 *et seq.* Even *if* a nonprofit athletic organization would fall within the LAD's coverage as a "place of public accommodation" as argued by petitioners, there is nothing in the record to suggest that the decision to realign the divisions reflect any religious restrictions which would implicate LAD, nor, as noted above, have petitioners provided any *evidence* that the realignment has deprived them of full membership privileges in NNJIL. The Special Committee specifically noted that they "could not find any evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any 'anti-Catholic bias.'" (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 11)

Finally, it is well-settled that participation in interscholastic sports is a privilege, rather than a right, and that privilege can be circumscribed by rules, such as those found in the

NJSIAA Constitution, Bylaws, rules and regulations. *Burnside, supra; Camden City Bd. Of Ed., supra.* Even assuming, *arguendo,* a right to participate, however, an interscholastic league may limit its organization to public schools if there is a *rational basis* to do so. The record supports the conclusion that a rational basis exists, in this instance, because 1) parochial schools were found to be dominating League competition creating a competitive imbalance and 2) parochial schools have an enrollment advantage since they are able to enroll students from a wide geographic area and are able to offer financial-aid to their student-athletes. *Christian Bros., supra,* and *Valencia, supra.* It is noted, however, that the League herein does not seek to *exclude* parochial schools, but rather to incorporate their participation in such a manner as to restore a competitive balance within the League. The record reflects that NNJIL has realigned its divisions cognizant of the necessity of maintaining the benefits of full membership for the parochial members, expanding the competition among the parochial schools enjoying the same enrollment procedures, and insuring the parochial schools of continued competition against public schools within the League.

Accordingly, having found that due process was granted petitioners, and that there is sufficient credible evidence in the record to support the NJSIAA's conclusion with regard to competitive imbalance within the League, the Commissioner can find no basis under the appropriate standard of review on which to overturn the NJSIAA's decision and, therefore, must affirm its determination in this matter.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

[6] In so holding, the Commissioner again stresses that, even if he might have decided differently in a *de novo* hearing, he may not set aside the determination of the NJSIAA absent a showing that such determination was patently arbitrary, unreasonable or otherwise contrary to law.

[7] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

Date of Decision: June 23, 2000
Date of Mailing: June 27, 2000

210-00EM

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, PETITIONER, V. BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL DISTRICT NO. 1, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

June 29, 2000

OAL DKT. NO. EDU 4603-00
AGENCY DKT. NO. 205-6/00

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, PETITIONER, V. BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL DISTRICT NO. 1, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

The recommended Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed by the Commissioner.

Upon such review, the Commissioner concurs with the ALJ that petitioner has met the requisite standards for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) Accordingly, the recommended order of the ALJ granting petitioner's Motion for Emergent Relief is adopted for the reasons well expressed therein. This matter is being returned to the Office of Administrative for a plenary hearing on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 29 2000

Date of Mailing: JUN 29 2000

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4603-00

AGENCY DKT. NO. 205-6/00

BERLIN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

LOWER CAMDEN COUNTY REGIONAL DISTRICT NO. 1 BOARD OF EDUCATION,

Respondent.

RECEIVED BY CONTROVERSIES AND DISPUTES
00 JUN 29 AM 10:42

Vito A. Gagliardi, Jr., Esq., for petitioner Berlin Township Board of Education, (Porzio, Bromberg & Newman, attorneys)

Barry Chatzinoff, Esq., for respondent Lower Camden County Regional District No. 1 Board of Education, (Weinberg, McCormick, Chatzinoff and Paul, attorneys)

Wayne Oppito, Esq., for Intervenor Lower Camden County Regional District No. 1 Administrators Association

Record Closed: June 27, 2000 Decided: June 28, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

The Berlin Township Board of Education is a constituent district of the Lower Camden County Regional District No. 1 (Board) On May 12, 1998 the voters approved the dissolution of

the regional district. [1] At a meeting held in March 2000, the Board approved what it calls a Dissolution Incentive Program (or Program) by which selected personnel are to be paid certain sums of money in the present school year and again in the 2000-2001 school year in return for their promise to continue their employment until the dissolution date. [2] The Berlin Township Board of Education seeks emergency relief in the form of a temporary restraining order against the Board from making payments to any employees under the program until a hearing is conducted on its five count verified petition of appeal filed before the Commissioner June 21, 2000.

The Commissioner immediately transferred the matter to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13. Oral argument on the emergency relief application was heard June 26, 2000 at the Office of Administrative Law, Mercerville. The record of the application includes petitioner's motion for interim relief with supporting letter memorandum, along with the five count petition of appeal, and the letter memorandum of the Board with supporting affidavit in opposition to the motion., as well as its answer to the verified petition of appeal. Intervenor joins in the Board's opposition to the application for emergency relief. An audio transcript of the oral argument is also included in the record.

FACTS

I have reviewed all papers filed on the application. For purposes only of the motion, and except as otherwise may be noted, the facts of the matter are these.

The record shows that sometime during the 1999-2000 school year, an administrator voluntarily left the employ of the Board. The administrator made application for payment of accrued sick leave days under the then existing Agreement between the Administrators'

[1] It is represented that the Commissioner of Education established June 30, 2001 as the effective date of the dissolution.

Association and the Board. The application was denied because the Board was of the view one had to retire under a recognized retirement program such as the Teachers' Pension and Annuity Fund (TPA & F) or the Public Employees Retirement System (PERS) to be eligible for such payment. This, the record suggests, was contrary to the view held by the superintendent and by the Association. In order to provide the benefits to certain employees the superintendent already believed the Agreement provided but which the Board rejected, and to provide an incentive for certain employees not to leave the employ of the Board until the dissolution is effective, he recommended the adoption of the Dissolution Incentive Program. The Program is not the result of negotiation under the New Jersey Public Employment Relations Act between the Board and the Association; rather, it stems from the recommendation of the superintendent to forestall the possibility of employees considered to be key from leaving the District prior to the effective date of dissolution. The Program as approved by the Board consists of three parts. Part A is that part which petitioner seeks to restrain, while Parts B and C address related though separate issues. Part A of the Program provides as follows:

> Administrators who choose not to retire from the district but would otherwise be eligible for the negotiated sick leave benefit in the contract will be eligible to receive full compensation associated with this benefit if they remain employed as an administrator or in their respective position in the Lower Camden County Regional High School District #1 until the date of final dissolution. 'Administrators' in this recommendation are defined as those who are members of the Administrators' Association, members of the Central Administration (minus the Superintendent and Business Administrator/Board Secretary) and personnel covered by the Central Office Personnel Terms of Employment. The approximate cost of this benefit is $800,000-900,000 and it is also recommended that payment be spread over a two year period. (Petition of Appeal, Exhibit C)

The letter memoranda filed by the parties in support of their respective positions show agreement that the Program as set out above is intended to provide eligible employees to receive a maximum of $45,000 in accrued sick leave benefits if the employee remained employed with the Board until dissolution, while retaining all other accrued tenure and seniority rights they may otherwise have in the constituent districts post dissolution. Monies for the payments to be made

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[2] A companion case to this matter involves the issues of tenure and seniority claims teachers may presently have for use once the dissolution becomes effective. (See *Lower Camden County Regional Education Association, et al. v. Berlin Township Board of Education, et al.*, OAL DKT. NO. EDU 962-00, AGENCY DKT. NO. 83-3/00)

under the Program are to come from current expense surplus; no money has been budgeted either in the 1999-2000 or 2000-2001 current expense budget for the Program. While the resolution adopting the program suggests the benefits are intended for those who otherwise intended to retire, the term "retire" apparently has been defined by the Board to mean any eligible employee who intended to leave its employ in good standing for any reason.

Those who participate in the Program must agree to the following:

> Individuals who accept payment for unused sick days and who are not retiring from TPAF/PERS agree to remain employed by the Lower Camden County Regional High School District Number One until the date of dissolution. The final date of dissolution may be June 30, 2001, or a later date, if dissolution is not completed by that projected date. Individuals who choose to resign from Lower Camden County or otherwise leave the employment of Lower Camden County for any reason other than retirement prior to the date of dissolution agree to immediately repay all monies received and forfeit any future benefit associated with this provision. Failure to make the aforesaid repayment may result in Lower Camden County commencing any legal or equitable action as permitted pursuant to New Jersey Law, as well as any administrative proceeding, including tenure charges pursuant to *N.J.S.A.* 18A:6-10 and for commencement of revocation or suspension of certificate, pursuant to *N.J.A.C.* 6:11-3.6. (See Exhibit I attached to Board's memorandum in opposition to the motion for emergency relief.)

Petitioner also alleges in support of its application for emergency relief that one of the Board members who voted in favor of the Program is in conflict of interest because his wife who is employed by the Board may be eligible for participation in the Program, and because his wife's immediate supervisor is considered to be eligible to participate in the Program, and because his running mate for board membership is also eligible to participate in the Program. The Board specifically denies these allegations that the referenced Board member is or was in conflict of interest.

ARGUMENTS ON THE MOTION FOR INTERIM RELIEF

PETITIONERS' ARGUMENTS

Petitioner seeks emergency relief because it asserts students in the still existing regional district will suffer irreparable harm if the requested relief is not granted because the funds

necessary to support the Program have not been budgeted and will be taken from current expense surplus and those funds may be better used to provide instructional supplies and equipment to provide them a through and efficient program of education; that it has a reasonable likelihood of prevailing on the merits of the petition of appeal because the Board has no authority to create and fund a program by which public funds are expended for services not rendered; that in balancing the relative hardship of the parties, it would suffer greater harm if the relief is not granted than the damage the affected employees would incur if the relief were to be granted; and, the public interest supports granting the relief requested.

BOARD'S ARGUMENTS IN OPPOSITION

The Board argues that petitioner's motion for emergency relief must be denied for petitioner failed to show irreparable harm if the relief is not granted. The Board says it has sufficient surplus to support the Program and the Program has the legitimate goal of providing quality staff for its students. The Board argues that it has the legal right to enter contractual obligations with its employees and that it should be allowed to operate its schools in the manner it sees fit. The Board maintains that the granting of injunctive relief would unlawfully impair its contractual obligations and more likely than not encourage administrative employees to resign or retire and leave its employ resulting in insufficient staff to operate its schools.

ANALYSIS

Emergency interim relief is to be granted if the moving party demonstrates it will suffer irreparable harm if the relief is not granted, the legal right underlying the claim is not unsettled, that the moving party has a reasonable probability of success on the merits, and that the equities favor the granting of the relief. *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982).

The motion for emergency relief must be granted for this reason. It is recognized a board of education through either expressed or implied power has wide authority to operate the schools in a manner it sees fit. However, authority to act must exist in order for board action to be valid.

I am aware of no authority nor has any been cited for a board of education to enact the Dissolution Incentive Program.

The Program, insofar as this record shows, is a "bonus" program in that it pays certain employees an amount over and above their contractual entitlements to do something they implicitly already agreed to do; that is, to continue in the Board's employ until they determine not to do so through resignation, retirement, or other means of separation from employment. The payment of public funds under the Program is for a service not otherwise rendered because the employee is already committed to remain in the Board's employ. Should the employee determine to retire under TPA&F or PERS, the benefits the Program contemplates, and presumably identical to the benefits in the negotiated Agreement, being paid would still be available to the employee but only because they retired in the generally accepted sense of retirement under a retirement program.

Based on the facts developed in this record on the motion, should emergency relief not be granted, irreparable harm would be inflicted not only upon students of the regional district but upon the general public of the entire regional school district because public funds would be expended for services not rendered. The payment of public money to do something one is already obligated to do is a bonus payment; the payment of money for service one is already obliged to provide. It appears that petitioner has a reasonable probability of success to establish the Program as an *ultra vires* act of the Board, and the equities favor the granting of the relief because if the Program is a valid exercise of Board authority payments may be made to those who are otherwise eligible under the Program. Should payments be now made and the Program be declared invalid, the recovery of the payments already made would place the burden of recovery on the Board which would take more time than it now has available to it.

CONCLUSION

For all the foregoing reasons, I **CONCLUDE** the application of the Berlin Township Board of Education for emergency interim relief must be **GRANTED** pending a plenary hearing

on the merits. The Lower Camden County Regional School District No. 1 Board of Education is hereby temporarily enjoined from expending public funds under its Dissolution Incentive Program until such time that a plenary hearing is conducted on the merits of the verified petition of appeal. At the conclusion of the plenary hearing, the temporary restraining order may be dissolved or it may be made permanent. Should the restraint be dissolved, all affected employees may be made whole through the payment of benefits contemplated by the Program.

ORDER

It is hereby **ORDERED** that petitioner's motion for emergency interim relief must be and is **GRANTED.**

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

June 28, 2000
DATE

Daniel B. McKeown by
DANIEL B. MC KEOWN, ALJ (t/a)

/lam

211-00

A.M., on behalf of minor, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

June 30, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2657-00
AGENCY DKT. NO. 126-4/00

A.M. o/b/o S.B.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION (MERCER COUNTY),
Respondent.

Teresa D. Journigan, Parent Advocate, for petitioner

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: May 10, 2000 Decided: May 12, 2000

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 20, 2000, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

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

May 12, 2000
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

5/16/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 17 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

**Destribats, Campbell, DeSantis,
Magee & O'Donnell
247 White Horse Avenue
Trenton, N.J. 08610
Tel: (609) 585-2443
Attorneys for Respondent**

2000 MAY 10 A 10:30

A.M. o/b/o Minor Child S.B.,	**OFFICE OF ADMINISTRATIVE LAW OF NEW JERSEY**
PETITIONER,	
V.	**OAL DOCKET NO:** EDU 2657-00
HAMILTON TOWNSHIP BOARD OF EDUCATION (MERCER COUNTY),	**AGENCY DKT. NO.:** 126-4/00
RESPONDENT.	**CONSENT ORDER**

This matter being opened to the Court by A.M. o/b/o Minor Child S.B., Teresa Journigan, appearing as Parent Advocate and Dennis M. DeSantis, of the firm of Destribats, Campbell, DeSantis, Magee & O'Donnell, appearing as attorney for the Respondent, and the parties having entered into an Agreement regarding this matter.

It is on this 10th of May, 2000, ordered as follows:

1. S.B. shall be permitted to attend the Hamilton Township Adult Evening School for the purposes of obtaining a diploma.

2. Should S.B. engage in any inappropriate conduct involving either students or faculty while attending the Hamilton Township Adult Evening School, which results in disciplinary action, then S.B. shall no longer be permitted to attend the Hamilton Township Adult Evening School.

DESTRIBATS, CAMPBELL, DESANTIS, MAGEE & O'DONNELL
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

3. The Petitioner dismisses her Appeal in the within matter from the expulsion of S.B. from the Hamilton Township Public School System.

Robert Miller, A.L.J.

Consent is hereby given to the form and entry of the for going Order.

Destribats, Campbell, DeSantis,
Magee & O'Donnell
Attorney for Respondent

Alvera Morris, Petitioner

By: Dennis M. DeSantis, Esq.

Teresa Journigan, Advocate
For Petitioner

DESTRIBATS, CAMPBELL,
DESANTIS, MAGEE &
O'DONNELL
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

OAL DKT. NO. EDU 2657-00
AGENCY DKT. NO. 126-4/00

A.M., on behalf of minor, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter, Consent Order and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The application for emergent relief and Petition of Appeal matter are hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 30 2000

Date of Mailing: JUN 30 2000

MAUDE BRUNSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CONSTANCE JOHNSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7702-98
AGENCY DKT. NO. 357-7/98

MAUDE BRUNSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
Respondent

OAL DKT. NO. EDU 7701-98
AGENCY DKT. NO. 354-7/98

CONSTANCE JOHNSON
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD
Respondent.

Alfred F. Maurice, Esq., for petitioner

Eric Martin Bernstein, Esq, for respondent

Record Closed: May 10, 2000 Decided: May 10, 2000

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

Statement of the Case

These two matters were transmitted to the Office of Administrative Law on August 27, 1998 and consolidated for hearing pursuant to *N.J.S.A.* 52:14B-13 *et seq.*

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

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

1. The parties have voluntarily agreed to the settlement .
2.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

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

May 10, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/16/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

STATE OF NEW JERSEY

SETTLEMENT AGREEMENT

This Agreement between the Board of Education of the City of Englewood (Board) and Maude Brunson and Constance Johnson (Petitioners) dated this MAY 10 day of , 2000.

1) Petitioners have filed Petitions of Appeal with the Commissioner of Education under Agency Reference Numbers: 357-7-98 and 354-7-98 and OAL Docket Numbers: EDUOR 07702-98N and 07701-98N, respectively, claiming improper withholding of employment and adjustment increments for the 1998-1999 school years.

2) The Board has filed Answers to the petitions denying Petitioner's claims that resulted in the matters being referred to the OAL for disposition as contested cases where they were consolidated for trial.

3) Without an acknowledgement of wrongdoing by the Board or the lack thereof by the Petitioners, the Board and the Petitioners have agreed to resolve the matter in difference between them as follows:

A) The Board agrees to restore the employment and adjustment increments withheld from the Petitioners for the 1998-1999 school year.

B) The Board will place both Petitioners on the salary step and provide them with the pay and benefits, which they would have received, were it not for the 1998-1999 increment withholdings.

C) Petitioners' 1999-2000 and future salaries shall be calculated and paid as if the 1998-1999 withholding of increments had not occurred.

D) All sums which have been withheld from Petitioners' 1998-1999 and 1999-2000 salaries, based upon the prior year's withholding, shall also be paid to Petitioners in a lump sum, less withholding taxes and charges, within thirty (30) days of the execution of this Agreement.

E) Respondent shall make pension contributions for Petitioners to reflect their amended 1998-1999 and 1999-2000 salaries so that they receive full credit for pension purposes as if their increments had not been withheld.

M.B.

M.B.

F) All documents in the personnel files of the Petitioners relating to insubordination or the withholding of their increments, which were the subject of the above-referenced petitions of appeal, shall be permanently removed from Petitioners' personnel files.

G) The Board has adopted a resolution formally authorizing the Board President to enter into this Agreement on the Board's behalf, a copy of which is attached hereto and incorporated herein by reference.

H) Upon the execution of this Agreement by all parties, the Petitioners shall withdraw the above-referenced Petitions of Appeal with prejudice. Furthermore, Petitioners, their agents, family, designees or other applicable parties shall not file any litigation in any forum against the Board, its officials, officers, employees, agents, assigns and/or designees deriving out of any facts/issues related to the matters set forth herein.

I) This is the entire agreement of the parties. It may not be altered or amended, except in writing with the same formality as this Agreement.

ENGLEWOOD BOARD OF EDUCATION

By: _____
Board President

Dated: 4/6/00

_____
Business Administrator/Board Secretary
Board of Education of the City of Englewood

Dated: 4/7/00

_____
Maude Brunson, Petitioner

Dated:

_____
Constance Johnson, Petitioner

Dated:

disk3/1029 settlement agreement

OAL DKT. NOS. EDU 7702-98 and EDU 7701-98 (CONSOLIDATED)
AGENCY DKT. NOS. 357-7/98 and 354-7/98

MAUDE BRUNSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CONSTANCE JOHNSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 30 2000

Date of Mailing: JUN 30 2000

214-00

D.H., AND K.H., on behalf of his minor daughter, S.H.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners, individual high school student (D.H.) and her father on behalf of her sister (S.H.), challenged the Board's refusal to place D.H. in 12th grade and S.H. in 11th grade absent receipt of their transcripts from a nonpublic school. Because of a financial dispute as to tuition, that school refused to send the school records of the students to the respondent Board.

Emergent relief was granted in May 2000 to permit D.H. to graduate with her class provided she passed the required courses necessary for graduation.

In light of the testimony of witnesses and the evidence that both students passed the eleventh grade proficiency test, the ALJ ordered that D.H. be permitted to graduate provided she passed the required courses necessary for graduation and that S.H. be placed in the 12th grade for the 2000-01 school year provided she passed her current courses.

The Commissioner adopted findings and determination in Initial Decision as his own.

July 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2794-00

AGENCY DKT. NO. 133-4/00

DEANNA HOOVER AND K. H., ON BEHALF OF HIS MINOR DAUGHTER, S. H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,

Respondent.

Kenneth E. Smith, Esq., on behalf of the petitioners (Wade & Wood, attorneys)

Barry Chatzinoff, Esq., on behalf of the respondent (Weinberg, McCormick, Chatzinoff & Paul, attorneys)

Record Closed: May 11, 2000 Decided: May 23, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by the petitioners, with the Commissioner of Education (Commissioner) on April 24, 2000. The petitioners request that the Commissioner find that Deanna Hoover, as of the start of the 1999-2000 school year, had successfully completed the requirements for the eleventh grade and that she be allowed to graduate from the

Edgewood Senior High School at the end of the 1999-2000 school year. Also, that the Commissioner find that S.H., as of the start of the 1999-2000 school year, had successfully completed the requirements for the tenth grade and that she be placed in the eleventh grade for the 1999-2000 school year. In addition, the petitioners filed a request for emergency relief on behalf of both Deanna Hoover and S.H.

The matter was transmitted on April 27, 2000, to the Office of Administrative Law, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-t o –13, prior to the filing of any papers by the respondent, since the petitioners requested emergency relief.

The matter was scheduled for an oral argument as to the motion for emergency relief and for a hearing on May 11, 2000. I granted the motion for emergency relief as to Deanna Hoover by order dated May 15, 2000. The record as to this initial decision closed on May 11, 2000.

I **FIND** that the facts pertinent to this matter are not in dispute.

Deanna Hoover attended St. Joseph High School for three years and S.H. attended St. Joseph High School for two years. At the end of the 1998-99 school year, Keith Hoover, the father of Deanna Hoover and S.H., enrolled his daughters with the respondent. Because of a financial dispute as to tuition, St. Joseph High School refused to send the school records of Deanna Hoover and S.H. to the respondent. Both Deanna Hoover and S.H. past the Grade 11 High School Proficiency Test (P-9, P-8), and the respondent placed Deanna Hoover in the twelfth grade and S.H. in the eleventh grade at the Edgewood Regional Senior High School for the 1999-2000 school year. Without the school records from St. Joseph High School, Michelle Ferner, the principal of the Edgewood Regional Senior High School testified that she cannot certify that Deanna Hoover has the necessary credits needed for graduation or that S.H. has the needed credits for advancement to the twelfth grade.

At the hearing, Deanna Hoover testified that she took and successfully completed the following courses at St. Joseph High School:

Freshman (9th grade) – 1996-97 School Year

English I	-	4 marking periods (full year)
Algebra I	-	4 marking periods
Physical Science	-	4 marking periods
World Culture	-	4 marking periods
Spanish I	-	4 marking periods
Physical Education	-	2 marking periods (1/2 year)
Art History	-	1 marking period (1/4 year)
Family Life	-	1 marking periods
Intro to Computers	-	1 marking period

Sophomore (10th grade) – 1997-98 School Year

English II	-	4 marking periods
Geometry	-	4 marking periods
Biology	-	4 marking periods
U.S. History I	-	4 marking periods
Spanish II	-	4 marking periods
Physical Education	-	2 marking periods
Computer	-	1 marking period
Driver Education	-	1 marking period

Junior (11th grade) – 1998-99 School Year

Chemistry	-	4 marking periods
Algebra II	-	4 marking periods
History II	-	4 marking periods
English III	-	4 marking periods
Computer-Lotus	-	4 marking periods
Physical Education	-	2 marking periods
Computer	-	1 marking period
First Aid	-	1 marking period

In addition, Deanna Hoover presented her final report card for her freshman year (P-1), and intern report cards for her sophomore (P-2) and junior years (P-3). By affidavit, Robert Cizozzi stated that he was one of Deanna Hoover's teachers during the 1998-99 school year at St. Joseph High School and that she had successfully completed the eleventh grade at St. Joseph High School (P-10). Keith Hoover testified that his daughter, Deanna Hoover had successfully completed her first three years at St. Joseph High School.

During the 1999-00 school year at the Edgewood Senior High School, Deanna Hoover testified that she is taking the following courses:

English	-	4 marking periods
Mathematic	-	4 marking periods
Physical Education	-	4 marking periods
Work Program	-	4 marking periods

Deanna Hoover presented her first marking period report card for her senior year (P-4), and testified that she is passing all her courses except for mathematics.

Both Ms. Ferner and Ross Heaton, the Director of Guidance at the Edgewood Senior High School, testified that based on the high school's graduation requirements policy (J-1), if the high school had received school records from St. Joseph High School showing that Deanna Hoover had taken the courses she testified she took at St. Joseph High School, she would have had sufficient course credits for placement in the 12th grade at the Edgewood Senior High School for the 1999-00 school year. Ms. Ferner testified that based on the courses Deanna Hoover testified she took at St. Joseph High School and the courses she is taking at the Edgewood Senior High School, Deanna Hoover will have sufficient course credits to graduate if she passes her current courses except for mathematics.

S.H. testified that she took and successfully completed the following courses at St. Joseph High School:

Freshman year (9th grade) – 1997-98 School Year

English I	-	4 marking periods
Algebra I	-	4 marking periods
Physical Science	-	4 marking periods
World Culture	-	4 marking periods
Spanish I	-	4 marking periods
Physical Education	-	2 marking periods
Family Life	-	1 marking period
Computer	-	1 marking period

Sophomore year (10th grade) – 1998-99 School Year

English II	-	4 marking periods
Spanish II	-	4 marking periods
U.S. History	-	4 marking periods
Biology	-	4 marking periods
Geometry	-	2 marking periods
Algebra II	-	2 marking periods
Physical Education	-	2 marking periods
Driver Education	-	1 marking period
Computer	-	1 marking period

In addition, S.H., presented her intern report cards for her freshman and sophomore years (P-5, P-6). Mr. Hoover testified that his daughter, S.H. had successfully completed her first two years at St. Joseph High School.

During the 1999-00 school year at the Edgewood Senior High School, S.H. testified that she has taken or is taking the following courses:

English	-	4 marking periods
History	-	4 marking periods
Science	-	4 marking periods
Advanced Mathematics	-	4 marking periods
Computer	-	4 marking periods
Exploring Childhood	-	4 marking periods
Physical Education	-	4 marking periods
Health	-	1 marking period

S.H. presented her second marking period report card for her junior year (P-7), and testified that she is passing all her courses.

Both Mr. Heaton and Ms. Ferner testified that if the high school had received school records from St. Joseph High School showing that S.H. had taken the courses she testified she took at St. Joseph High School, she would have had sufficient course credits for placement in the 10th grade at the Edgewood Senior High School for the 1998-99 school year. Ms. Ferner testified that based on the courses S.H. testified she took at St. Joseph High School and the courses she is taking at the Edgewood High School, S.H. will have sufficient course credits to be placed in the 12th grade if she passes her current courses.

Kenneth E. Smith, Esq., on behalf of the petitioners, argued that based on the fact that both Deanna Hoover and S.H. had successfully past the Grade 11 High School Proficiency Test and their testimony as to the courses they successfully completed at the St. Joseph Highs School, the Commissioner should determine that Deanna Hoover was properly placed in the 12th grade and that S.H. was properly placed in the 11th grade for the 1999-00 school year. Also, Mr. Smith argued that the Commissioner should determine that Deanna Hoover has sufficient course credits to graduate this June provided she passes all necessary courses for graduation and S.H. has sufficient course credits to be placed in the 12th grade class for the 2000-01 school year.

Mr. Smith stated that the facts in this matter are similar to those in *M.C. on behalf of L.C., a minor child v. Board of Education of the Freehold Regional High School District, Monmouth County*, EDU 8229-98, Initial Decision, (October 29, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r. (February 20, 2000). This case deals with the high school placement of L.C. who had been home schooled for a period of time. The Commissioner emphasized that the decision regarding the placement of L.C. should not have focused on the equivalency of L.C.'s home school instruction to the school's program but rather on L.C.'s level of proficiency as determined by appropriate testing. In this matter, Mr. Smith argued that the placement of Deanna Hoover and S.H. was correct based on their scores in the eleventh grade proficiency test and their testimony as to the courses they had successfully completed at St. Joseph High School.

Barry Chatzinoff, Esq., on behalf of the respondent, stated that without the previous high school records, the respondent cannot determine if Deanna Hoover has sufficient credits to graduate and S.H. has sufficient credits to advance to the twelfth grade consistent with the respondent's policy (J-1) and *N.J.A.C.* 6:3-4A.1(d)ii(3).

I am persuaded by the testimony of the witnesses and Mr. Smith's arguments, and I **ORDER** that Deanna Hoover be permitted to graduate this June provided that she passes the required courses necessary for graduation, and that S.H. be placed in the 12th grade for the 2000-01 school year provided she passes her current courses.

The hearing in this matter was handled on an expedited basis and I am confident that the Commissioner will issue a final decision as soon as possible.

At the hearing, both parties waived the right to file exceptions.

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

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

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

May 23, 2000
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

5/24/00
DATE

DEPARTMENT OF EDUCATION

MAY 26 2000
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioners:

P-1 Report Card for Deanna Hoover from St. Joseph High School – 9th grade
P-2 Partial Report Card for Deanna Hoover from St. Joseph High School – 10th grade
P-3 Intern Progress Card for Deanna Hoover from St. Joseph High School – 11th grade
P-4 Partial Report Card for Deanna Hoover from Edgewood Senior High School – 12th grade
P-5 Partial Report Card for S.H. from St. Joseph High School – 9th grade
P-6 Intern Progress Card for S.H. from St. Joseph High School – 10th grade
P-7 Partial Report Card for S.H. from Edgewood Senior High School – 11th grade
P-8 Grade 11 High School Proficiency Test results for Deanna Hoover
P-9 Grade 11 High School Proficiency Test results for S.H.

For the Respondent:

None

Joint Exhibits:

J-1 Graduation Requirement Policy

WITNESSES:

For the Petitioners:

Deanna Hoover
S.H.
Keith Hoover
Ross Heaton

For the Respondent:

Michelle Ferner

OAL DKT. NO. EDU 2794-00
AGENCY DKT. NO. 133-4/00

D.H., AND K.H., on behalf of his minor daughter, S.H.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 03 2000

Date of Mailing: JUL 03 2000

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

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board appealed the Department's determination that petitioner was the "district of residence" for student M.J.F. during the 1998-99 school year and that petitioner was therefore financially responsible for M.J.F.'s education during that period, under the State Facilities Act, *N.J.S.A.* 18A:7B-1 to –13, and the regulations promulgated thereunder.

The ALJ noted that under *N.J.S.A.* 18A:7B-12, subsection (b), children placed in residential State facilities by State agencies are deemed to reside in the district where their parent or guardian resided at the time of admission to the State facility. Based on the Bradley Beach address provided by DYFS for Mr. F., M.J.F.'s adoptive father, the Department determined that this was M.J.F.'s district of residence for the 1997-98 school year. Since the information did not change for the 1998-99 school year, the Department reached the same conclusion. Thus, the ALJ concluded that, in the absence of any affirmative proofs to the contrary, petitioner was the district of residence for M.J. F.

The Commissioner rejected the Initial Decision since the ALJ, in his Pre-hearing Order placed the burden of proving district of residence upon the State, but in his Initial Decision he re-shifted the burden to petitioner, with no advance notice of such change afforded petitioner. The Commissioner observed that it is well-established that when a board is contesting a district of residence determination made by Finance based upon the information provided it by the Department of Human Services, the board bears the burden of proving that such determination was in error. Thus, the Commissioner set aside the Initial Decision and remanded the matter to OAL to allow petitioner's presentation of its case with the unambiguous recognition that it bears the burden of persuasion.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4975-99
AGENCY DKT. NO. 114-5/99

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

Michael J. Gross, Esq., on behalf of petitioner (Kenney, Gross & Kovats, attorneys)

Jack S. Senechal, Deputy Attorney General, on behalf of respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: April 24, 2000 Decided: May 15, 2000

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of respondent's determination that petitioner was the "district of residence" for M.J.F. during the 1998/99 school year and is therefore financially responsible for his education during that period, under the State Facilities Education Act, *N.J.S.A.* 18A:7B-1 to -13, and regulations promulgated thereunder. Petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.*

52:14B-1 to -12. A hearing was conducted on April 6, 2000, and the record closed on April 24, 2000, with receipt of the last post-hearing memorandum.

Certain facts are undisputed. M.J.F. was born on May 22, 1987. A birth certificate in evidence reflects that M.N.F. is his father, that R.E.F., now deceased, was his mother, and that the family resided in Bradley Beach (R-3). Documentation from the Department of Human Services, Division of Youth and Family Services (DYFS), confirms a Bradley Beach address, and adds that Mr. and Mrs. F. were adoptive parents (R-1). On August 29, 1995, the Superior Court awarded temporary custody of M.J.F. to the DYFS (R-2). On April 1, 1996, the DYFS placed him at the School for Children at Monmouth University, a residential facility. On September 18, 1996, the DYFS moved M.J.F. to the Somerset Hills School, another residential facility, where he remains. Based on the Bradley Beach address provided by the DYFS for Mr. F., respondent determined that this was M.J.F.'s district of residence for the 1997/98 school year (R-4). No appeal was taken. The information did not change for the 1998/99 school year, and respondent reached the same conclusion (R-5); now petitioner sought review.

Melvin L. Wyns is director of the Office of School Finance for respondent, and he decides district of residence questions. Mr. Wyns testified that he makes no independent investigation, but rather relies on information supplied by the DYFS. When the DYFS furnished documentation that M.J.F. was at Somerset Hills School and that M.N.F. continued to reside in Bradley Beach, his course was clear. Mr. Wyns acknowledged not knowing for sure whether the DYFS had instituted proceedings to assume guardianship, but he is generally notified of such actions. It did not appear that guardianship had transferred to the DYFS as late as February 1999 (A-1).

Petitioner presented no witnesses. This is the substance of the record.

The record lacks depth. Some documentation reflects that Mr. and Mrs. F. were the adoptive parents of M.J.F., that the DYFS took custody of the child in 1995 and placed him residentially, that Mr. and Mrs. F. lived in Bradley Beach and that Mr. F. continued to live there during the 1998/99 school year. Petitioner argues that the information is too thin to deem it responsible for tuition. For example, we cannot say with assurance that Mr. and Mrs. F. ever

actually adopted M.J.F. We do not know if the DYFS has assumed guardianship and thus financial responsibility for his education. In short, the documentation standing alone is insufficient to preponderate. I do not agree.

N.J.S.A. 18A:7B-12 requires the Department of Education to determine district of residence for school funding purposes. Under subsection (b), children placed in residential State facilities by State agencies are deemed to reside in the district where their parent or guardian resided at the time of admission to the State facility. Annual redeterminations are made based on the residence of the parent or guardian as of October 15 of each school year. Regulations permit respondent to make this decision from addresses supplied by the relevant State agency, *N.J.A.C.* 6:20-5.3(b). Mr. Wyns followed this procedure.

Petitioner cannot be heard to complain about a dearth of evidence when it failed to so much as call a witness. Petitioner sought and obtained an order for the production of the DYFS file pursuant to *N.J.S.A.* 9:6-8.10. If this did not fully clarify matters, it was free to go on. The names of the DYFS employees who supplied Mr. Wyns with the information he used are contained in the records; they could have been approached. If petitioner was unsure about Mr. F.'s status as an adoptive father, it might have contacted him as well. Court records would likely verify whether the DYFS had assumed guardianship for M.J.F. Although respondent's initiative was limited, it met the regulatory scheme, which appears reasonably calculated to yield a correct result. In the absence of any affirmative proofs to the contrary, it is enough.

Based on the foregoing, it is my conclusion that respondent has established that Bradley Beach is the district of residence for M.J.F.

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

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

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

5/15/00
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

May 17, 2000
DATE

D. M. Antanaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/caa

List of Witnesses

For Petitioner:

None

For Respondent:

Melvin L. Wyns

List of Exhibits

For Petitioner:

A-1 Letter from Karen Gagne, dated February 16, 1999

For Respondent:

R-1 District of residence determination application
R-2 Superior Court Order to Show Cause for Protective Services with Preliminary Removal and Custody
R-3 Birth Certificate of M.J.F.
R-4 Letter from Melvin L. Wyns, dated July 13, 1998
R-5 Letter from Melvin L. Wyns, dated December 11, 1998

OAL DKT. NO. EDU 4975-99
AGENCY DKT. NO. 114-5/99

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) determination that it is responsible for M.J.F.'s educational costs for the 1998-99 school year, essentially contending that 1) in reaching such conclusion the ALJ misapplied the burden of proof that he, himself, had previously established and 2) in light of its burden, the quantum of proof advanced by respondent was insufficient to reasonably lead to the conclusion that petitioner is the financially responsible district in this matter. (Petitioner's Exceptions at 2) As such, it avows, the Initial Decision is incorrect and must be overturned.

In support of this charge, petitioner first argues that the ALJ's decision chastising it for the "lack of depth" in the record in that petitioner presented insufficient proofs or failed to call witnesses in this matter, ignores a pivotal consideration here, respondent, not petitioner, bore

the burden of proof. (*Id.* at 3-4) It proffers that in the progress of this case it quickly became apparent that the parties here were in significantly disparate positions with regard to obtaining information necessary to allow a determination in this matter, *i.e.*, "[t]he records pertaining to the alleged adoption of the child, and to the alleged transfers of custody, guardianship and parental rights, are protected by statute. *N.J.S.A.* 9:6-8.10" (*Id.* at 3) The only information which petitioner has here, it maintains, and the only information to which it is entitled, is a packet provided by the State in November 1999 in response to a Motion for the Production of Documents filed by petitioner. Additional information, it posits, is in the sole control of the State. (*Id.*) Such a situation, it avers, moved petitioner to seek a transfer of the burden of proof in a pre-hearing telephone conference between the ALJ and the parties on November 8, 1999 where, subsequent to hearing petitioner's arguments in this regard, the ALJ appropriately shifted the burden of proof from petitioner to respondent in his November 23, 1999 Pre-hearing Order. (*Id.* at 3-4) Petitioner further contends that no interlocutory appeal was taken on the issue of burden, nor was any objection, formal or informal, raised on this issue until the conclusion of the hearing on April 6, 2000, at which time respondent argued that the burden should be shifted back to petitioner, which contention was subsequently denied by the ALJ. Consequently, petitioner advances, respondent had the burden of proving that petitioner is the financially responsible district here and any lack of depth in the record is solely attributable to respondent. (*Id.* at 4)

Notwithstanding that "the ALJ himself placed the burden upon the State," subsequent to the closing of the record, he filed an Initial Decision which clearly re-shifted the burden to petitioner, with no advance notice of such change being afforded petitioner. (Petitioner's Exceptions at 10) Such a clear contradiction, it argues, "constitute[s] a severe prejudice, injustice and inequity against [petitioner]." (*Id.*) Petitioner, therefore, urges that

should the Commissioner find "that the ALJ properly shifted the burden to [petitioner] without notice or rationale, [petitioner] must then be afforded the opportunity of a further hearing, at which time it may present additional witnesses and testimony, consistent with the responsibilities of a party which knows it bears the burden of persuasion." (*Id.* at 11)

Petitioner next argues, that based upon the allocation of the burden of proof established by the Pre-hearing Order, the proofs advanced by respondent in support of its determination were insufficient to "objectively and conclusively" allow for determination of petitioner as the financially responsible district here. (Petitioner's Exceptions at 9) In that respondent has failed to meet its burden of persuasion here, petitioner contends that subsection (d) of the controlling statute, *N.J.S.A.* 18A:7B-12, requires that the State assume financial responsibility for the educational costs of M.J.F. (*Id.*)

Upon his independent review of the record in this matter, the Commissioner is compelled to reject the Initial Decision since he concludes that, notwithstanding that the ALJ's Initial Decision reflects the utilization of the proper burden of proof in matters of this type, as was advanced in respondent's exceptions, the ALJ's Pre-hearing Order in this case erroneously imposes the burden of proof on respondent, thereby serving to unduly prejudice petitioner's advancement of its case. As such, this matter must be remanded to the OAL to allow for full presentation and argument under the correct standard.

The Commissioner observes that it is well-established that when a board is contesting a district of residence determination made by Finance based upon the information provided it by the Department of Human Services, the board bears the burden of proving that such determination was in error. *See Board of Education of the City of Atlantic City v. New Jersey Department of Education*, 92 *N.J.A.R.* 2d. (EDU) 545; *Board of Education of the City of*

Wildwood v. New Jersey State Department of Education, 97 *N.J.A.R.* 2d (EDU) 273, *Reversed on other grounds* State Board of Education June 7, 2000; *State-operated School District of the City of Newark v. New Jersey State Department of Education, Division of Finance,* decided by the Commissioner March 22, 1999. Moreover, petitioner's argument with respect to its inability to secure information, over and above that which has been provided in this matter, is rejected as without merit. Although certain DYFS records and documents themselves may, indeed, be protected from discovery, the Board clearly has the ability to call witnesses and elicit testimony from individuals with knowledge of essential facts. As one such example, the person who completed the report relied on by the respondent could be called to testify as to the basis for the information which was provided the respondent; as another, noted by the ALJ, the Board's concerns vis-à-vis Mr. F.'s status as an adoptive father could be resolved by contacting and/or calling him as well. (Initial Decision at 3)

Accordingly, the recommended Initial Decision is set aside and this matter is remanded to the OAL to allow for petitioner's presentation of its case with the unambiguous recognition that it bears the burden of persuasion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 03 2000

Date of Mailing: JUL 03 2000

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

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

July 3, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 11465-99
AGENCY DKT. NO. 199-7/99

MARY FORD,

Petitioner,

v.

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

Respondent.

Peter J. Scandariato, Esq., for Petitioner (Alampi, Arturi, DiArgenio & Guaglardi, attorneys)

Gregory G. Johnson Esq., for Respondent

Record Closed: May 16, 1999 Decided: May 17, 2000

BEFORE **THOMAS R. VENA,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 22, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to-15 and *N.J.S.A.* 52:14F-1 to 13.

A pre-hearing conference was held on January 11, 2000, at which time the parties settled the matter and on May 16, 2000, they submitted the attached Settlement Agreement.

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

1. The Settlement Agreement complies with the requirements of *Cardonic v. Brooklawn Bd. of Ed.*, 193 *S. L. D.* _____ (St. Bd. April 6, 1983).

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

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

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

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

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

May 17, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

5-19-00
DATE

DEPARTMENT OF EDUCATION

DATE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 22 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

GREGORY G. JOHNSON, ESQ.
P.O. Box 2148
Trenton, New Jersey 08607
(609) 896-3550
Attorney for Respondent

MAY 16 12 47 PM '00

MARY FORD *Petitioner* *vs.* STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON *Respondent.*	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 11465-99 Agency Dkt. No. **STIPULATION OF SETTLEMENT**

The parties, the petitioner Mary Ford ("Petitioner" or "Ford") and respondent State Operated School District of the City of Paterson ("District"), state as follows:

1. On or about July 15, 2000, the petitioner, a non-tenured accountant, filed a Petition of Appeal with the Commissioner of Education claiming the District's action withholding her salary increment for the 1999-2000 school year was arbitrary and capricious.

2. The District filed an Answer to the Petition denying the petitioner's claims.

3. In light of the nature of this dispute, and the possibility of protracted litigation, it is in the best interest of the parties to resolve the this matter before the Commissioner of Education.

4. The parties hereby stipulate to the terms outlined herein. The petitioner agrees to withdraw the Petition of Appeal in the above matter with prejudice.

5. The District agrees to restore only one-half of the petitioner's salary increment for the 1999-2000 school year. The petitioner's salary increment for the 1999-2000 school year is $1,460, not including her base salary. The District agrees to increase petitioner's salary by one-half of her withheld increment or approximately $730, retroactive to September, 1999. Petitioner fully understands that the one-half withheld salary increment is permanent, except that she may apply to the State District Superintendent for restoration of the increment. The Superintendent, as part of his discretionary authority, may consider restoring the increment prospectively only. Petitioner may apply for restoration on condition that she receive at least three consecutive years of satisfactory evaluations from the date of this Agreement.

6. The petitioner acknowledges that this Agreement does not prevent the District from taking disciplinary action in the future, whether based upon performance or conduct, if warranted. The parties understand and agree that this Agreement may not be used to suppor or defend potential disciplinary action.

7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

8. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other.

9. This Agreement is subject to approval by the State District Superintendent, and Commissioner of Education.

FOR THE EMPLOYEE

Mary Ford

Mary Ford

Dated: 5/9/00

Peter J. Scandariato, Esq.
Attorney for Mary Ford

Dated: May 11, 2000

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dr. Edwin Duroy
State District Superintendent

Dated: 3-21-00

Gregory G. Johnson, Esq.

Dated: March 14, 2000

OAL DKT. NO. EDU 11465-99
AGENCY DKT. NO. 199-7/99

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

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 03 2000

Date of Mailing: JUL 03 2000

217-00

IN THE MATTER OF THE TENURE :
HEARING OF DR. ROBERT H. MANN, :
ASBURY PARK SCHOOL DISTRICT, :
MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

July 7, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10864-99

AGENCY DKT. NO. 331-11/99

IN THE MATTER OF THE TENURE HEARING OF DR. ROBERT H. MANN, ASBURY PARK SCHOOL DISTRICT,

---

Kathleen Smallwood-Johnson, Esq., for petitioner (Hill Wallack, attorneys)

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: May 22, 2000 Decided: May 23, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Asbury Park Board of Education sought to remove Dr. Robert H. Mann, serving under contract pursuant to *N.J.S.A.* 18A:17-15 as superintendent of schools, prior to the end of the contract period. The matter was opened before the Commissioner of Education, *N.J.S.A.* 18A:6-9, and answered by the respondent.

The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case on December 10, 1999, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After a motion to dismiss three of the counts in the petition of appeal was denied and after four days of hearing and one day of settlement conferences, the parties reached an amicable resolution of the matter. On May 18, 2000, the terms of the settlement were read into the record. After being placed under oath, the respondent stated he fully understood and consented to all of the terms and conditions of the settlement. The Board's counsel represented that the Board had authorized her to enter into the settlement on its behalf and that the Board would meet that night to ratify the agreement.

On May 22, 2000, I received a certified copy of the Board's resolution of May 18, 2000 approving the settlement and typed and handwritten copies of the agreement. The latter had been signed in my presence, on May 18, 2000. These documents are attached to and are part of this initial decision.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement, and

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I further **FIND** no impediment to this settlement in the nature of the charges brought. The agreement comports with the principles expressed in *Cardonick v. Brooklawn Board of Education*, decided by the State Board of Education, April 6, 1983.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

MAY 2 3 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/26/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

407 LAKE AVENUE
ASBURY PARK, NEW JERSEY 07712
TEL #: 732-776-2663 X 233
FAX #: 732-988-7315

Asbury Park Board of Education

May 19, 2000

Judge Bruce Campbell
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

Dear Judge Campbell:

As per the instructions of Ms. Kathleen Smallwood Johnson, Board Attorney, enclosed are copies of the following:

1. Resolutions adopted by the Board of Education on May 18, 2000;

2. Executed copy of the Settlement Agreement between Asbury Park Board of Education and Dr. Robert H. Mann, Superintendent

Should you have any questions, please so advise.

Sincerely,

Dora E. Mylchreest
Board Secretary/Business Administrator

C: Kathleen Smallwood Johnson, Board Attorney

MAY 22 A 8:31

Asbury Park Board of Education

407 Lake Avenue
Asbury Park, NJ 07712
(732) 776-2663, extension 233

2000 MAY 22 A 10:31

CERTIFICATE

I, Dora E. Mylchreest, Board Secretary of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on May 18, 2000 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

Settlement Agreement

That the Board approve the settlement agreement between the Board of Education and Robert H. Mann, Ed.D., effective immediately.

MOTION TO APPROVE Mrs. Johnson **SECOND**: Mrs. Ross **VOTE:** 7-0-1
Upon roll call the Motion was adopted with all members present voting yes, except for Mrs. Maynard, who abstained.

Resignation
That the Board approve the irrevocable resignation of Robert H. Mann, Ed.D, effective June 30, 2000.

MOTION TO APPROVE Mrs. Sonnier **SECOND**: Mrs. Johnson **VOTE:** 7-0-1
Upon roll call the Motion was adopted with all members present voting yes, except for Mrs. Maynard, who abstained.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 19H day of May 2000.

Dora E. Mylchreest, Board Secretary/
Business Administrator

Settlement Agreement

between

Asbury Park Board of Education

and

Dr. Robert H. Mann, Superintendent

May 18, 2000

1. The parties, the Asbury Park Board of Education and Dr. Robert H Mann, Superintendent, mutually agree to dissolve the employment contract of Dr. Mann as Superintendent of the Asbury Park Board of Education, effective June 30, 2000.

2. Dr. Robert Mann, pursuant to this agreement, tenders his irrevocable resignation effective June 30, 2000.

3. The parties agree to the following financial terms for the execution of this settlement:

   $310,000 to be distributed as follows:

   $50,000, to be paid on or before June 1, 2000.

   $130,000, to be paid on or before August 15, 2000.

   $130,000, to be paid on or before August 15, 2001

4. The Asbury Park Board of Education and Dr. Mann acknowledge that the sum of $310,000 represents the compromise settlement of any and all claims Dr. Mann would have under the terms and conditions of his Superintendent's contract, past practice and policies of the District with regard to the severance of employment relationships with employees, including sick and vacation days; and the annuity provision of his contract.

5. Dr. Mann releases the Asbury Park Board of Education from any past, present or future contract claims.

6. The Asbury Park Board of Education, upon execution of this settlement agreement, agrees to withdraw its tenure charges against Dr. Mann.

7. Dr. Robert Mann hereby releases and waives any right to any past, present or future claims against the District, including any litigation or civil suits.

8. Both parties agree to maintain the confidentiality of this settlement agreement. The parties agree not to disclose the amount of any payments made pursuant to this agreement to any non-party unless required by law to do so.

9. The parties voluntarily entered into this agreement in good faith to resolve this matter.

10. The Board additionally agrees to pay counsel fees of $40,000 to James E. Collins. This payment will be distributed upon receipt of an invoice for services.

11. This agreement will be ratified by the Board on Thursday, May 18, 2000.

(SIGNATURES AS ATTACHED)

Settlement Agreement
between
Ashby Park BOE
and
Dr. Robert Mann, Superintendent
MAY 18, 2000

1. The parties, A.P.B.O.E. and Dr. Robert Mann, Superintendent mutually agree to dissolve the employment contract of Dr. Mann as Superintendent of the Ashby Park School District, 6/30/00

2. Dr. Robert Mann, pursuant to this agreement is tendering his ~~##~~ 2000. irrevocable Resignation effective June 30, ~~####~~

3. The parties agree to the following financial terms for the execution of this settlement:

$ 310,000 ~~$ 350,000.00~~ to be distributed

As follows

$ 50,000.00 on or before June 30, 2000

$ 130,000.00 on or before August 15, 2000

$ 130,000.00 on or before August 15, 2001

The Ashby Park BOE and Dr. Mann acknowledges that

4. The $ 310,000.00 ~~$ 350,000.00~~ represents the compromise settlement of any and all claims Dr. Mann would have under the terms and conditions of his Superintendent contract, postponed

and policies of the District in regards to severance of the employment relationship with employees, including sick and vacation days and the annuity provision of the contract.
&.

5. Dr. Robert Mann releases the Ashby Park BOE from ~~and~~ any past, present or future Contract claims, against it

6. ~~Dr Robert Mann~~

6- ~~The Ashby Park BOE, in consideration for the~~

6. The Ashby Park BOE upon execution and ~~receipt~~ of this Settlement Agreement Agrees to withdraw all tenure charges against Dr. Mann.

7. Dr. Robert Mann hereby releases and waives any right to file any past present or future claims against the District including any litigation or Civil suits.

8. Both parties agree to maintain the confidentiality of this settlement agreement. The Parties Agree not to disclose the amount of any payments made pursuant to this agreement to any non party unless ~~agreed~~ required to by law to do so.

9. The parties voluntarily entered into this agreement in good faith to resolve this matter.

10. The Board Additional Agrees to pay ~~Dr Allen's~~ counsel fees to SE ~~Legal Attorneys fees~~ of $40,000.00. This sum will be distributed upon receipt of invoice for services

11. This will be ratified by the Board on Tuesday ~~5/16~~ 5/18/00

For Board:

For Respondent
James E. Collins Esq.

Robert Allen
5/18/00

DATED: MAY 18, 2000

OAL DKT. NO. EDU 10864-99
AGENCY DKT. NO. 331-11/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. ROBERT H. MANN,	:	COMMISSIONER OF EDUCATION
ASBURY PARK SCHOOL DISTRICT,	:	DECISION
MONMOUTH COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) in the form of a Settlement Agreement have been reviewed.

Upon careful and independent review of the terms of the settlement, together with the full record of this matter, the Commissioner is compelled to reject the agreement as it is currently structured. On its face, the agreement purports to "dissolve the employment contract of Dr. Mann as Superintendent of the Asbury Park School District, 6/30/00." (Settlement Agreement) However, such an arrangement *cannot*, in and of itself, serve as a settlement duly reached pursuant to the certification of tenure charges brought before the Commissioner, in accordance with the standards for settling such tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *affirmed* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846. In this respect, the Commissioner finds that the within agreement and supporting record are completely devoid of the content and analysis fundamental to a board's duty to act in a manner consistent with public policy. *Cardonick at* 848.

Initially, the Commissioner notes that it is well-established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on

the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *affirmed with modification* by the State Board of Education November 2, 1983, *affirmed* Superior Court January 30, 1986. *The present record contains no such explanation and analysis.* Neither does the agreement indicate that respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

Moreover, it appears that the terms of the settlement have already been effectuated through the Board's initial distribution to respondent of $50,000 on or before June 1, 2000. To the extent such payment was made in furtherance of this agreement, the Board has acted at its own peril, since settlement agreements of controverted matters are of *no force and effect* and *may not be implemented* absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for expansion of the record and

revision of the Settlement Agreement, consistent with the concerns set forth above.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 07 2000

Date of Mailing: JUL 07 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

218-00

JUDY SMITH,	:	
PETITIONER,,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

July 6, 2000

OAL DKT. NO. EDU 634-00
AGENCY DKT. NO. 335-11/99

JUDY SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review of the record in this matter, the Commissioner concurs with the determination of the Administrative Law Judge that the Board's failure to participate in scheduled proceedings in this matter requires that its defenses be stricken and it be ordered to pay petitioner's withheld increment.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The within Board is hereby directed to restore the subject increment improperly withheld from petitioner.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 06 2000

Date of Mailing: JUL 06 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 634-00

AGENCY DKT. NO. 335-11/99

JUDY SMITH,

Petitioners,

v.

ASBURY PARK

BOARD OF EDUCATION,

Respondent.

Wayne Oppito, Esq., for petitioner

Kathleen Smallwood Johnson, Esq., for respondent (Hill Wallach, attorneys)

Record Closed: May 18, 2000 Decided: May 18, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner, employed by the respondent Asbury Park Board of Education (BOE) as a tenured teaching staff member, appeals from the BOE's withholding of her salary increment. Petitioner alleges that the BOE failed to notify her of the reason for the withholding of the increment and that the withholding was arbitrary, capricious and unreasonable, etc., and

petitioner contends that the BOE violated laws including N.J.S.A. 18A:28-5 and N.J.S.A. 18A:29-14.

The BOE has failed to participate in this appeal, so that its defenses are stricken and it is ordered to pay the increment.

PROCEDURAL HISTORY

On November 19, 1999, the petition of appeal was filed with the Department of Education and, thereafter, the BOE's answer and defenses were filed. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where, on February 10, 2000, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On March 21, 2000, the case was assigned to me and I sent a scheduling letter to the attorneys relative to this case and the related case bearing OAL docket number EDU 633-00. The scheduling letter, among other things, notified the attorneys of a May 3, 2000 4:00 p.m. telephone conference to be held for the cases. On May 3, 2000, at 4:00 p.m., petitioner's attorney was available; however, telephone calls to the BOE's attorney's office showed that no attorney was available for the BOE.

In my May 3, 1999 letter, I wrote to the BOE's attorney:

> My files show that you are the attorney for the Asbury Park BOE in these cases and that, by way of my March 21, 2000 letters, I notified Wayne Oppito, the attorney for BOE employees Burgess and Smith, and you of a telephone conference to be held today at 4:00 p.m. Mr. Oppito was available for today's telephone conference. However, you were not available.
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> This is **notice** to you that, if by May 12, 2000, I do not have from you a written explanation for your unavailability for today's conference, I will assume that the Asbury Park BOE does not intend to defend the petitions (claims) brought by Burgess and Smith; I will order the Asbury Park BOE's defenses stricken; and I will ask the OAL's clerk to transmit the cases back to the Department of Education for action consistent with the petitioner's claims, *i.e.*, ordering the Asbury Park BOE to pay the increments, etc.

After mailing the above-quoted letter I have had no response and no communication from the BOE's attorney or anyone else acting on behalf of the BOE.

CONCLUSIONS OF LAW

As a matter of fairness and due process, parties must cooperate with the administrative adjudicatory process, including participation in prehearing conferences, etc., and, for failure to appear and participate in any proceeding scheduled by an ALJ, the party that fails to appear and participate may be subject to appropriate orders in the interest of fairness, etc. N.J.A.C. 1:1-9.1.1, -13.1, -14.6.

The BOE, having had notice of same, failed to participate in the scheduled prehearing conference and has failed to respond to the notice that, for such failure to participate, its defenses would be stricken and it would be ordered to pay the subject increment.

ORDERS

I **ORDER** the BOE's defenses to the petitioner's claims stricken and I **ORDER** the BOE to pay the increment to the petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 18, 2000
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

May 22, 2000
DATE

DN Centanaccles I fc
DEPARTMENT OF EDUCATION

MAY 23 2000
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-049
(609)588-6531

JOHN R. TASSINI
ADMINISTRATIVE LAW JUDGE

May 3, 2000

Kathleen Smallwood Johnson, Esq.
Hill Wallack
202 Carnegie Center
Princeton, NJ 08543

Re: Burgess v. Asbury Park BOE, EDU 633-00
Smith v. Asbury Park BOE, EDU 645-00
634

Dear Ms. Smallwood Johnson:

My files show that you are the attorney for the Asbury Park BOE in these cases and that, by way of my March 21, 2000 letters, I notified Wayne Oppito, the attorney for BOE employees Burgess and Smith, and you of a telephone conference to be held today at 4:00 pm. Mr. Oppito was available for today's telephone conference. However, you were not available.

This is **notice** to you that, if by May 12, 2000, I do not have from you a written explanation for your unavailability for today's conference, I will assume that the Asbury Park BOE does not intend to defend the petitions (claims) brought by Burgess and Smith; I will order the Asbury Park BOE's defenses stricken; and I will ask the OAL's clerk to transmit the cases back to the Department of Education for action consistent with the petitioners' claims, i.e., ordering the Asbury Park BOE to pay the increments, etc.

Sincerely,

John R. Tassini

John R. Tassini, ALJ

C: Wayne Oppito, Esq.

219-00

LINDA BURGESS,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

July 6, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 633-00

AGENCY DKT. NO. 352-11/99

LINDA BURGESS,

Petitioners,

v.

ASBURY PARK

BOARD OF EDUCATION,

Respondent.

Wayne Oppito, Esq., for petitioner

Kathleen Smallwood Johnson, Esq., for respondent (Hill Wallach, attorneys)

Record Closed: May 18, 2000 Decided: May 18, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner, employed by the respondent Asbury Park Board of Education (BOE) as a tenured teaching staff member, appeals from the BOE's withholding of her salary increment. Petitioner alleges that the BOE failed to notify her of the reason for the withholding of the increment and that the withholding was arbitrary, capricious and unreasonable, etc., and

petitioner contends that the BOE violated laws including N.J.S.A. 18A:28-5 and N.J.S.A. 18A:29-14.

The BOE has failed to participate in this appeal, so that its defenses are stricken and it is ordered to pay the increment.

PROCEDURAL HISTORY

On November 19, 1999, the petition of appeal was filed with the Department of Education and, thereafter, the BOE's answer and defenses were filed. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where, on February 10, 2000, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On March 21, 2000, the case was assigned to me and I sent a scheduling letter to the attorneys relative to this case and the related case bearing OAL docket number EDU 634-00. The scheduling letter, among other things, notified the attorneys of a May 3, 2000 4:00 p.m. telephone conference to be held for the cases. On May 3, 2000, at 4:00 p.m., petitioner's attorney was available; however, telephone calls to the BOE's attorney's office showed that no attorney was available for the BOE.

In my May 3, 1999 letter, I wrote to the BOE's attorney:

> My files show that you are the attorney for the Asbury Park BOE in these cases and that, by way of my March 21, 2000 letters, I notified Wayne Oppito, the attorney for BOE employees Burgess and Smith, and you of a telephone conference to be held today at 4:00 p.m. Mr. Oppito was available for today's telephone conference. However, you were not available.
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After mailing the above-quoted letter I have had no response and no communication from the BOE's attorney or anyone else acting on behalf of the BOE.

CONCLUSIONS OF LAW

As a matter of fairness and due process, parties must cooperate with the administrative adjudicatory process, including participation in prehearing conferences, etc., and, for failure to appear and participate in any proceeding scheduled by an ALJ, the party that fails to appear and participate may be subject to appropriate orders in the interest of fairness, etc. N.J.A.C. 1:1-9.1.1, -13.1, -14.6.

The BOE, having had notice of same, failed to participate in the scheduled prehearing conference and has failed to respond to the notice that, for such failure to participate, its defenses would be stricken and it would be ordered to pay the subject increment.

ORDERS

I **ORDER** the BOE's defenses to the petitioner's claims stricken and I **ORDER** the BOE to pay the increment to the petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 18, 2000
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

May 22, 2000
DATE

DJMCentanaitis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-049
(609)588-6531

JOHN R. TASSINI
ADMINISTRATIVE LAW JUDGE

May 3, 2000

Kathleen Smallwood Johnson, Esq.
Hill Wallack
202 Carnegie Center
Princeton, NJ 08543

Re: Burgess v. Asbury Park BOE, EDU 633-00
Smith v. Asbury Park BOE, EDU 643-00
634

Dear Ms. Smallwood Johnson:

My files show that you are the attorney for the Asbury Park BOE in these cases and that, by way of my March 21, 2000 letters, I notified Wayne Oppito, the attorney for BOE employees Burgess and Smith, and you of a telephone conference to be held today at 4:00 pm. Mr. Oppito was available for today's telephone conference. However, you were not available.

This is **notice** to you that, if by May 12, 2000, I do not have from you a written explanation for your unavailability for today's conference, I will assume that the Asbury Park BOE does not intend to defend the petitions (claims) brought by Burgess and Smith; I will order the Asbury Park BOE's defenses stricken; and I will ask the OAL's clerk to transmit the cases back to the Department of Education for action consistent with the petitioners' claims, i.e., ordering the Asbury Park BOE to pay the increments, etc.

Sincerely,

John R. Tassini

John R. Tassini, ALJ

C: Wayne Oppito, Esq.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6531
Fax (609) 588-3730

John R. Tassini
Administrative Law Judge

March 21, 2000

Wayne J. Oppito, Esquire
N.J. Principals & Supervisors Association
12 Centre Drive
Jamesburg, New Jersey 08831

Kathleen Smallwood-Johnson, Esquire
Hill Wallack
50 West State Street
P. O. Box 1388
Trenton, New Jersey 08607-2475

RE: Linda Burgess v. Asbury Park Board of Education
OAL DKT. NOS. EDU 633-00
Judy Smith v. Asbury Park Board of Education
OAL DKT. NO. EDU 643-00

Dear Counsel:

These cases have been assigned to me and for it I proposed the following schedule:

If you have not already done so, by March 31, 2000, serve your discovery requests.

On May 3, 2000 at 4 p.m. and 4:15 p.m., we will hold a telephone conference and discuss matters, including possibilities of resolution by settlement or motion for summary decision. We will also schedule hearing dates, if needed.

By May 31, 2000, serve answers to discovery requests.

If you have difficulty with this schedule, please confer, attempt agreement on an alternative and notify me of your proposed schedule or of any other proposal for this litigation.

Very truly yours,

JOHN R. TASSINI
Administrative Law Judge

JRT:cc

OAL DKT. NO. EDU 633-00
AGENCY DKT. NO. 352-11/99

LINDA BURGESS,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review of the record in this matter, the Commissioner concurs with the determination of the Administrative Law Judge that the Board's failure to participate in scheduled proceedings in this matter requires that its defenses be stricken and it be ordered to pay petitioner's withheld increment.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The within Board is hereby directed to restore the subject increment improperly withheld from petitioner.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 06 2000

Date of Mailing: JUL 06 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

221-00SEC

IN THE MATTER OF ALEXANDER SIPOS,	:	COMMISSIONER OF EDUCATION
GARFIELD BOARD OF EDUCATION,	:	DECISION
BERGEN COUNTY.	:	

July 10, 2000

IN THE MATTER OF ALEXANDER SIPOS,	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No.: C20-99**
GARFIELD BOARD OF EDUCATION, BERGEN COUNTY	:	**DECISION**

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Sheila Kelly on August 23, 1999 alleging that respondent Alexander Sipos violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, Mrs. Kelly alleged that the Board hired Mr. Sipos' wife and brother. She also alleged that Mr. Sipos made the motion to hire his wife twice, once as secretary to the high school principal and, six months later, as child study team secretary, resulting in a large raise for Mrs. Sipos. The complainant further alleged that Mr. Sipos' actions violated N.J.S.A. 18A:12-22(a) and N.J.S.A. 18A:12-24(b). On October 12, 1999, Mrs. Kelly amended her complaint to include an allegation that the Board had hired Mr. Sipos' daughter and an employee of Meltzer's Sporting Goods, where Mr. Sipos works as a manager. The Commission found probable cause that Mr. Sipos violated N.J.S.A. 18A:12-24(c) when he made two motions to pass resolutions that resulted in the appointment of his wife to two positions with the Board. It did not find probable cause regarding the remaining allegations. The Commission found that there were no material facts in dispute and requested that respondent file a written statement as to whether the conduct constitutes a violation of the Act. The Commission now finds that Mr. Sipos violated N.J.S.A. 18A:12-24(c) and recommends a penalty of censure.

Mr. Sipos filed his answer on September 24, 1999 stating that he made the motion on all the personnel appointments because it was his duty as chairperson of the Personnel Committee. He denied having violated the School Ethics Act. Mr. Sipos' response to the amended complaint was that his daughter was appointed to her position with the Board a year before he became a member in April 1997. He denied that he has any relationship with the current employee of Meltzer's that would create a conflict of interest under the Act.

The Commission invited the parties to testify at its February 22, 2000 meeting. Mr. Sipos appeared with his attorney, Toni Belford Damiano, Esq. Mrs. Kelly appeared pro se. After hearing testimony, the Commission tabled the matter. At its March 28, 2000 meeting, the Commission voted to find probable cause that Mr. Sipos violated N.J.S.A. 18A:12-24(c) by making the motions to hire his spouse. Ms. Damiano submitted a timely written statement on behalf of Mr. Sipos in response to the Commission's determination. Mrs. Kelly also submitted a written statement, but it was not in time to be considered by the Commission.

FACTS

The Commission finds the following facts to be undisputed.

Mr. Sipos was elected to the Garfield Board of Education in April 1997. He is a thirteen year resident of Garfield. When the 1998-99 Board held its reorganization meeting, it decided that individual committees that had been formed would have the responsibility of moving their committee's resolutions, via the chairperson, before the Board. According to Mr. Sipos, this meant that each specific committee would discuss its particular business at a committee meeting scheduled prior to the regularly scheduled Board meeting. At all times relevant to this complaint, Mr. Sipos was the appointed chair of the Personnel Committee. As such, he was to present to the Board resolutions to be acted upon involving personnel.

On July 21, 1998, Mr. Sipos' wife was appointed to the position of eleven-month high school secretary at a salary of $26,529.33 effective August 1, 1998. Mr. Sipos made the motion to pass the personnel committee resolutions that included her appointment. The vote was eight ayes and one "excused" which was Mr. Sipos. At the January 19, 1999 meeting of the Board, Mrs. Sipos was appointed to the position of twelve-month child study team secretary at a salary of $33,893.12 effective January 20, 1999. Mr. Sipos again made the motion to pass the personnel committee resolutions that included the appointment of Mrs. Sipos. The vote was five ayes, one "excused" (Mr. Sipos) and three absent. Mrs. Sipos' salary thus increased by $7,364.00 or 27.7%.

Although he was Chairperson of the Personnel Committee, there is no information to indicate that Mr. Sipos participated in discussions or involved himself with the decision to hire his wife. He either did not attend meetings at which the positions were discussed or stepped out of the room during those particular discussions. Mr. Sipos did not participate in interviews with the applicants for the positions that his wife obtained and did not discuss the qualifications of his wife for the appointments that she received.

Counsel for Mr. Sipos agrees with the facts set forth above, except that Mr. Sipos wishes to stress that he moved the resolutions of the Personnel Committee en masse and excused himself from the vote. Therefore, he did not believe that he violated the Act.

ANALYSIS

The Commission found probable cause on the charge that Mr. Sipos' conduct when he made two motions to pass resolutions that resulted in the appointment of his wife to two positions with the Board violated N.J.S.A. 18A:12-24(c). It provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Mr. Sipos argues that because the Commission found that he did not use his position to secure unwarranted privileges for his wife in violation of N.J.S.A. 18A:12-24(b), it must similarly find that he did not violate N.J.S.A. 18A:12-24(c). The Commission disagrees.

N.J.S.A. 18A:12-24(c) prohibits acting in one's official capacity in any matter in which he or his spouse has a financial involvement that might reasonably be expected to impair his objectivity. There is no question that Mr. Sipos and his wife had a financial involvement in the two positions to which his wife was appointed. Clearly, the employment of one's spouse is a matter that might reasonably be expected to impair one's objectivity. Therefore, the only question remaining is whether Mr. Sipos acted in his official capacity. Making a motion that places a matter before the board for its vote is the way board business is conducted. Without the initial motion, no business takes place. Therefore, Mr. Sipos' moving the resolutions to hire his spouse on two instances was clearly acting in his official capacity. Pursuant to the Act, it is of no moment that he moved all the personnel committee recommendations or that he moved them en masse. The only question is whether Mr. Sipos acted in his official capacity, which he clearly did.

The Commission rejects the argument that it has to find that Mr. Sipos was trying to secure unwarranted privileges or employment for his wife in order to find a violation of N.J.S.A. 18A:12-24(c). The two provisions are separate and require different evidence. N.J.S.A. 18A:12-24(c) does not require that the Commission show that a school official acted with a motive to secure employment for someone who does not deserve it. Rather, subsection c requires only a showing that the school official took official action as a Board member in a matter in which he had a financial involvement in which his objectivity may be impaired. The Commission finds that Mr. Sipos took such action.

In finding a violation of N.J.S.A. 18A:12-24(c), the Commission is also mindful of the Legislature's purpose set forth at N.J.S.A. 18A:12-22(a), which provides:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

In this case, the Commission is concerned that Mr. Sipos actions created a justifiable impression that the public trust was violated. Here, Mr. Sipos became a board member in April 1997, became Chair of the Personnel Committee and then moved the resolution to appoint his wife in July 1998. The fact that the personnel committee resolutions were moved en masse contributes to the public's feeling that the Board is attempting to limit the amount of information that it receives. The public would have a justifiable impression that Mr. Sipos was involved with the appointment of his wife when he serves as Chair of the Personnel Committee and then places the appointments before the Board for their consideration. While the Commission does not find a violation solely on N.J.S.A. 18A:12-22(a), the Commission believes that its conclusion that Mr. Sipos violated the N.J.S.A. 18A:12-24(c) of the Act is more than adequately supported by the Legislature's stated purpose.

DECISION

For the foregoing reasons, the Commission finds that respondent Alexander Sipos violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. It now recommends that the Commissioner of Education impose a penalty of censure.

In determining the penalty to recommend to the Commissioner of Education, the Commission considered that Mr. Sipos had been serving on the Board for more than a year at the time he made the motion, therefore he should have attended new board member training by that time. Nevertheless, the Commission finds it credible that he did not know that he would violate the Act by moving the Personnel Committee recommendations that included his wife since he abstained from the votes. Therefore, the Commission finds that the appropriate penalty that suits the offense, but informs Mr. Sipos and the other board members that they must not act in their official capacity in any manner concerning matters involving the hiring of their family members, is a censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and Mrs. Kelly.

Paul C. Garbarini/HB

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C20-99

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in testimony; and

Whereas, the Commission found probable cause to credit the allegations in the complaint that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the written statement of the respondent setting forth the reasons that he should not be found in violation of the Act; and

Whereas, the Commission finds that Mr. Sipos violated the Act;

Now Therefore Be It Resolved that the Commission finds that Alexander Sipos violated N.J.S.A. 18A:12-24(c) of the School Ethics Act, recommends that the Commissioner of Education impose a penalty of censure and adopts this decision as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that this decision
was duly adopted by the School
Ethics Commission at its public meeting
on May 23, 2000.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 190-6/00

IN THE MATTER OF ALEXANDER SIPOS,	:	COMMISSIONER OF EDUCATION
GARFIELD BOARD OF EDUCATION,	:	DECISION
BERGEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Initially, the Commissioner emphasizes that pursuant to *N.J.S.A.* 18A:12-29(c), the Commission's determination as to violation of the Act is not reviewable by him. Only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and the Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of such a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Exceptions with respect to the Commission's recommended penalty were submitted on behalf of Mr. Sipos.[1] *N.J.A.C.* 1:6C-18.1. Counsel for Mr. Sipos urged the Commissioner's leniency, arguing:

> Because this is a case of first impression, and because Mr. Sipos was cognizant of what the existing law states with respect to conduct involving employment of a spouse, it is respectfully requested that you consider applying any sanctions prospectively or, alternatively, levy the most lenient censure. Mr. Sipos had no intent to violate the School Ethics Law and, in fact, he took every step that he thought necessary to not be in violation of the School Ethics Law. (Sipos' Exceptions at 5)

[1] Complainant Sheila Kelly submitted comments to the Commission's decision by letter dated June 30, 2000. However, even assuming such comments were timely filed, pursuant to *N.J.A.C.* 1:6C-1.1 *et seq.* and *N.J.A.C.* 1:1-18.4, Ms. Kelly is not a party to the within matter so as to provide her with the requisite standing to file written exceptions to the Commission's decision.

Upon thorough review of the full record in this matter, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

Accordingly, IT IS HEREBY ORDERED that Alexander Sipos be censured as a school official found to have violated the School Ethics Act.[2]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 10 2008

Date of Mailing: JUL 10 2008

[2] This decision, as the Commissioner's final determination regarding penalty, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, Board of Education of the Ramapo-Indian Hills Regional High School District, challenges the legal basis for the operation of certain magnet schools (designated Academies) by the Bergen County Vocational Technical School District. Petitioner seeks a determination that it is not legally obligated to pay tuition for its resident students enrolled in the Academies operated by respondent because the Academies are not approved by the Commissioner of Education, and because operation of the Academies is contrary to the Carl D. Perkins Vocational & Applied Technology Act. Alternatively, petitioner seeks a determination that it is not liable for tuition because it operates a program that is at least comparable to that offered by respondent.

The ALJ, in granting respondent's motion for summary decision, determined that petitioner is responsible to pay tuition for its students attending respondent's Academies. The ALJ rejected the argument that the Academies were not approved by the Department and concluded that the programs offered therein are vocational within the meaning of the Perkins Act. Finally, the ALJ rejected petitioner's argument that it is not liable for tuition for resident students because it operates a comparable program in its schools.

The Commissioner affirmed in part and modified in part the decision of the ALJ. The Commissioner affirmed the determination that the Academies are approved pursuant to *N.J.A.C.* 6:43-8.2. The Commissioner also affirmed the determination that the Academies conform with State and Federal definitions of "vocational education." In addition, the Commissioner reversed the determination of the ALJ that the "comparable program" threshold requirement in the regulations, which permits boards of education to decline to pay tuition for students to attend a program in another district that is identical or comparable to a program offered in the resident district, is contrary to the enabling statute. Finally, the Commissioner determined that petitioner's programs were not comparable to the programs provided in respondent's Academies and affirmed the ALJ's grant of summary decision.

July 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION 3103.99
OAL DKT. NO. EDU ~~3130-00~~
AGENCY DKT. NO. 13-1/99

BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT,

Petitioner,

v.

BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,

Respondent.

Nicholas Celso, III, Esq., for petitioner
Marc H. Zitomer, Esq. on the brief
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Henry J. Amoroso, Esq., for respondent
William C. Soukas, Esq. on the brief
(Nowell, Amoroso, Klein Bierman, P.A., attorneys)

Record Closed: March 30, 2000 Decided: May 22, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a challenge by a regional high-school district to the legality of certain magnet schools, designated "Academies," operated by a county vocational school district. Petitioner Board of Education of the Ramapo-Indian Hills Regional High School District ("Ramapo-Indian Hills") seeks a declaration that it has no legal obligation to pay tuition or related costs for resident students enrolled in any Academy operated by respondent Bergen County Vocational-Technical School District ("Bergen Vo-Tech"). Basically, petitioner alleges that Bergen County Vo-Tech has failed to obtain the approval of its programs by Commissioner of Education, as required by *N.J.S.A.* 18A:54-24, and that operation of these schools contravenes the provisions of the Carl D. Perkins Vocational & Applied Technology Act ("Perkins Act"), 20 *U.S.C.S.* §§2301 to 2471. Alternatively, if the legality of the Academies is upheld, petitioner contends that it is not liable for tuition because, as provided by *N.J.A.C.* 6:43-3.11, it offers a program at least comparable to that offered by Bergen Vo-Tech. The parties have filed cross-motions for summary decision on the merits.

Procedural History

Ramapo-Indian Hills filed its petition with the Commissioner of Education ("Commissioner") on January 20, 1999. Bergen Vo-Tech filed its answer on February 16, 1999. Subsequently, on March 15, 1999, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On March 1, 2000, Bergen Vo-Tech filed a motion for summary decision, together with supporting certification, statement of undisputed facts and brief. That same date, Ramapo-Indian Hills filed a cross-motion for summary decision, with brief. Thereafter, on March 16, 2000, the parties filed opposing papers, including additional certifications. Both parties filed replies by March 23, 2000. The OAL heard oral argument on March 30, 2000.

Findings of Fact

All relevant facts are uncontested and may be derived from the pleadings, certifications and attached exhibits, and admissions made during oral argument. For purposes of these motions, **I FIND** the following undisputed facts:

Ramapo-Indian Hills is a limited-purpose regional school district serving secondary school students residing in the municipalities of Franklin Lakes, Oakland, and Wyckoff, New Jersey.[1] It operates two high schools, Ramapo High School located in Franklin Lakes and Indian Hills High School located in Oakland, New Jersey. Facilities operated by Ramapo-Indian Hills are "comprehensive" high schools providing regular education courses consistent with state core curricular standards, college preparatory courses, special education services, and extracurricular activities. As part of its instructional program, Ramapo-Indian Hills offers two specialized pre-collegiate programs entitled the University Program for Science, Mathematics & Research and the University Program for International Studies & Business (collectively "University Programs").

Petitioner does not maintain a separate vocational school. However, it offers several courses in subjects traditionally regarded as vocational, such as drafting, metal and power technology, wood technology, and business studies. The *Directory of Verified Occupational Educational Programs, revised 1995, ("Directory")*.[2] shows that Ramapo-Indian Hills has only one vocational program approved by the Commissioner, namely "accounting technician," CIP No. 520302.[3]

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[1] *N.J.S.A.* 18A:13-1 to 81 permits establishment of a limited-purpose regional school district authorized to provide one or more levels of educational instruction, including high school, within a designated territory.

[2] The excerpt of the *Directory* applicable to Bergen County is part of the record in this matter because both sides appended it to their moving papers. Moreover, it is readily available to the general public at the New Jersey Department of Education's website. http://www.state.nj.us/njded/voc/pubvoc.xls

[3] The N.J. Department of Education uses the Classification of Instructional Programs ("CIP") director to categorize the program and to assign a CIP number to the program. The CIP code process enables all states to used standardized categories for reporting program information to the U.S. Department of Education.

Bergen Vo-Tech is a county vocational school district with offices in Paramus, New Jersey.[4] Among its educational programs, Bergen Vo-Tech offers four specialized programs known as the Academy for Medical Science and Technology ("AMST"), the Academy for Business and Computer Technology ("ABCT"), the Academy for Engineering and Design Technology ("AEDT") and the Academy for the Advancement of Science and Technology ("AAST") (collectively, the "Academies").

Each of the Academies offers a four-year program designed to prepare high-school students for entry into a four-year college or university. Illustratively, the website for AMST emphasizes, "We are dedicated to learning in many different aspects of the medical field. This will help us when we go on to our course of study in college." http://www.bergen.org/AMST/about.html Likewise, the website for ABCT promotes that its students "receive the best education and learning environment available" and that "[t]hese selected, elite young women and men learn computer and business skills early in their high school years and move on to the most prestigious colleges in the nation." http://www.bergen.org/ABCT/index.html Respondent's answers to interrogatories reflect that one-hundred percent of the graduates of the AAST program (the only Academy yet to have a graduating senior class), went on to a four-year college or university, including some of the top institutions of higher learning in the country.

Some seventy-five programs taught at Bergen Vo-Tech are approved by the Commissioner and listed in the official *Directory*. Dr. Thomas A. Henry, Director of the Office of School-to-Career and College Initiatives at the New Jersey Department of Education ("Department"), clarified that presently the Department "does not approve or regulate the *format* by which an approved vocational program is offered."[5] (Emphasis

[4] *N.J.S.A.* 18A:54-12 authorizes the county board of chosen freeholders to establish county vocational schools.

[5] Dr. Henry explained that, "The term format refers to either the administrative structure of the program (i.e. magnet school, career academy, traditional program) or the intended audience (i.e. secondary, postsecondary, special needs). He added that, "Although magnet schools and career academies have been operating for nearly 100 years in this country, they are becoming increasingly popular because of their demonstrated success in student achievement."

added). However, he emphasized that, "every magnet school and career academy must be based on an approved vocational *program*." (Emphasis added). With regard to Bergen Vo-Tech, Dr. Henry identified the following approved vocational programs "as the foundations for the academies:"

Drafting CIP 480101	Academy for the Advancement of Science and Technology
Electrical/Electronics Engineering Technology CIP 15030	Academy for Engineering and Design Technology
Computer Applications CIP 521201	Academy for Business and Computer Technology
Allied Health CIP 511614	Academy for Medical Science and Technology

In its newsletter, Ramapo-Indian Hills recognizes that, "Education has changed dramatically in the last decade alone, with new standards, technology and curricular advances challenging our students to perform at a higher level." Currently, several students residing within the Ramapo-Indian Hills School District attend one of the Academies run by Bergen County Vo-Tech. Petitioner anticipates that additional students residing within its district will seek enrollment in Academy programs for the upcoming academic year.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Ramapo-Indian Hills is obligated by statute to pay tuition and related costs for resident students attending the Academies operated by Bergen Vo-Tech.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any,

show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a summary-decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield,* 17 *N.J.* 67, 74 (1954).

Recently, the New Jersey Supreme Court encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." *Brill*, at 540. Both parties agree that the legal issues in this case are ripe for disposition on the papers.

N.J.S.A. 18A:54-20-1(a) provides, in pertinent part, that:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. *The board of education shall pay tuition for each of these pupils to the county vocational school district*[.] (Emphasis Added).

New Jersey statutes broadly define "vocational education" to include any education intended "(a) to fit for profitable employment; (b) to provide training which is supplemental to the daily employment; or (c) to fit for homemaking, according to the state plan for vocational education adopted by the state board." *N.J.S.A.* 18A:54-1.

Such language is sufficiently expansive to cover magnet schools of the type involved here. Rejecting the argument that magnet schools are elite, quasi-private academic institutions falling outside the scope of vocational education, the Commissioner declared that "vocational education encompasses a range of levels from rudimentary to highly advanced." *M.R. v. Bd. of Educ. of Pompton Lakes*, CD#386-97, (Comm'r July 29, 1997) (slip op. at 6.), *remanded on other grounds*, SB#386-97 (State Bd. Dec. 3, 1997). www.state.nj.us/njded/legal/index.htmf

In arriving at this conclusion, the Commissioner relied on state regulations which enunciate that vocational instruction does not deal exclusively with immediate employment opportunities, but "may also prepare individuals for enrollment in advanced or highly skilled postsecondary vocational and/or technical education programs." *N.J.A.C.* 6:43-3.3(a). Any suggestion that schools espousing rigorous academic standards and high-level preparation are incompatible with the concept of vocational education "ignores the changing and ever more sophisticated needs of today's workplace, as well as the wisdom of the Legislature in recognizing that the State plan for vocational education must remain fluid in response to this continual evolution." *Pompton Lakes*, at 6.

With specific mention of the AEDT and ABCT operated by Bergen County Vo-Tech, the Commissioner noted that such schools "are, in actuality, advanced-level vocational schools falling well within the purview of the State's vocational educational delivery system." Hence, the Commissioner determined that, "Within that system, they effectively function as career academies, magnet schools offering rigorous, highly structured programs linking college-level academies to advanced preparation in specified vocational/technical fields (in this instance, Engineering and Design Technology, and Business and Computer Technology.)" *Pompton Lakes, at 6.*

Nevertheless, Ramapo-Indian Hills contends that it does not have to pay for attendance of its resident students at the Academies because respondent's schools are not approved by the Department as required by state law. *N.J.S.A.* 18A:54-24 mandates that "[t]he courses of study to be pursued in every county vocational school,

and all changes therein" shall be approved by the Commissioner, with the advice and consent of the State Board. Significantly, this statutory directive requires approval of particular "courses of study" rather than any particular kind of school. In the Department's own words, approval is given to the content of "programs" and not to the "format" or "administrative structure" chosen by a county vocational school to implement its function. Consequently, the Academies operated by Bergen Vo-Tech do not require separate approval. Only programs taught in such schools must be approved.

Before a program can obtain the required approval, it must successfully navigate a multi-layered review process, which includes: recommendations from the Workforce Investment Board to eliminate unnecessary duplication of programs and to foster a unified delivery system; recommendation by the County Superintendent of Schools; consideration of occupational supply and demand needs by the Vocational Education Program Review Panel, and final approval by the Director of the Office of School-to-Career and College Initiatives. *N.J.A.C.* 6:43-8.2.

When a program receives approval, it is listed in the official *Directory* published by the Department. Several Commissioner's decisions have held that listing of a course in the *Directory* reflects "its status as a [Department] approved trade and industrial program." *See, e.g., Bd. of Educ. of Gloucester Cty. Instit. Of Tech.,* Initial Decision, EDU 10120-98 (Oct. 28, 1999), *modified* Final Decision (Comm'r Dec. 16, 1999) (slip op. at 13) http://lawlibrary.rutgers.edu/oal/search.html, upholding an ALJ ruling that, "There is no reason to look behind this approval." *Accord, D.F. v. Bd. of Educ. of Roselle Park,* EDU 5903-98 Initial Decision (May 24, 1999) http://lawlibrary.rutgers.edu/oal/search.html), *adopted* Final Decision (Comm'r July 9, 1999) www.state.nj.us/njded/legal/index.htmf, wherein the Commissioner examined the list of approved programs to determine whether the local school district offered a comparable program to that offered by the county vocational school.

Continued viability of these holdings, however, has been put into question by a recent remand order from the State Board critical of the practice of taking official notice

of the *Directory* without prior notification to the parties.[6] *K.B. v. Bd. of Ed. of Rancocas Valley Reg. High Sch. Dist.*, EDU 6974-97, Initial Decision (Nov. 12, 1997)(slip op. at 8), *adopted* (Comm'r Dec. 29, 1997), *remanded* (St. Bd. March 2000) http://www.state.nj.us/njded/legal/index.html Of course, that problem does not arise here because both parties incorporated relevant portions of the *Directory* in their moving papers. More importantly, however, the State Board went on to hypothesize that:

> [E]ven if the Commissioner had followed the required procedure for taking official notice of the fact that the GCIT program was listed in the Department's Directory of Verified Occupational Education Programs, it was not proper for him to construe such inclusion as providing conclusive proof that the program satisfied the requirements of *N.J.S.A.* 18A:54-1 *et seq.* The record before us is devoid of any information regarding the procedure for inclusion of a program in the Directory during the period relevant to this matter. Nor is there any indication of the basis for the determination to include the GCIT performing arts program or the standard applied in determining to include that program.

Unlike *Rancocas*, the regulatory process for inclusion of Bergen Vo-Tech's programs is spread on the record and the head of the responsible office within the Department has corroborated that the Academies' programs have received the Department's blessings. Insofar as Ramapo-Indian Hills alleges that Bergen Vo-Tech's programs lack the necessary Department approvals, that assertion is factually insupportable and legally incorrect.

Instead, petitioner appears to be mounting a collateral attack on the underlying validity of the approval given to these particular programs. Essentially, Ramapo-Indian Hills is asking an administrative law judge to micromanage the workings of the Department of Education and intrude into the exercise of its vested discretionary authority. Courts will abstain from interference with regulatory and administrative judgments of professionals in the field of public education "unless those judgments are

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[6] *N.J.A.C.* 1:1-15.2 requires that a judge "shall disclose the basis for taking official notice and give the parties a reasonable opportunity to contest the material so noticed."

palpably arbitrary or depart from governing law." *Dennery v. Bd. of Educ.*, 131 *N.J.* 626, 643 (1993). Ramapo-Indian Hills, however, does not allege that the Commissioner or his representatives acted arbitrarily, capriciously or unreasonably, but merely advocates a narrower view of what constitutes "vocational education."

Not every agency action requires the full trappings of an administrative hearing, with accompanying rights to discovery, subpoena power and cross-examination. Illustratively, a trial-type hearing is unnecessary in order for the Commissioner to evaluate a cap waiver application, *Bd. of Educ. of East Windsor Reg. Sch. Dist. v. State Bd. of Educ.*, 172 *N.J. Super.* 547(App. Div. 1980) or for the Department of Community Affairs to review fees established by local ordinance, *Toys R Us v. Twp. of Mt. Olive,* 300 *N.J. Super.* 585 (App. Div. 1997) or for the Department of Transportation to place a traffic signal. *Cedar Grove v. Sheridan*, 209 *N.J. Super.* 267 (App. Div. 1986). *See*, S. Lefelt, *New Jersey Administrative Law and Practice* §120 (Supp. 1999). Facts involved in resolutions of that type have sometimes been designated as "legislative." *Cunningham v. Dep't of Civil Service*, 69 *N.J.* 13, 22 (1975). Disputes over policy questions "need not be resolved through trial procedure even if the decision is made in part on the basis of broad and general facts of the kind that contribute to the determination of a question of policy." 2 Davis, *Administrative Law Treatise*, §12:3 (2d ed. 1979).

Administrative agencies possess the ability to be flexible and responsive to changing conditions. This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy. *Texter v. Human Services Dep't*, 88 *N.J.* 376, 385 (1982). If a full-blown administrative hearing were required whenever a school district does not want to pay its bill, the result will tend to stifle educational innovation and turn every routine billing dispute into a detailed programmatic review. Surely parents of students who attend county vocational schools should be able to rely on the government seal of approval and not be personally liable for tuition costs.

Next, Ramapo-Indian Hills argues that it is not obligated to pay for resident students' enrollment in the Academies because the programs "are not vocational within the meaning of the Perkins Act." Previously, in the *Pompton Lakes* case, the State Board granted the Commissioner's motion to participate in a pending case and to remand the matter to the OAL for consideration of the identical issue apparently raised for the first time on appeal. Eventually, however, Pompton Lakes was resolved by settlement between the parties so that the Perkins issue was never addressed. *M.R. v. Bd. of Educ. of Pompton Lakes,* EDU 1084-98 Decision on Remand (Comm'r Oct. 19, 1998) http://www.state.nj.us/njded/legal/index.html.

Initially, it should be noted that the underlying premise of petitioner's argument is erroneous. Assuming that federal funds available under the Perkins Act cannot be legally used to finance the Academies' programs, it would not necessarily follow that Ramapo-Indian Hills should be relieved of its independent obligation under state law to contribute its appropriate share of tuition costs. Instead, it would mean that Bergen Vo-Tech might be subject to a future accounting by government auditors and be required to reimburse the federal government for any misspent money. Thus, even if petitioner is right on this point, it would not help win the present case.

Ramapo-Indian Hills posits its legal analysis on an interpretation of the language of the Perkins Act. In the definitional section, 20 *U.S.C.A* §2302(29), the term "vocational and technical education" means organized educational activities that:

> (A) offer a sequence of courses that provides individuals with the academic and technical knowledge and skills the individuals need to prepare for further education and for careers (other than careers requiring a baccalaureate, master's, or doctoral degree) in current or emerging employment sectors; and (B) include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, of an individual.

Seizing on the phrase "other than careers requiring a baccalaureate, master's or doctoral degree, " Ramapo-Indian Hills emphasizes that the definition does not make college education a career goal. Inquiry into the meaning of a law begins by looking to the plain language of the statute itself. When the language is clear, no further inquiry is necessary unless applying the plain language leads to an absurd result. *In re Resorts International, Inc.*, 181 *F.* 3d 505 (3d Cir. 1999). On its face, the highlighted language in the Act only modifies "careers" and does not similarly limit provision of academic and technical knowledge needed for "further education." Indeed, Congress explicitly intended Perkins money to be used for education that contributes to "academic knowledge, higher-order reasoning and problem-solving skills."

Other statutory sections cited by petitioner do not help its argument. The primary purpose of the Perkins Act is "to make the United States more competitive in the world economy by developing more fully the academic and occupational skills of all segments of the population." To achieve that purpose, the Act envisions "concentrating resources on improving educational programs leading to academic and occupational skill competencies needed to work in a technologically advanced society." 20 *U.S.C.A* §2301. Because "area vocational and technical school" is defined in terms of educational services for "individuals who are available for study in preparation for entering the labor market," 20 *U.S.C.A.* §2302(3)(A) and (B), does not imply that Congress sought to deprive such students of enhanced preparation necessary to prosper in today's technologically sophisticated climate. Requiring funds for secondary-school programs to be utilized for programs that "link" secondary and postsecondary vocational and technical education displays an awareness on Congress' part of the importance of continuing education after graduation from high school. 20 *U.S.C.A.* §2355(b)(8).

Further support for an expansive reading of the federal legislation comes from the *State Plan for Vocational-Technical Education FY 2000-2004* ("*State Plan*"), which must comport with the Perkins Act and be approved by the United States Department of

Education.[7] 20 *U.S.C.A.* §§2321 to 2328. This five-year plan reflects New Jersey's vision for vocational education. Funds awarded under the Perkins Act are to be used to improve the skills of vocational students by "integration of academics with vocational and technical education programs" and by developing "a coherent sequence of courses to ensure learning in the core academic and vocational and technical subjects." *State Plan*, §2.2 (at 24.) Increased reliance on technology will provide students "with the academic, and vocational and technical skills that lead to entry into the high technology and communications field." *Ibid.* Vocational-technical courses are geared to develop competencies for various endeavors including "further education." *State Plan*, §2.3 (at 26). Programs must include "occupationally specific skill training and integrated applied academic instruction" and must not be remedial in nature or calculated to repair deficiencies in basic skills. *State Plan*, §2.3 (at 27). Programs funded under the Perkins Act "will prepare students either for entry into high-skill, high-wage jobs in current and emerging occupations or for opportunities in postsecondary education[.]" *State Plan*, §2.5 (at 34.) There is no basis for Ramapo-Indian Hills' assertion that vocational training may not prepare high school students for entry into college.

Ramapo-Indian Hills' major concern is that allowing vocational schools to offer college-preparatory courses would "compete, supplant and/or conflict with the role of the traditional public secondary school." At oral argument, petitioner's counsel complained that county vocational schools have "invaded" the province reserved to local school districts. We have come full circle when vocational schools, long regarded as a refuge for less academically-talented students, are now accused of luring away the best and the brightest by offering greater educational opportunities. Implicitly, Ramapo-Indian Hills has no objection to its students attending Bergen Vo-Tech, provided that the quality of education at vocational school is inferior to its own. Competition in excellence, however, is a healthy development likely to promote improvement in educational quality in both regular and vocational schools. Children will benefit if they

[7] While respondent's motion papers include only a preliminary draft of the *State Plan*, the final version is accessible over the internet. http://www.state.nj.us/njded/voc/votechplan.pdf

and their parents are afforded some choice in deciding which of the two types of settings will best equip them to become useful and productive citizens.

Lastly, Ramapo-Indian Hills claims that it is not obligated to pay for student enrollment at the Academies by virtue of *N.J.A.C.* 6:43-3.11(a), under which students shall be admitted to county vocational programs offered "so long as the resident district board of education does not offer a comparable type of program." Insisting that its University Programs are "comparable" to those offered at the Academies, Ramapo-Indian Hills demands a course-by-course comparison to ascertain whether it fits within the exemption. This portion of the regulation, however, conflicts with the governing statute, *N.J.S.A.* 18A:54-20.1(a), which does not recognize an exception for "comparable programs." Under the statute, the payment obligation applies to *all* local or regional school districts, except for those "maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes."[8]. Thus, the regulation purports to enlarge the category of districts that do not have to pay tuition beyond the scope contemplated by the Legislature.

To the extent that the regulation impermissibly exceeds the clear statutory language, it must yield to the overriding legislative policy. Clear legislative intent cannot be trumped by countervailing administrative practice. *Turnpike Auth. v. ASFME, Council 73,* 150 *N.J.* 331, 351 (1997). Administrative regulations "cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute." *N.J. Chamber of Commerce v. N.J. Election Law Enforcement Comm'n,* 82 *N.J.* 57, 82 (1980). An administrative regulation "must be within the fair contemplation of the delegation of the enabling statute." *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 561-562 (1978). When the rule of an administrative agency contravenes the statute which created it, the rule lacks legal efficacy. *In re the Freshwater Wetlands Protection Act Rules*, 238 *N.J. Super.* 515, 526 (App. Div. 1989).

Here Ramapo-Indian Hills acknowledges that it has not "establish[ed] and maintain[ed]" a vocational school, which it would be permitted to do under *N.J.S.A.*

[8] *N.J.S.A.* 18A:54-5 to 10.4.

18A:54-6.[9] Since it does not maintain its own vocational school, Ramapo-Indian Hills is bound as a matter of law to pay tuition for its resident students enrolled in a county vocational school.

Order

It is **ORDERED** that Bergen Vo-Tech's motion for summary decision is granted and that Ramapo-Indian Hills pay all past, present and future tuition and related costs for all its resident students attending the Academies.

And it is further **ORDERED** that Ramapo-Indian Hills' cross-motion for summary decision is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[9] Petitioner correctly points out that it is not required to obtain state approval of its vocational program under *N.J.S.A.* !8A:54-24 because it "neither operates, nor has ever claimed to operate[,] a county vocational school."

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 22, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/26/00
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 3130-00
AGENCY DKT. NO. 13-1/99

BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the ALJ's finding that respondent's Academy programs are, in fact, approved programs because these Academies were "founded upon" other approved vocational programs. Petitioner maintains that both statute and regulation require that "each and every course of study offered in a vocational school must be approved by the Commissioner *and* the State Board of Education ***." (emphasis in text) (Petitioner's Exceptions at 5) In this connection, petitioner contends that the ALJ failed to conduct a "proper inquiry" into whether the respondent's academy programs satisfy the requirements of *N.J.S.A.* 18A:54-1 *et seq.*; that is, petitioner seeks "a factual hearing to determine whether the Academies' programs have been approved and, if so, the standard that was applied in reaching that determination." (*Id.* at 9) Petitioner asserts that the ALJ's conclusion in this regard does not satisfy the State Board's

recent remand decision in *K.B. & G.C.I.T. v. Bd. of Ed. of Rancocas Valley Reg. H.S. District, supra*. (Petitioner's Exceptions at 10)

Petitioner further challenges the ALJ's legal conclusion that the Academies are "vocational," within the meaning of both State and Federal law. For the reasons expressed in its prior submissions before the ALJ, petitioner maintains that the curricula and course offerings available in the Academies do not reflect vocational programs. While petitioner does not dispute that the definition of vocational education must remain flexible, "it does dispute that the concept of vocational education should be read so expansively that there is essentially no difference between a vocational education and a 'regular' educational program." (*Id.* at 13)

Finally, petitioner excepts to the ALJ's finding that *N.J.A.C.* 6:43-3.11 contravenes the plain meaning of *N.J.S.A.* 18A:54-20.1, thereby rendering the regulation null and void. (*Id.* at 20) Rather, petitioner argues that the regulation in question is a "logical extension of *N.J.S.A.* 18A:54-20.1 and the two enactments must be read *in pari materia*." (*Ibid.*) Petitioner acknowledges the Supreme Court's substantial deference to regulations adopted by administrative agencies, based on the Court's recognition that:

> the "basic purpose of establishing agencies to consider and promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with staff, resources and expertise to understand and solve those specialized problems." (*Id.*, citing *In re Amendment of N.J.A.C. 8:31B-3.31*, 119 *N.J.* 531, 543-44 (1990) (which cites to *Bergen Pines Hosp. v. Department of Human Servs.*, 96 *N.J.* 456, 474 (1984))

Moreover, petitioner asserts that the ALJ overlooked *M.R. v. Pompton Lakes, supra*, wherein the Commissioner read the pertinent statute and code together, as establishing a statewide procedure for providing vocational education to students. (Petitioner's Exceptions at 21)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part, and reverse in part, the Initial Decision of the ALJ. At the outset, the Commissioner concurs that this matter is ripe for summary decision and, accordingly, accepts the factual findings of the ALJ. (Initial Decision at 3-5)

The Commissioner next affirms, for the reasons expressed in the Initial Decision, that the programs operated by respondent's academies have been approved, pursuant to *N.J.A.C.* 6:43-8.2. In so doing, the Commissioner finds that the ALJ's discussion satisfies the State Board's directive in *K.B., supra*, to bring to the record "information regarding the procedure for inclusion of a program in the Directory [of Verified Occupational Educational Programs] ***." (*Id.* at 9)

Additionally, for the reasons well-articulated by the ALJ, the Commissioner finds that the Academy programs at issue herein satisfy State and Federal definitions of "vocational education,"[1] and do not contravene either the expressed language or the intent of current vocational education mandates. Specifically, with respect to Federal enactments, as the ALJ aptly notes:

> The primary purpose of the Perkins Act is "to make the United States more competitive in the work economy by developing more fully the academic and occupational skills of all segments of the population." To achieve that purpose, the Act envisions "concentrating resources on improving educational programs leading to academic and occupational skill competencies needed to work in a technologically advanced society." 20 *U.S.C.A.* section 2301. (Initial Decision at 12)

Finally, the Commissioner rejects the ALJ's finding that *N.J.A.C.* 6:43-3.11(a) contravenes its enabling statute, *N.J.S.A.* 18A:54-20.1(a). In this connection, the Commissioner underscores that, read together,

[1] See also *M.R. v. Pompton Lakes, supra*, for discussion regarding State vocational education law and regulations.

> these enactments clearly establish a statewide delivery system for vocational education that ensures pupil access to such education through a tiered structure that first directs pupils to the local or regional district, then to the county district if the local district does not offer a comparable type of program, and then to schools statewide, to the extent that facilities permit and students qualify, if a comparable type of program is unavailable within the county district. *M.R. v. Pompton Lakes, supra,* slip op. at 5.

The Commissioner finds that the "comparable program" threshold requirement, as adopted by the State Board of Education, provides a framework which strikes a workable balance between a student's right to access vocational education and the State's legitimate interest in avoiding duplication of programs and costs. As petitioner notes, it would be illogical to compel a local board "to pay for its students' enrollment in an academy or magnet school program, irrespective of whether the school district offers a comparable program, or even an identical program." (Petitioner's Exceptions at 22)[2]

Accordingly, the Initial Decision of the ALJ is affirmed in part, and reversed in part, as set forth herein. Respondent's Motion for Summary Decision is granted. Petitioner is directed to remit tuition costs to respondent for its resident students attending the Academies.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 19 2000

Date of Mailing: JUL 19 2000

[2] Having so found, the Commissioner further notes that the within record contains the Department's *Directory of Verified Occupational Educational Programs, revised 1995* (Initial Decision at 3, footnote 2) which does not include petitioner's University Programs. (*Ibid.*) As such, petitioner's assertion that it offers a "comparable program" to that of the respondent must be rejected, and it cannot invoke *N.J.A.C.* 6:43-3.11(a) to prevent its otherwise qualified and eligible students from attending respondent's Academies.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BARRY STATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAPE-ATLANTIC LEAGUE AND NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

This is an appeal of a decision of the NJSIAA to suspend petitioner, Barry Staton, from coaching track and field for the 1999-2000 Spring track season for pulling his team from a track competition on April 27, 1999 prior to its completion. Specifically, Staton was found to have failed to field competitors in three events scheduled after the 200 meter race was completed because of his dissatisfaction with the officiating in that race. The NJSIAA, after reviewing the transcripts of the hearing before the Cape-Atlantic League (CAL) and the arguments of the parties, determined to uphold the determination of CAL to suspend Staton for the 1999-2000 Spring track season for violating its sportsmanship rule.

Staton argues on appeal that the record does not support a determination that he failed to permit his team to complete the track meet on April 29, 1999, arguing instead, that his determination not to filed athletes in certain events does not constitute a failure complete the track meet. In this regard, Staton argues that he permitted an athlete to compete in the high jump competition, which event concluded after the 200 meter race. As such, petitioner argues that he cannot be held to have violated NJSIAA's sportsmanship rule.

The Commissioner affirmed the determination of the NJSIAA. The Commissioner determined that Staton received the full measure of due process to which he was entitled by the NJSIAA. The Commissioner also affirmed the NJSIAA's determination that Staton's failure to field athletes in several events at the April 27, 1999 track meet after completion of the 200 meter race because of his dissatisfaction with the officiating violated its sportsmanship rule, thus warranting his suspension for the 1999-2000 Spring track and field season. Finally, the Commissioner rejected petitioner's argument that, because he permitted an athlete to compete in the high jump competition, which event concluded after the 200 meter race, he did not fail to complete the competition. The Commissioner noted that the high jump competition began prior to the 200 meter race, and that Staton permitted the athlete to participate in order to facilitate his qualification for all-star status. As such, this argument provided no basis to reverse the determination of the NJSIAA as arbitrary, capricious or unreasonable.

AGENCY DKT. NO. 117-4/00

BARRY STATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAPE-ATLANTIC LEAGUE AND NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

For Petitioner, Waltman, Reilly & Rogovoy (Ned P. Rogovoy, Esq.)

For Respondent, New Jersey State Interscholastic Athletic Association (NJSIAA), Herbert, Van Ness, Cayci & Goodell, P.C. (Michael J. Herbert, Esq. and Steven P. Goodell, Esq.)

For Respondent, Cape-Atlantic League (CAL), That, Stanton & McCrosson (Michael P. Stanton, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on April 17, 2000, by petitioner Barry Staton (hereinafter "Staton"), a track and field coach at Pleasantville High School. Petitioner seeks a reversal of the decision of the New Jersey State Interscholastic Athletic Association (hereinafter "NJSIAA") Executive Committee, dated April 5, 2000, which affirmed the determination of that body's Controversies Committee, dated March 3, 2000, upholding the February 1, 2000 decision of the Cape-Atlantic League (hereinafter "CAL") Executive Committee. Such CAL decision declared that Staton had violated the CAL Constitution and by laws and NJSIAA rules by terminating an April 27, 1999

track meet against Bridgeton High School prematurely, and imposed a penalty of suspension on Staton for the 1999-2000 spring track season. Staton seeks a reversal of the NJSIAA Executive Committee decision as being arbitrary, capricious and unreasonable, alleging that the facts and the record do not sustain a finding of premature termination of a meet.

On April 28, 2000, respondent NJSIAA filed its Answer to the Petition of Appeal, along with a listing, pursuant to *N.J.A.C.* 6A:3-7.2(b), of the Statement of Items Comprising the Record on Appeal. On May 4, 2000, respondent CAL advised that its position with respect to petitioner's claims herein was identical to that of the NJSIAA and it, therefore, adopted the Answer filed by the NJSIAA as the CAL's responsive pleading in this matter. On May 11, 2000, Staton, in accordance with *N.J.A.C.* 6A:3-7.3(a), submitted a brief in support of his position and copies of all items comprising the record which had been identified by the NJSIAA. Pursuant to *N.J.A.C.* 6A:3-7.3(b), both the NJSIAA and the CAL filed opposing briefs on May 24, 2000. Upon receipt of these submissions, the record in this matter was closed.

STATEMENT OF FACTS

The record evidences the following relevant facts:

- The NJSIAA is a voluntary association of approximately 430 member schools, established pursuant to *N.J.S.A.* 18A:11-3, which organizes high school athletics in New Jersey. Each member school adopts the rules and regulations of the NJSIAA as policies of its school's board of education.
- The CAL is a league of 23 public and parochial schools in Cumberland, Atlantic and Cape May counties. This league organizes competitions among these schools in accordance with a league constitution and bylaws approved by the NJSIAA.

- Delegation of authority between the NJSIAA and the leagues/conferences is delineated in the League/Conference Position Statement.[1] (1999-2000 NJSIAA *Handbook* at pp. 134-135)
- The Pleasantville and Bridgeton High Schools are members of both the CAL and the NJSIAA, and have adopted the rules and regulations of these organizations.
- On April 27, 1999, the male and female teams of Pleasantville and Bridgeton High Schools participated in a dual track meet.
- Following the conclusion of the men's 200m race, Coach Staton raised issues relating to the officiating of the race and made allegations of official misconduct. In so doing, Coach Staton threatened to withdraw his male athletes from the remaining events.
- Coach Staton subsequently pulled his athletes from competition in the shot-put, the 1600-meter relay and the 3200-meter run. Coach Staton allowed his high jumper to complete that event.
- Both the NJSIAA Bylaws and the NJSIAA rules governing Procedure before a game is terminated expressly prohibit a coach or school administrator from unilaterally withdrawing a team from an event which is in progress and vests meet or game officials with the sole authority to prematurely conclude an event.[2]

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[1]Such provision encourages leagues and conferences to adopt disciplinary procedures through which infractions of good sportsmanship can be penalized, and specifies that the NJSIAA will not interfere with those disciplinary actions imposed by leagues/conferences unless the actions are arbitrary, capricious or in violation of the NJSIAA Constitution and Bylaws.

[2]NJSIAA Bylaws, Article IX, Sportsmanship, Section 2E (NJSIAA *Handbook*, 1999-2000 at p. 51) in pertinent part specifies:

> COACHES MUST BE CAUTIONED NOT TO REFUSE TO PLAY OR TO COMPLETE A GAME/MEET. SUCH DECISIONS ARE WITHIN THE JURISDICTION OF THE GAME/MEET OFFICIALS ONCE A GAME/MEET HAS STARTED, OR REST WITH HOME MANAGEMENT AND/OR TOURNAMENT DIRECTOR IF THE GAME/MEET HAS NOT STARTED. (emphasis in original)

The policy against improper termination of an event is further memorialized in the Procedure section of the NJSIAA Handbook wherein it states:

- On January 31, 2000, the CAL Executive Committee held a full hearing, where Staton was represented by counsel and a stenographic record was compiled, to consider testimony and evidence with respect to the allegation that Staton had improperly terminated the track and field contest.
- The CAL Executive Committee, in its decision issued on February 1, 2000, concluded that "Staton refused to participate, and indeed removed some athletes preparing to participate, in the remaining events as a result of his strongly expressed disagreement with several decisions made by the meet officials***" in violation of NJSIAA Sportsmanship policy (Article IX, Section 2, E), the National Federation of High School Sports Code of Ethics (NFHS 1999 Track and Field Rules Book at p. 74)[3], and CAL Bylaws, Article X, Section 7-B.[4] (CAL Executive Committee decision at pp. 2-4) The CAL decision offered the following substantiation for its conclusion:

> Bridgeton Athletic Director Joe Blandino communicated, in writing, with the NJSIAA on 4/28/99, detailing the incident and his attempt to convince Coach Staton to finish the meet. In this letter, Mr. Blandino stated he warned Coach Staton that his actions could be in violation of NJSIAA and Cape-Atlantic League Rules and Regulations and that a report would be submitted. His

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> TERMINATION, ONCE THE GAME HAS STARTED, IS NOT THE PREROGATIVE OF A COACH OR SCHOOL MANAGEMENT, AND THE ACTION OF REMOVING A TEAM FROM THE EVENT PRIOR TO THE CONCLUSION OF THE GAME/MEET/EVENT, REGARDLESS OF THE CIRCUMSTANCES, WILL RESULT IN SEVERE PUNITIVE ACTION BY THE NJSIAA CONTROVERSIES OR EXECUTIVE COMMITTEE.
> (NJSIAA *Handbook*, 1999-2000 at p. 142, emphasis in original)

[3]This provision states "[t]he coach shall respect and support contest officials. The coach shall not indulge in conduct which would incite players or spectators against officials. Public criticism of officials or players is unethical." (CAL Executive Committee decision, at p. 3)

[4]This provision specifies that "[a]ny coach using profanity, obscene gestures, excessive harassment or any motions or actions that could be described as unsportsmanlike...may be subjected to Article X, Section 7-A." Article X, Section 7-A states "[a]fter a hearing, a coach may be censured or barred from the field of play during sanctioned play and/or the school employing him/her made subject to probation, suspension and/or fine where there is a definite indication that the school district is not fulfilling its responsibility for control of its athletic program." (CAL Executive Committee decision at p. 4)

communication relates Coach Stanton's comments that his team was "cheated" by the officials and that he was not going to finish the meet. Mr. Blandino provided credible testimony at the hearing that was consistent with the findings in his report, which was written the day after the subject track meet. Mr. Blandino's testimony was supported and confirmed by testimony given by Will Barry, Head Coach Bridgeton Boys Track and Field, who testified he had his own discussion with Coach Staton, in which Coach Staton said his team was being cheated and that they were leaving. Coach Barry testified that he asked Coach Staton to reconsider leaving. Howard Furtek, Assistant Coach Bridgeton Boys Track and Field, testified that Coach Staton said directly to him that Pleasantville was being cheated and he was taking his team from the meet, and that he, (Furtek), attempted to convince Coach Staton to reconsider. In his testimony, Coach Staton did not deny stating to Coach Furtek that Pleasantville was being cheated.

The Press, April 28, 1999 article titled "Bridgeton boys post win after Pleasantville bolts", in which Coach Staton commented, "Beat me I can take it...Cheat me, I'd rather take my kids home," is consistent with Mr. Blandino's testimony and report and the testimonies of Coaches Barry and Furtek. The article additionally states that Pleasantville did not compete in the shot-put, 3200 meter run and 1600 meter relay. In his testimony, Coach Staton claimed that he did not speak directly to the newspaper reporter, even though he was directly quoted three times and referenced four times by the reporter.

[T]he testimony of Starter and Head Official Andrea Kuhar was consistent with the report she submitted to her assignor on May 1, 1999. Ms. Kuhar's testimony corroborated many of the details presented by Athletic Director Blandino including her knowledge of Coach Staton's disagreement with the results of the boys 200 meter race. She also testified that a member of her officiating staff informed her that the Pleasantville teams were boarding the busses prior to the start of the 3200 meter run. Ms. Kuhar additionally testified that the field official in charge of the shot-put, Tony Copare, informed her that the Pleasantville athletes had warmed-up for the event but were told, by their coach, to leave.

[T]he findings of the investigation conducted by the Pleasantville Board of Education, dated September 10, 1999, included the "Undisputable Material Facts" that "Following the conclusion of the men's 200m race, Coach Staton raised issues relating to the officiating of the race and made allegations of official misconduct.

> In doing so, Coach Staton threatened to withdraw the male athletes from the remaining events." (pg2,pp3). Additionally, the Board found that "The facts clearly establish that Coach Staton threatened to withdraw his male athletes from the meet and did in fact withdraw his entries from the 3200 and 1600m(sic) races.", (pg3, pp4) (CAL Executive Committee decision at pp. 2-3)

The CAL's decision discounted Staton's assertion that his action was taken out of concern for his players due to a "hostile environment" stating:

> Considerable testimony was provided by Coach Staton and his witnesses detailing alleged actions by Bridgeton fans in the stands and surrounding areas, creating what Coach Staton and the other Pleasantville High School witnesses referred to as a "hostile environment". The Committee members weighed the testimony carefully in relation to the charges brought against Coach Staton. While there was some consistency in the testimony offered by those witnesses, there was also significant conflicting testimony as to the location of the "hostility" and the degree of danger represented by the alleged actions of the fans. No witness reported the fan behavior to the meet site manager or to an official. The Committee felt it compelling that Coach Staton did not report any "hostile" behaviors to Athletic Director Blandino or to Head Official Kuhar, even though prior testimony demonstrated the opportunity to do so. While Coach Staton asserts he pulled his athletes off the track for protection, he allowed Fred Lemons to continue to compete in the high jump and allowed many of his athletes to stand in the area directly adjacent to the east side of the stadium, below the fans in the area some witnesses described as "hostile". Additionally, Coach Staton did not provide evidence that he immediately informed his athletic administration of the "hostile environment", and, indeed, did not present any such evidence until a Pleasantville Board meeting scheduled on May 18, 1999, eight days after receiving a notice of suspension, from Pleasantville Interim Superintendent Avrami, for the remainder of the track and field season, effective May 10, 1999. (CAL Executive Committee decision at p. 3)

Finally, the Committee's decision determined that "[t]he fact that Coach Staton allowed an athlete to complete an event he had already entered before the coach pulled his team, does not change the stated intent of Coach Staton's actions." (*Ibid.*)

- The CAL Executive Committee's decision imposed a penalty of suspension for the 2000 Spring Track and Field season on Coach Staton. (*Id.* at p. 4)
- On February 9, 2000, NJSIAA's Controversies Committee reviewed the full record and concluded that the CAL had acted properly and decided not to overturn the the CAL's decision.[5] (NJSIAA Answer, Second Affirmative Defense, at p. 3) It further separately determined that the imposition of a one-season suspension was not arbitrary or capricious noting that another CAL coach had previously been terminated for a similar violation. (March 3, 2000 decision of the NJSIAA Controversies Committee at p. 2)
- On April 5, 2000, the NJSIAA Executive Committee considered Staton's appeal from the NJSIAA Controversies Committee's ruling and affirmed that body's decision.

PETITIONER'S POSITION

Staton argues that the within record does not sustain a finding that he failed to complete a meet and, therefore, the conclusions of the NJSIAA Controversies Committee, sustained by the NJSIAA's Executive Committee, are arbitrary, capricious and unreasonable calling for the Commissioner's overturning of such decision and vacating of the penalty imposed against him. (Brief in support of Appellant at pp. 2-3)

[5]NJSIAA's Controversies Committee's decision did, however, modify the last page of the CAL's decision "to make clear that, although Coach Staton improperly terminated the track meet with Bridgeton in violation of Article IX, Section 2E of the NJSIAA Bylaws, he did so without 'using profanity, obscene gestures or excessive harassment.' The Committee believed this was important in view of the otherwise unblemished record of Coach Staton and the need for clarification that the Coach did not use abusive or profane language while removing his team from the track meet on April 27, 1999." (NJSIAA Controversies Committee March 3, 2000 Decision at p. 2)

In support of his contention, Staton advances that the April 27, 1999 boys track meet between Pleasantville and Bridgeton had a total of 15 events, with "the meet" comprising the sum total of the scores derived from each team's completion of these 15 individual events.

> When Coach Staton chose not to enter athletes in the shot put event, Bridgeton received, after completing the event, 9 points. The[n], Bridgeton completed the 3200 meter run and received 9 points, then Bridgeton completed the 1600 meter relay and received 5 points, then, by all accounts, approximately twenty minutes later, the high jump event concluded with Pleasantville receiving 5 points and Bridgeton receiving 4 points. After the last event was concluded, that being the high jump, the meet was concluded and Pleasantville left. There is no doubt ***that the last thing that occurred was the completion of the high jump event. ***Coach Staton could have stopped his high jumper from completing the event but he let the event continue until the meet was concluded. (Brief in Support of Appellant at pp. 3-4)

Staton, therefore, reasons that because the last points of the cumulative score of the meet were compiled in the high jump, an event in which Pleasantville competed and received 5 points, he cannot be charged with improperly terminating the meet. (*Id.* at p. 5) Staton posits that there is no prohibition against a coach choosing not to enter athletes in particular events, "no matter what his subjective motivation" may be. (*Id.* at p.6) Consequently, petitioner argues that, notwithstanding that the reviewing authorities in this matter may have been displeased with what they perceived was Staton's motivation for not entering his athletes in certain events, such displeasure does not equate to "termination of a meet and to reach [such] a conclusion ***is an arbitrary premise coloring what should be [a] clinical analysis of the facts." (*Ibid.*) Rather, he argues, he must be tried on the specific charge which he has been accused of violating, "not on some concept of nebulous fairness with no written standard, the law so mandates." (*Ibid.*)

RESPONDENTS' POSITIONS

CAL

The CAL argues that Staton received a full measure of due process pursuant to the CAL Constitution and Bylaws, *i.e.*, he had a hearing, he was represented by counsel, he had an opportunity to present witnesses on his behalf, and he received a prompt written decision. (Brief of Respondent Cape-Atlantic League, at p. 3) Additionally, it proffers, the CAL's decision to suspend Staton for the 2000 spring track season for terminating the April 27, 1999 Pleasantville/Bridgeton meet "is supported by sufficient credible evidence in the record as a whole," (*Ibid.*) in that there was evidence and substantial credible testimony, under oath, from meet officials and coaches present at the event which "establishe[s] "that [Staton] *** refused to participate, and removed some athletes preparing to participate in the events scheduled after the 200 meter race as a result of his strongly expressed disagreement with judgement decision made by the meet officials." (Brief of Respondent Cape Atlantic League p. 4) As such, the CAL argues, under the Commissioner's applicable standard of review in matters of this kind, the decision rendered by the CAL and the NJSIAA should be affirmed. (*Id.* at pp. 3-4)

NJSIAA

NJSIAA advances that this matter represents a classic example of interpretation of NJSIAA rules, "specifically, when is a track meet 'terminated' and a coach subject to punishment for prematurely terminating the meet?" (NJSIAA Brief at p. 2) NJSIAA further argues that, although Staton had three hearings before entities charged with interpreting NJSIAA rules with respect to termination of a meet, each of which found him guilty of such charge, he, nonetheless, seeks to persuade the Commissioner "that because he allowed one event to proceed,

he did not in a technical sense 'terminate' the track meet." (*Id.* at pp. 1-2) NJSIAA urges that, absent a deprivation of due process, a lack of sufficient substantiation in the record or a demonstration that the NJSIAA's rules were applied in an arbitrary and capricious manner, the Commissioner should not overturn the CAL and NJSIAA's interpretation and application of their rules. Here, the NJSIAA argues, it is clear that both the CAL and the NJSIAA provided Staton the due process to which he was entitled, the decisions reached by these bodies were based on substantial evidence in the record and were neither arbitrary nor capricious. (NJSIAA Brief at pp. 10-15)

Initially, the NJSIAA observes that "Staton has received an extraordinary degree of due process" in this matter. (NJSIAA Brief at p. 10) He received a plenary hearing before the CAL Executive Committee, comprised "of athletic directors and principals from nine Cape-Atlantic League schools", where he was represented by counsel, sworn testimony was offered, witnesses were cross examined, a stenographic record was made, and a written decision advancing that body's rationale for its decision was issued one day later. (NJSIAA Brief at p. 11) This was followed by appeals before two NJSIAA Committees.

First, the NJSIAA's Controversies Committee, where Staton was represented by counsel, reviewed the CAL decision, heard oral argument, and questioned both Staton and the Bridgeton Athletic Director, and the Committee's decision, unanimously upholding CAL's determination, was promptly issued. Second, Staton appeared before the NJSIAA's Executive Committee where, again, he was represented by counsel who presented his arguments. The Executive Committee voted 31-1 to uphold the two prior decisions. (*Ibid.*) As such, NJSIAA argues that, to date, Staton's "case has been reviewed by 50 educators, all but one of whom have

determined that he violated the rules and exhibited unsportsmanlike conduct by prematurely withdrawing his team from the track meet on April 27, 1999." (*Ibid.*)

Next, the NJSIAA posits, the record clearly supports the findings of the CAL "that Coach Staton purposefully pulled his team from the meet, failing to complete the shot-put, 3200-meter and 1600-meter runs." (NJSIAA Brief at p. 13) The sportsmanship provisions of the NJSIAA Bylaws and Rules (NJSIAA *Handbook*, 1999-2000 at pp. 51-52) it argues, unequivocally provide that "[a] coach's failure to complete a meet, regardless of the circumstances" is a violation of these provisions, subjecting such coach to "severe punitive action." (*Ibid.*) Specifically, the NJSIAA proffers, the evidence and testimony show:

> *** that the real reason [Staton] *** pulled his team from the field was not because of any commotion, but because he was angry at the officiating. Three witnesses testified that Coach Staton had said that he was being cheated and that he was leaving. One witness, Coach Furtek, tried in vain to convince him to reconsider. The Bridgeton athletic director even said that he warned Coach Staton that his actions could be in violation of NJSIAA and Cape-Atlantic League rules, and that a report would be submitted, but Coach Staton pulled his team from the field anyway. The testimony of these witnesses was supported by an article in the Atlantic City Press reporting the events, and testimony of the starter and head official, Andrea Kohar, who said that Coach Staton had disagreed with the results of the 200-meter race and that officials reported to her that the Pleasantville teams were boarding the busses prior to the start of the 3200-meter run and Pleasantville shot-putters had been told by their coach to stop warming up and to leave. Coach Staton's complaints about a "hostile environment" are further belied by the fact that he never reported the "hostile environment" to meet officials, and only raised it as a issue when he faced disciplinary action by the Pleasantville Board of Education.
> (NJSIAA Brief at pp. 12-13)

Finally, NJSIAA contends that Staton's exclusive defense in this regard, *i.e.*, that, because the rules do not expressly prohibit a coach from determining not to enter athletes in specific events, and because he allowed his high jumper to complete the meet, he was not in

technical violation of the rules, fails on at least four levels. First of all, it asserts, three separate committees of educators, fully knowledgeable of NJSIAA, CAL and track and field rules, found to the contrary when they undertook to interpret such rules. Specifically, the NJSIAA contends that these individuals recognized that "[w]hile a track coach might elect to save a runner so as not to tire him or her out, or scratch runners from competition for strategic reasons, there is no right to refuse to participate because the coach does not like the way the meet is being run." (NJSIAA Brief at p. 13)

Second, the NJSIAA asserts, irrespective of Stanton's belief as to whether his conduct in this matter was a violation of the rules, "he acted in an unsportsmanlike manner because he deprived his athletes, specifically his shot-putters, 3200-meter runners and 1600-meter relay team, of the opportunity to compete." (NJSIAA Brief at p. 14) Because of Staton's "impulsive act," it avows, these athletes were denied the chance to vie in one of their limited high school contests. (*Ibid.*)

Third, it argues, Staton's position is fully belied by the facts in this matter. NJSIAA argues that:

> The high jump began *before* the 200-meter dash, and the only reason he allowed his jumper to finish the event was because the jumper asked him to. The jumper wanted to jump a personal best and qualify for all-star status. *Coach Staton refused to participate in every event that began after the 200-meter*, when he felt he had been cheated, and he thus failed to complete the meet. (Emphasis in original). (*Ibid.*)[6]

[6]It is noted that the NJSIAA's submission presents a proffer of explanation of the sequence of events in track and field meets in general, and the meet at issue herein in particular:

> [I]n a track and field dual meet, events on the track follow a fixed schedule, while field events run simultaneously in different areas. The last three running events of a meet are the 200-meter dash, the 3200-meter run, and the 1600-meter relay. During the Bridgeton-Pleasantville meet, the high jump, a field event, started before the 200-meter dash, and concluded sometime before the end of the running races. (Pet. App. Ex E, p. 105 & 118). The shot-put, another field event, was scheduled to begin shortly after the 200-meter dash was finished. *Id.*
> (NJSIAA Brief at pp. 3-4)

Fourth, the NJSIAA charges that Staton's argument fails on the basis of prior decisional law, citing *Bower v. NJSIAA,* 94 *N.J.A.R.* 2d (EDU) 80, wherein the Commissioner upheld a determination of the NJSIAA sanctioning a wrestling coach for pulling his athletes from a tournament match for improper motives, thereby precluding them from participation in a significant competition. (NJSIAA Brief at pp. 14-15)

The NJSIAA urges that, under all of these circumstances, the Commissioner should uphold the decisions of the League and the Association.

APPLICABLE LAW

The Commissioner's standard of review in NJSIAA determinations is explicitly delineated in *N.J.A.C.* 6A:3-7.4:

> (a) In determining appeals from NJSIAA decisions, the Commissioner's scope of review shall be appellate in nature.
>
> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his or her judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner.

Furthermore, it is well-established that the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288, 297 (App. Div. 1960).

COMMISSIONER'S DETERMINATION

After consideration of the full record in this matter,[7] the Commissioner determines to uphold the decision of the NJSIAA finding Staton guilty of violating the sportsmanship rules and imposing a penalty of suspension for the 1999-2000 spring track season.

In so determining, the Commissioner, initially, is convinced that there can be no reasonable claim made here that Staton did not receive the full measure of due process owed him by each of the three deliberative bodies which reviewed the charges against him. Similarly, the Commissioner is persuaded that the CAL and the NJSIAA did not act arbitrarily or unreasonably when, on the basis of the record before them, they found Staton guilty of unsportsmanlike conduct for prematurely terminating the competition on April 27, 1999. The rules in this regard are clear. That Staton permitted his high jumper to conclude participation in his event, which had begun prior to the running of the 200-meter race, in order to facilitate the athlete's qualification for all-star status, does not serve to mask or to nullify the reasonableness of, and rational basis for, the Committees' determinations. The record here is abundantly clear that Staton purposely acted to pull his athletes from every competitive event which began subsequent to the running of the 200-meter race, with regard to which he had expressed his dissatisfaction with the officiating and stated his intent to leave the meet, thereby depriving those athletes of a meaningful opportunity to compete in those events. The Commissioner finds it unmistakable that in so doing Staton violated both the letter and the spirit of the sportsmanship rules.

[7]It is noted that the record includes transcripts of the CAL hearing conducted on January 31, 2000 and the NJSIAA Controversies Committee and Executive Committee hearings held on February 29, 2000 and April 5, 2000, respectively.

The Commissioner, therefore, concludes that under these circumstances, Staton has failed to establish that the NJSIAA's interpretation and application of its rules in this matter constituted arbitrary, capricious or unreasonable action which would warrant reversal of that body's decision. The Commissioner, likewise, finds no cause to disturb the penalty prescribed to Staton as a consequence of his infraction.

Accordingly, the Commissioner affirms the determination of the NJSIAA in this matter and hereby dismisses the within Petition of Appeal.[8]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DATE OF DECISION JUL 10 2000

DATE OF MAILING JUL 10 2000

[8]This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

224-00SEC

IN THE MATTER OF ANNE DORETY,	:	
BOARD OF EDUCATION OF OLDMANS	:	COMMISSIONER OF EDUCATION
TOWNSHIP, SALEM COUNTY.	:	DECISION
_____	:	

July 10, 2000

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
Anne Dorety,	:	
Oldmans Twp. Board of Education	:	**SEC Docket No.: T20-00**
Salem County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Anne Dorety was elected to serve a three-year term on the Oldmans Township Board of Education in April 1999; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on May 1, 1999; and

WHEREAS, the NJSBA conducted seven training sessions between April 1999 and April 2000 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 14, 2000, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she did not submit a timely signed and notarized response; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its May 23, 2000 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1999 to April 2000 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, she could have attended one of the many other sessions offered; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Dorety violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board.

Dated: May 23, 2000

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 23, 2000.

Lisa James-Beavers, Executive Director

[225_eaststate:docs/orders/trng/(TrngRes2000.doc)]

AGENCY DKT. NO. 191-6/00

IN THE MATTER OF ANNE DORETY, :
BOARD OF EDUCATION OF OLDMANS : COMMISSIONER OF EDUCATION
TOWNSHIP, SALEM COUNTY. : DECISION
:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend that the above-named Board member, who was elected to the Oldmans Township Board of Education in April 1999, be removed from office for failure to attend the Board member training sessions by April 2000 as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), on April 14, 2000 the Commission issued an Order to Show Cause why the Board member had not attended such training ; and

Whereas, the above-named Board member failed to provide a timely signed and notarized response to the Order of the Commission; and

Whereas, the Commission voted on May 23, 2000, to recommend removal of the above-named Board member for failure to timely attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 24, 2000, subsequent to the Commission's meeting, correspondence, signed by the above-named Board member but still not notarized, was received

by the Commission in response to the Show Cause Order assuring that she will fulfill the training requirements as soon as possible and explaining that, although she had good intentions of honoring her commitment to the Board, her efforts to date had been unsuccessful because, *inter alia*: the birthday of one of her young children fell on the date of the October 1999 training, which was the first training session reasonably close to her home; a snow storm fell on the date of the January 2000 training and she wrongly assumed that the training was cancelled, but, admittedly, even if she had known it was not cancelled, she would not have driven on icy rural roads to attend; and, although she registered for the April 2000 training, at the last moment a situation with respect to the family's "adopted" great-grandmother required her attention; and

Whereas, on May 24, 2000, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending removal; and

Whereas, the above-named Board member submitted to the Commissioner a copy of her response to the Commission cited *ante,* together with a letter averring that the penalty of removal is too harsh and that a sanction of reprimand, censure or suspension would be justified; and

Whereas, the Commissioner has carefully considered the record of this matter, including the decision of the School Ethics Commission and the above-named Board member's response, and, having done so, determines that removal from the Oldman's Board of Education is justified under the circumstances due to her repeated failure to attend the statutorily required training session within one year of her election to the Oldman's Board in April 1999; now therefore

IT IS ORDERED that the above-named Board member be removed from office.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 10 2000

Date of Mailing: JUL 10 2000

*This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

ELLEN WOOLLEY AND MELVIN CLARKE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, THERESA THOMAS, DANIEL GALLAGHER, MATTHEW DORAN, JAMES HERZOG AND THERESA KELLY, INDIVIDUALLY AND JOINTLY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners, a Supervisor of Pupil Personnel Services and an Assistant Superintendent, alleged violations by respondent Board of the New Jersey Law Against Discrimination (NJLAD), the Tenure Employees Hearing Law and the Open Public Meetings Act (OPMA). Respondent Board filed a motion for summary decision, alleging a failure to state a claim upon which relief may be granted.

The ALJ determined that petitioners failed to allege or demonstrate a tangible adverse employment action that is actionable under the NJLAD. The ALJ further concluded that no viable claim pursuant to the Tenure Employees Hearing Law had been set forth because no tenure charges had been discussed by respondent or filed against petitioners. Finally, the ALJ determined that no OPMA violation had been established because no official action was taken or considered by respondent Board.

The Commissioner affirmed the Initial Decision of the ALJ and dismissed the amended petition. The Commissioner held that, to the extent he has jurisdiction over NJLAD claims, no adverse employment action based on petitioners' race or other invidious classification had been established, nor had petitioners demonstrated that they were subjected to adverse employment decisions which would rise to an allegation of reprisal. With respect to the Tenure Employees Hearing Law claims, the Commissioner held that petitioners failed to state a claim that, if true, would constitute a violation of the tenure laws. Finally, the Commissioner concurred with the ALJ's determination that petitioners failed to state a claim pursuant to the OPMA because his incidental jurisdiction over such claims may only be invoked if a valid claim arising under the school laws is established, but no such claim had been established in this case.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4553-99

AGENCY REF. NO. 86-4/99

ELLEN WOOLLEY AND MELVIN CLARKE,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, THERESA THOMAS, DANIEL GALLAGHER, MATTHEW DORAN, JAMES HERZOG AND THERESA KELLY, INDIVIDUALLY AND JOINTLY,

Respondents.

Gregory Johnson, Esq., for petitioners

George Frino, Esq., for respondents

Record Closed: April 3, 2000 Decided: May 19, 2000

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners alleged, among other things, that the Board of Education of the City of Atlantic City (Board) and individual members thereof violated the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to –42l; that the Board and individual members violated the School Ethics Act, *N.J.S.A.* 18A:12-21 to –34; petitioners' privacy rights and the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to 6-25; that the Board and named individuals violated the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:5-6 to –21.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Subsequent to Prehearing Conferences, telephone conferences, frequent delays with respect to discovery and other motions, the Board now seeks to dismiss the instant matter by way of summary decision, pursuant to *N.J.A.C.* 1:1-12.5. The arguments of the parties are set forth herein below.

Respondent's Board's Position

Statement of Facts

This matter involves a four count, "amended" Petition brought by two current employees of the Board.

The four counts seek a "cease and desist" order that would prevent the Board and individuals respondents "from harassing petitioners and interfering in District operations."

Count One alleges racial discrimination in violation of *N.J.S.A.* 10:5-12(a) and (d) of the LAD.

Count Two alleges "retaliation" in violation of *N.J.S.A.* 10:5-12(d). It asserts respondent Loggi excluded Clarke from "a very important meeting" (see paragraph 29); did not allow Clarke "to represent the Administration" at another meeting (see paragraph 30); and was publicly "reprimanded" by the respondent Kelly on August 23, 1999 (see paragraph 31).

Count Three alleges that respondents Lopez, Thomas, Kelly and Gallagher have publicly stated that they intend to "terminate petitioners' employment" in violation of *N.J.S.A.* 18A:6-11 (see paragraphs 36-37).

Finally, Count Four alleges Sunshine Law violations whereby respondents Lopez, Thomas, Kelly and Gallagher violated "petitioners' rights by making public statements" in violation of *N.J.S.A.* 4:12(b)(8).

The relief in all cases seeks injunctive relief. There are no factual assertions that:

a. tenure charges exists or are being prepared;

b. petitioners have been suspended, demoted, terminated or have suffered a job-related loss; and/or

c. a job-related sanction has been the subject of Board action.

Woolley has not answered interrogatories; Clarke has.

In response to Question No. 30 that stated:

> Whom do you contend on behalf of the Board violated the individual privacy rights of employees as alleged in Paragraph 14 of the Joint Petition of Appeal? Include in your answer what the specific actions were and the name of the individual(s) whose rights were violated. Provide any documentation that you may have in your possession to support your answers.

Clarke stated:

> Board members Perry, Kelly, Gallagher and others named in the Petition. The Board has committed numerous violations. Board members violated my rights by discussing my employment with the

> press and with third parties. Recently, the Commissioner ruled that the Board violated Dr. Williams's privacy and tenure rights on March 1, 1999. See attached decision. On September 2, 1998, Judge Martone ruled that the Board violated the tenure laws by filing a Cross Petition [containing the exact language in the tenure charges.]

In response to Question No. 31 that stated:

> Whom do you contend on behalf of the Board violated the Open Public Meetings Act (OPMA) as alleged in Paragraph 14 of the Joint Petition of Appeal? Include in your answer what specifically was violated as contained in the Act. Provide any documentation that you may have in your possession to support your answer.

Clarke stated:

> Board members named in the Petition. The Board has committed numerous violations of the OPMA. Board members violated my rights by discussion (sic) my employment with the press and with third parties, and not providing me with a Rice notice. Recently, the Commissioner ruled that the Board violated Dr. Williams's privacy and tenure rights by voting in public on March 1, 1999. See attached Decision. Previously, Judge Martone ruled that the Board violated OPMA by filing a Cross Petition (containing the exact language in the tenure charges) on September 2, 1999. Also, the Atlantic City Press has sued the Board in the past for OPMA violations. See also closed session minutes of board dated December 8, 1998 and minutes of Policy committee meeting on March 25, 1999.

In response to Question 32 that stated:

> Whom do you contend on behalf of the Board violated the tenure laws as alleged in Paragraph 14 of the Joint Petition of Appeal? Include in your answer what the specific sections of the tenure laws were violated and the name of the individual(s) whose rights were violated. Provide any documentation that you may have in your possession to support your answers.

Clarke stated.

> See No. 30.

In response to Question No. 49 that stated:

> Describe in detail the types of retaliation were you subjected to by board members as stated in Paragraph 17 of the Joint Petition of Appeal? Include why you feel that this retaliation was the result of your reporting racially discriminatory practices of the District, and whom on behalf of the Board committed these alleged acts of retaliation against you.

Clark stated:

> Some board members placed my name on a "Hit List" and then attempted to eliminated [sic, eliminate] my position in retaliation for assisting in ending the discriminatory practices concerning the grade and transcript scheme; and also for dealing with "protected employees." (Daly Griffiths)

Question No. 64 stated:

> Do you feel that the respondents are not entitled to be involved in administrative matters? Please refer to the allegations in Paragraph 23 of the Joint Petition of Appeal when forming your response. State specifically why you feel they should or should not be involved and what you feel job description is.

Clarke did not respond.

Clarke has admitted that the Board has the right to eliminate certain positions as its prerogative. *See,* Clarke's answers to Questions Nos. 66 through 67.

Question No. 68 stated:

> Do you have any knowledge of instances where the Board terminated an individual and/or eliminated a position without notifying the individual(s) affected? If yes, state in detail, who was terminated, what positions were eliminated, the date of the event(s), etc.

Clarke only answered yes.

The Atlantic City School District is a district in distress inasmuch as it is a "Level Two" monitored school district. This status was based upon a May 1995 Monitoring Report promulgated by the Commissioner of Education (Commissioner); it is the level preceding a State takeover. During the 1997-98 school year, the School District ran an approximate five million dollar ($5,000,000) deficit that was eliminated by the Commissioner's permission to transfer funds from a capitol account in order to cure the multi-million dollar deficit.

The financial distress caused a discussion of a reduction in force (RIF) of staff that may have impacted the petitioners herein. However, the full RIF did not have to be implemented. It is this potential (never realized) job loss that petitioners carelessly refer to as a "Hit List."

Consequently, this tribunal is faced with a Petition that alleges no tangible, adverse employment action by the employer, and no claim for relief.

Point One

No Claim is Stated for an LAD Violation

Petitioners in this case have not alleged any tangible adverse employment action by the employer, the Board. They have alleged that a private speech of certain members that allegedly reflected an individual intent to terminate employment is a violation of LAD. They further allege

that they were periodically excluded from meetings by their supervisor (not the Board). In short, they allege no remediable conduct under the law.[1]

LAD is a comprehensive scheme that prohibits an unlawful employment practice. It is axiomatic that the employee must be deprived, of, by the employer (in the case, the Board), a term, a condition or a privilege of employment. *N.J.S.A.* 10:5-12(a). Likewise, reprisals on account of forbidden practices are illegal. *N.J.S.A.* 10:5-12(d). These two provisions are those relied upon by the petitioners.

Entitlement to attendance at, private meetings has never been declared actionable under LAD. Certainly, a discharge from employment is actionable. *Slohoda v. UPS, Inc.* 193 *N.J. Super.* 586 (*App. Div.* 1984). A failure to hire is actionable, *O'Lowe v. NJ Dept. of Corrections,* 313 *N.J. Super.* 249 (*App. Div.* 1998) and a RIF layoff is actionable. *Edwards v. Schlunberger-Wells,* 984 *F. Supp.* 264 (*D.N.J.* 1997). A denial of a promotion is actionable. *Jamison v. Rockaway Twp. Bd. of Ed.* 242 *N.J. Super.* 436 (*App. Div.* 1990).

Allegations of reprisals do not state a cause of action unless adverse employment action is taken. *Reyes v. McDonald Pontiac,* 997 *F. Supp.* 614 (*D.N.J.* 1988) and *Craig v. Suburban Cablevision, Inc.,* 274 *N.J. Super.* 303 (*App. Div.* 1994) aff'd 140 *N.J.* 623 (1997).

The case at bar is devoid of any suggestion, let alone facts, supporting the requisite element of a deprivation of a term and condition of employment. Both petitioners remain employed without any reduction in pay. They have not been suspended, demoted or refused a promotion. In short, no claim for relief has been stated under LAD.

[1] Clarke is an Assistant Superintendent. This tribunal is undoubtedly aware that no board member (or full Board for that matter) can affect the employment of an Assistant Superintendent without the "nomination" of the Superintendent. *See, N.J.S.A.* 18A:17-16. Likewise, he cannot even be transferred without a recommendation form the Superintendent. *See, N.J.S.A.* 18A:27-4.1(a). Petitioners make no claim that such recommendations were entertained, let alone made. Thus, no individual Board members purported intent to termination is relevant where no majority action ever occurred.

Point Two

No Violation of the Tenure Laws is Present

The only reference in the Tenure Law scheme relating to confidentiality is found in *N.J.S.A.* 18A:6-11, which provides:

> 18A:6-11 Written charges; written statement of evidence; filing, statement of position by employee; certification of determination; notice.
>
> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction in salary, then it shall forward such a written charge to the commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. <u>The consideration and actions of the board as to any charge shall not take place at a public meeting.</u>

The statute is quite clear that the confidentiality attaches only in the event, and at the point, where the written charges are prepared. Then and only then do the deliberations become confidential. Even pre-charge employee notification non-renewal and/or related activity has never been held to be subject to *N.J.S.A* 18A:6-11. *N.J.A.C.* 6:24-5.1(b)(7) mimics the statute and does not create a blanket prohibition of discussing a RIF.

In that vein, *N.J.S.A.* 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. [emphasis supplied.]

Obviously, the Legislature has clearly articulated an intent that no RIF can be limited or eviscerated by the Tenure Laws.

The Legislative command is as clear as it is mandatory. The plain language is that "Nothing . . . shall prevent the reduction of the number of any such persons." The Supreme Court has held that compensation can be reduced without Tenure Charges where there is a *bona fide* RIF. *Impey v. Shrewsbury Board of Education,* 142 *N.J.* 388 (1995).

Likewise, the Supreme Court has held:

> In addition, under Article Three of Chapter 28, entitled "Effect of Reduction of Force Upon Persons Under Tenure," *N.J.S.A.* 18A:28-9 states:
>
> > Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or

> supervisory organization of the district or for other good cause upon the district or for other good cause upon compliance with the provisions of this article.
>
> The dominant concern of this provision is that fiscal emergencies may warrant layoffs even of tenured teachers.

See, Old Bridge Board of Education v. Old Bridge Education Association, 98 *N.J.* 523, 531 (1985).

The plain, unambiguous command of *N.J.SA.* 18A:17-3 and *N.J.S.A.* 18A:6-10 that exempt RIF's from the Tenure Laws must be given its ordinary meaning. *Lammers v. Point Pleasant Board of Education,* 134 *N.J.* 264, 274 (1993). This is particularly the case when the dispute involves a RIF. *Francey v. Salem Board of Education,* 286 *N.J. Super.* 354 (*App. Div.* 1996).

The case at bar clearly does not involve any tenure charges, or any discussion of possible tenure charges. At best, petitioners have stated a complaint about purported individual threats of termination. That activity, even if proven, is not actionable. No tenure charges have ever been contemplated and the Petition states no basis for relief under the Tenure Laws.

Point Three

No Violation of the Sunshine Law is Alleged that Would Require Relief

The conclusory assertion of a Sunshine Law violation is a puzzlement. No facts are alleged that support any such claim. When asked for the factual basis for this claim, Clarke's answer to Question No 31. states:

> Board members named in the Petition. The board has committed numerous violations of the OPMA. Board members violated my rights by discussion (sic) my employment with the press and with third parties, and not providing me with a Rice notice. Recently, the Commissioner ruled out that the board violated Dr. Williams' privacy and tenure rights by voting in public on March 1, 1999. See attached Decision. Previously, Judge Martone ruled that the

> Board violated OPMA by filing a Cross Petition [containing the exact language in the tenure charges] on September 2, 1999. Also, the Atlantic City Press has sued the Board in the past for OPMA violations. See also closed session minutes of the board dated December 8, 1998 and minutes of Policy committee meeting on March 25, 1999.

Plainly, no factual basis is asserted. How any public discussion by individual Board members states a Sunshine Law violation is unclear to say the least.

The Sunshine Law is enshrined at the highest level of our System of Public Laws that regulates a well-ordered democratic process. *Polillo v. Deane*, 74 *N.J.* 562 (1977). All meetings must be open to the public, subject to only nine numerated exceptions. The only pertinent exceptions herein are found at *N.J.S.A.* 10:4-12(3) and (8) that state:

> (3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training. social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.
>
> a. Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Advance notice of a private Board meeting is required to be given by the employee who has the right to force the matter into public forum. *Jamison v. Morris School District,* 198 *N.J. Super.* 411 (*App. Div.* 1985), *Rice v. Union County High School Bd. of Ed.* 155 *N.J. Super.* 64 (*App.*

Div. 1977), cert., denied, 76 *N.J.* 238 (1978) and *Thomas v. Bergen County Welfare Board,* 122 *N.J. Super.* 371 (*App. Div.* 1973). Clearly, no such notice was required herein and there was no violation of the laws and rights of Plaintiff under the Sunshine Law. *See, Opinion of Attorney General,* No. 1-1988.

> *N.J.S.A.* 10:4-13 provides:
>
> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7b until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discusses; and
>
> b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in close session of the public body can be disclosed to the public.

RIFs are not implemented by official action are not remediable under the Sunshine Law because no rights are "adversely affected." *Jamison v. Morris School District,* 198 *N.J. Super.* 411, 416 (*App. Div.* 1985). Only "action taken by a public body at a meeting" in violation of the Law is remediable and even then in only "voidable." *N.J.S.A.* 10:4-15(a). Only clandestine meetings by a majority of a public body that result in official action are voidable. *South Harrison Twp. Committee v. Gloucester Freeholder Board,* 210 *N.J. Super.* 370 (*App. Div.* 1986).

The conclusory assertions based upon surmise and insinuation in the case at bar, even if credited, do not establish a violation. If several Board members not involving a majority, stop and chat about Board business they are not violating the law. In this case, petitioners can't even support a factual and legal theory to support their scurrilous claim.

Point Four

No Relief Can Be Granted in this Case Because it Would Deprive Respondents of Their Right to Free Speech

What is really at stake in this matter is an individual Board members right to speak his or her mind on issues of public affairs. Petitioners are really seeking a prior restraint for non-actionable conduct that does not violate any law, but may violate their own sensibilities no matter how unreasonable they are.

This tribunal must realize that the so-called "grading fixing" scandal in 1996 involved no affirmative finding by the Commissioner. Petitioners may feel that their activity was important and justifiable, but it did not clothe them with an indefinite immunity from criticism of other behavior totally unrelated to their actions in 1996. More to the point is the fact that all of the respondents herein only one was a member of the Board in 1996.

Petitioners seek sanctions for fair public comment by an individual board member.

The granting of the relief requested and the unique circumstances of this matter would unconstitutionally deprive the individual defendant board members of their First Amendment rights.

This tribunal must embrace the proposition that fair public comment by public figures concerning other public figures is protected First Amendment speech. *See New York Times v. Sullivan* 376 *U.S.* 254 (1964).

The protected speech of respondents cannot be muzzled by an executive branch order. Only the judiciary can entertain such a radical request.

Our Supreme Court has stated:

> Generally, [t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications are to occur.' *Alexander v. United States,* 509 *U.S.* ___, ____, *222 113 *S. Ct.* 2766, 2771, 125 *L. Ed.*2nd. 441, 450 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 12-24 at 1040 (2d. ed. 1988) (noting that central feature of prior restraint is "attempt to suppress speech prior to publication.)" Injunctions are often "classic examples of prior restraints." *Alexander, supra.* 509 *U.S.* at __, 113 *S. Ct.* at 2771, 125 *L. Ed.* 2d. at 450. But as the Supreme Court noted in *Madsen,* not all injunctions that "incidentally affect expression * * * are 'prior restraints' * * *." 512 *U.S.*at ___, n. 2, 114 *S. Ct.* at 2524 n. 2, 129 *L. Ed.* 2d. at 607 n., 2(3)(4). Although never outlining a precise test, the Supreme Court has considered a number of factors in determining whether a restriction is a prior restraint. One of those factors is whether the restraint prevents the expression of a message. *See, Ibid.* ("Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within 36 foot buffer zone."); *Alexander, supra.* 509 *U.S.* at ____, 113 *S. Ct.* at 2771, 125 *L. Ed.*2d. at 450 (finding that order requiring petitioner to forfeit property related to racketeering activity was not prior restraint because it "does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval from any expressive activities.") Thus the Supreme Court has consistently found (often without discussion) that injunctions are prior restraints if they forbid entirely the publication of a message.

Speech on "matters of public concern" is at the heart of the First Amendment protection. *Dunn &Bradstreet, Inc.v. Greenmoss Builders, Inc.* 472 *U.S.* 742 (1985). Thus, as then Judge Pashman stated in *East Rutherford Industrial Park v. State of New Jersey,* 119 *N.J. Super.* 352, 361-362 (Law Div. 1971):

> The public has an interest in keeping apprised of impending governmental action. To that end, the press and government are granted untold liberty of expression and reporting under the First Amendment of the United States Constitution. This public interest must take precedence over the possible and speculative injury to property rights resulting from the freedom of expression and the press. In a day when the right of government to suppress and classify information which it deems vital to the nations' security is

> being seriously argued and challenged, the plaintiffs allege incidental damages pale into significance."

Simply put, individual board members are entitled as citizens/taxpayers to speak their mind freely.

For all the foregoing reasons, this matter should be dismissed.

Petitioner's Position

Pursuant to the administrative regulations *N.J.A.C* 1-12.5(b), a motion for summary decision may be made "if the papers and discovery which have been filed together with the affidavits, if any, show that there is no genuine issue of as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." First of all, the respondents' motion is improper because discovery is not complete. When the respondent initially filed its motion, petitioner Woolley was on an extended medical leave and could not provide answers to interrogatories before February 29, 2000. Therefore, it is assumed that for purposes of this motion, that additional facts asserted in the attached answers are uncontested.

Further, on March 15, 2000, counsel wrote the respondents' attorney Mr. Frino and asked for responses to seven key questions. (See attached letter as Exhibit A). As of this date, Mr. Frino has not called nor responded to counsel's letter. For instance, Interrogatory No. 10 is directed at respondent Gallagher:

> As to respondent Gallagher, state whether you made statements regarding petitioner Clarke's employment to anyone (excluding legal counsel) during the period April 30, 1998 to June 30, 1999?

Response: None to Board's recollection . . .

Clearly, the question is not answered by Mr. Gallagher. The response is evasive. Mr. Gallagher could have responded yes or no, and if yes went on to answer question 11. Since these interrogatories were propounded upon the respondents on July 12, 1999, if there way any

misunderstanding, a phone call or letter requesting clarification could have been made. There is no question that the actions of Mr. Gallagher are in question here. It appears patently unfair for respondents to evade questions then file a motion under these circumstances. The petitioners only ask that Your Honor grant them a fully opportunity for discovery. Without dwelling on this discovery issue, the petitioners will now respond to substantive nature of the motion for summary decision.

Factual Statement

On or about April 22, 1999, petitioners Ellen Woolley and Melvin A. Clarke, filed a Joint Petition of Appeal with the Commissioner. On October 12, 1999, the petitioners filed an Amended Petition. The petition asserts the following claims: a pattern of racial harassment, and reprisal in violation of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* and *N.J.S.A.* 10:5-12(d); making public comments regarding terminating petitioners in violation of rights to confidentiality protected by the Tenure Employee's Hearing law, and Governor's Executive Orders. No. 9 and 11; and violation of petitioners' privacy rights under the *Open Public Meetings Act, N.J.S.A.* 4:12(b)8(OPMA).

The respondents argue that the petitioners' claims should be dismissed as insufficient to maintain an action under NJLAD, tenure laws and OPMA. To the contrary, the petitioners assert that the evidence adduced at this date, even with incomplete discovery at this stage, demonstrate a pattern of racial harassment and reprisal.

The court should handle this matter in a similar fashion like a motion for involuntary dismissal under *Superior Court Rule R.* 4:31-2. The ". . . judicial function here is a quite mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Dolson v. Anastasia,* 55 *N.J.* 2, 5-6 (1969). In other works, the evidence in support of the asserted claims, should be viewed most favorably to the petitioners.

First and foremost, the Atlantic City School District historically has had racial divisions and strife, which has negatively impacted its ability to overcome Level Two Monitoring

deficiencies. As stated in Paragraph 6 of the Amended Petition, in May 1996, the petitioners exposed a grade and transcript fixing scandal at the high school, which favored white students from sending districts such as Margate and Ventnor. They also reported that African American students were denied entry to upper level courses. This illegal practice had existed for years." This was a highly controversial public disclosure, which caused bad feelings and charges of racial favoritism. In fact, one board member, Jeffrey Fauntleroy, a graduate of the high school, recalled how as a student he was denied entry to into advance placement course. Mr. Fauntleroy, became emotionally upset, cried and then said, "they ruined my life." (Paragraph 7 of the amended Petition). Further, on March 4, 1996, Board President Marven Hill, wrote to the media stating that ". . . Mr. Clarke and Mrs. Woolley methodically presented to Dr. Ney definitive and credible evidence of long term grade and transcript abuses at the High School." The petitioners participated in several investigations by the Department of Education. The Atlantic County Prosecutors Office also started an investigation and issued subpoenas for many school records.

In June 1998, the racial divisions on the board were clearly played out when the new majority suspended former superintendent Dr. Benjamin Williams, and then filed tenure charges. This led to three lawsuits alleging racial discrimination, two of which are still pending involving former employees. Charlotte Wellins and Hiawatha Green. The discrimination case by the superintendent and the tenure charge case initiated by the Board were recently settled.

Moreover, board members Gallagher and Kelly are accused of micro-managing the District. It should be noted that Ms. Kelly is a board member from Ventnor based upon the sending-receiving relationship with the high school.

Here are the key facts that are relevant for this motion:

1. Ms. Kelly's written reprimand of petitioner Clarke on August 23, 1999;

2. Excluding of Mr. Clarke from the September 2, 1999, meeting with officials from the Department of Education while other cabinet officers were in attendance;

3. Gallagher told employee Elisah Tompkins that Clarke had accused his friend of attempting to orchestrate his removal in a closed session board meeting. Gallagher took exception to Clarke's statement. (Clarke's Answers to Interrogs., No. 57);

4. Ms. Kelly's role in supervising the school management team and excluding petitioner Woolley from participation;

5. As to Ms. Woolley being questioned at a July 28, 1998, board meeting regarding the grade fixing scandal, Mr. Feibig, the Fiscal Monitor, had to intervene and stop the questioning because it "crossed the line.;"

6. Two instances wherein the superintendent failed to discipline staff members who harassed Ms. Woolley by using crude language, spiting at her office, and on October 29, 1999, one teacher directed sexually offensive language at her. (Answer to Interrogatories No. 49);

7. Revelations of the "Hit List" as stated by respondent Thomas directly to petitioner Clarke (Affidavit paragraphs 3 & 6), and confirmation by Mr. Frino; and

8. Disclosures of improper conduct of Thomas seeking to fire central office administrators such as Dr. Campbell and Clarke. (Affidavit paragraph 9).

The above is just a sample of the improper conduct exhibited by the respondents. What is truly unique here is that roles of Thomas, Kelly and Gallagher have exceeded common bounds as policymakers, a part of the whole board, but, rather, includes administrative decision making. The Department of Education has warned the Board repeatedly about the practice of micro-managing.

Legal Argument

As to the Count One of the Amended Petition, the petitioners assert a claim of racial harassment. The court should examine this claim under the standard applied in *Lehman v. Toys 'R' Us, Inc.* 132 *N.J.* 587, 603, (1993). To establish a claim under of hostile work environment under *NJLAD*, a plaintiff must demonstrate that the complained of discriminatory conduct; (1) would not have occurred but for the employee's *reporting the grade fixing scandal and participating in the investigation* (2) severe or pervasive enough to make (3) a reasonable person believes that (4) the conditions of employment are altered and the working environment is hostile or abusive. (Emphasis)

First, it should be noted that the respondents did not address the alleged pattern of racial harassment contained in the Petition. The petitioners contend that but for their roles in reporting the grade fixing scandal at ACHS, they would not be subject to the endless and senseless attacks by the respondents. As set forth in facts Nos. 1 through 8, *supra.*, the petitioners contend that the respondents' actions are sufficient to meet the "severe and pervasive" element. As stated above, Kelly, Gallagher and Thomas have acted with hostility towards the petitioners.

Next, the LAD prohibits acts of reprisal against a person because he or she has opposed any practice or act forbidden under LAD, or because he or she has filed a complaint, testified or assisted in any proceedings under LAD. *N.J.S.A.* 10:5-12(d); *Velantzas v. Colgate Palmolive Co.*, 109 *N.J.* 189, 192 (1988). *NJLAD* is liberally construed to achieve its remedial purposes. *N.J.S.A.* 10:5-3. To establish a *prima facie* claim of unlawful reprisal, a person must demonstrate that (1) she engaged in protected activity that was known by the alleged retaliator; (2) she thereafter suffered and adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action. *See, Jamison v. Rockaway Twp.*, 242 *N.J. Super.* 436, 445 (*App. Div.* 1990).

The petitioners satisfy the first element of the test based upon reporting the grade fixing scandal, which favored white students from sending districts, and participating in subsequent investigations. Also, both petitioners have testified at recent hearings for ex-employees (Wellins and Green) alleging discriminatory discharges.

Next, the respondents argue that the petitioners have failed to satisfy the second element based upon no showing of an "adverse employment action." The respondents' counsel misconstrues the scope of LAD by attempting to define adverse action too narrowly to apply to terminations or demotions. *Deavenport v. MCI Telecommunications,* 74 *FEP Cases* 1238 (*D.C. Col.* 1997) (Court construing Title VII retaliation statute rejected employers argument that adverse action must be based upon "ultimate employment decision" or hiring, firing, or compensation.) In one case *Berry v. Stevenson Chevrolet,* 74 *F.* 3rd. 980, 986 (10th Cir. 1996) the court stated that adverse employment action is not limited to monetary losses in the form of wages or benefits. More importantly, in *Lombardi v. Cosgrove,* 7 *F. Supp.* 2d. 481, 498 (*D. N.J.* 1997), the court denied a motion for summary judgment on a retaliation claim under LAD. The plaintiff claim that a defendant order her office taken away in retaliation for filing an incident report survived summary dismissal and proceeded to trial.

The respondents have not shown that as a matter of law the petitioners' claims do not satisfy adverse employment action. The written reprimand by Ms. Kelly, Exhibit E, of the Petition copied to several people, clearly was disciplinary. Ms. Kelly, the representative from Ventnor seems incredulous to the disclosures of grade fixing and has vented her anger at Woolley and Clarke. Further, the exclusion of petitioners from important meetings that they otherwise attended in the past with other administrators has negatively impacted the conditions of employment and undermined their positions. Colleagues know that the petitioners are left out of the "loop" and do no want to be seen with petitioners for fear of retribution. Beyond mere argument, the respondents have offered no explanation to support their actions. Ms. Kelly has singled petitioners out for retribution. All of these actions took place after petitioners engaged in protected activity.

The respondent did not address the causal connection element. Petitioners believe they have provided sufficient evidence to satisfy this element. If all the evidence supporting the reprisal claim is considered in the most favorable light, the respondents' have failed to meet their burden, and therefore, the motion for summary decision should be denied.

Further, petitioner Clarke asserts that respondents violated his tenure and privacy rights by discussing his employment with the press and with third parties. Paragraphs 1-20 of the Petition supports Mr. Clarke's claim of privacy and tenure rights violation. Mr. Clarke brought to the Board's attention a March 19, 1999 article wherein Board members talk about eliminating his position to the media. At no point did Mr. Clarke receive notice of intended action or a problem with his performance from the interim superintendent. Later the Superintendent Loggi informed Clarke that he was discussed in executive session at a regular board meeting. Moreover, the actions by respondent Gallagher approaching employee Thompkins concerning a matter discussed in closed session was clearly improper. Assuming the actions as described by Mr. Clarke took place, such action by the board, or two of its members – Kelly and Gallagher, was a clear violation of *N.J.S.A.* 10:4-12(b)8. *See, Oliveri v. Carlstadt – East Rutherford Bd. of Ed.,* 160 *N.J. Super.* 131 (*App. Div.*1978).

As evidence of past violations by the respondent, the petitioners cite a recent ruling by the Commissioner finding that the Board violated Dr. Williams' privacy and tenure rights, decision dated March 1, 1999. See attached Decision. On September 2, 1998, Judge Martone ruled that the Board violated the tenure laws by filing a Cross Petition [containing the exact language in the tenure charges].

In addition, the petitioners argue that the tenure laws protect them from arbitrary actions of boards and conduct of board members. The petitioners are tenured administrators who have demonstrated competency and professionalism over the years.

The Legislature has granted boards of education mandatory and broad powers to perform acts consistent with the law and the rules of the State Board, necessary for the "lawful and proper conduct" of the public schools. *N.J.S.A.* 18A:11-1.d. Relative to this, a board may file tenure charges under *N.J.S.A.* 18A:6-10 in accordance with proscribed procedures. What if a board member, decides to make public statements about removing unpopular employees because of a personal animus? This is the case here. No superintendent has recommended for removal of the petitioners. But board members have sought to remove and harass petitioners for political reasons. The petitioners believe that this is a violation of their privacy rights as protected by the tenure laws.

For the foregoing reasons, the petitioners ask that Your Honor deny the motion for summary decision and schedule a hearing on all contested claims.

The Board's Reply

Petitioners have demonstrated a total misapprehension of their burden in meeting the within application to dismiss. They must demonstrate the existence of a dispute that will entitle them to judgment. *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995). They must submit *evidence* that would require submission to the truer of fact. *See, R.* 4:46-2(c). Obviously, facts supporting the elements of the cause of action must be proffered and if the facts are not proffered, summary judgment is mandatory. *Canesi v. Wilson,* 295 *N.J. Super.* 354 (*App. Div.* 1996).

The within application is based upon the certified Interrogatory answers of Clarke and Woolley and the copies of minutes of the ACBOE that are appended to the brief. There has been no effort by respondents to "contest" facts for purposes of this motion. The facts adduced by petitioners simply do not state any claim upon which this tribunal could grant relief. The improper hearsay and speculation of petitioners as to individual board members is of no assistance or relevance to the dismissal application.[2]

The legal argument of petitioners begins at page five and is both confusing and confused.

A. The Count One and Count Two Claims

Petitioners argue that they are asserting "a claim of racial harassment." This statement should give a thinking person pause: A white female and a black male are both claiming "racial harassment?" They both rely upon a gender harassment case, *Lehman v. Toys-R-Us,* 132 *N.J.* 587 (1993) and then argue that their protected status is not race, but "reporting the grade fixing scandal and participating in the investigations." The first element of a *Lehman* claim is that the conduct would not have occurred "but for" gender or race. *Lehman*, page 603. Obviously, no

[2] The desperate eleventh hour complaint about an insufficient interrogatory answer No. 11 is a red herring. Those answers have been in the possession of counsel since February 16, 2000. No "complaint" was made about until one week before petitioners' reply was due, after they received an extension of time (over the respondent's objection). Petitioners served interrogatories on the respondent Board and not any individual respondent. This is not a basis for denying the relief in the application. *Schettingo v. Roizman,* 310 *N.J. Super.* 159, 165 (*App. Div.* 1998).

claim upon which relief can be granted is stated by alleging a protected status that is not predicated on race or gender.

Petitioners' next assert a retaliation claim and assert that they have suffered an adverse employment action. They falsely characterize a letter by an individual Board member as a reprimand and their exclusion from a meeting by an interim superintendent as a satisfaction of this element. They fail to comprehend the law and offer no legal support for the theory. The retaliation must be performed by the *employer. See, N.J.S.A.* 10:5-12(d). Petitioners have not alleged facts to support this element and offer no legal authority to support a retaliation claim.

B. <u>The Count Three and Count Four Claims</u>

Petitioners again offer no legal support for their "tenure claim." Indeed, no claim can be asserted because the employer never considered a tenure charge.

The only legal authority offered in support of the Open Public Meeting Acts claims is *Oliveri v. Carlstadt-East Rutherford Board,* 160 *N.J. Super.* 131 (*App. Div.* 1978). *Oliveri* would be valid legal support if any official action was taken; no action was ever taken or considered, and therefore, no Sunshine Law violation occurred. *See, Jamison v. Morris School District,* 198 *N.J. Super.* 411, 416 (*App. Div.* 1985).

Accordingly, for all of the foregoing reasons, as a matter of law, the facts alleged do not rise to a level that would allow for legal or equitable relief. The essential elements of the claims for relief have not been alleged.

CONCLUSIONS

The standard for granting or denying summary judgment has been set forth by our Supreme Court in the matter of *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954). The standard was subsequently modified by the Court in *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995). The *Brill* Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2.(b) and for determining motions for judgment under *R.* 4:40-1 (Motion for judgment at trial) and *R.*

4:40-2 (Reservation of Decision on Motion: Motion for Judgment notwithstanding the verdict.) The courts considering motions for summary judgment are not required to engage in the same type of evaluation and analysis, or sifting of evidential material in light of the burden of persuasion that applies as if the matter goes to trial. The *Brill* Court held that:

> Under this new standard, a determination whether there exits a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single unavoidable resolution of the alleged disputed issue of fact that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2 . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law . . . the trial court should not hesitate to grant summary judgment . . . (citations omitted). *Id.* at 540.

The Appellate bench in *D'Amato by McPherson v. D'Amato,* 305 *N.J. Super.* 109, cited with the approval of the Supreme Court's decision in *Brill, supra.* and went on to state:

> Although *Rule* 4:46-5(a) states that the mere allegations or denials of pleadings are not evidence which can defeat a motion for summary judgment, there is no particular form of evidential material that either party to a summary judgment is required to present. *Rule* 4:46-2(a) states that a motion for summary judgment may be submitted *"with or without supporting affidavits,"* and *Rule* 4:46-2(c) provides that the motion shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, *if any,* show that there is no genuine issue as to any material fact challenged." (emphasis added). Construing the similar provisions of FRCP 56, the Supreme Court concluded that a party may demonstrate its entitlement to summary judgment without presenting any affidavits or other similar materials.
>
> > [W]e find no express or implied requirement in *Rule* 56 that the moving party support its motion with affidavits or other similar materials *negating* the

> opponent's claim . . . [R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment . . . is satisfied.
>
> [*Celotex Corp. v. Catrett, supra.* 477 *U.S.* at 323, 106 *S. Ct.* at 2553, 91 *L. Ed.* 2*d.* at 274] *D'Amato,* 305 *N.J. Super.* at 114.

Having carefully considered the entire record before me, I **FIND and CONCLUDE,** pursuant to *Brill, supra.,* that the instant matter is ripe for summary decision. I **FURTHER CONCLUDE** that summary decision should be entered on behalf of the Board grounded upon its arguments set forth in its brief.

With respect to petitioners Count One, alleging racial discrimination, in violation of *N.J.S.A.* 10:5-12(a) and (d) (LAD), the record is clear that the Board took no official action against petitioners because of race or gender which would trigger a LAD complaint. While certain Board members may have discussed petitioners' position with it, such discussions were engendered, in part, as a consequence of the Board fiscal problem. The Board faced a multi-million dollar deficit in its current expense budget. A careful review of *N.J.S.A.*10:5-12(a) shows, among other things, that it is unlawful practice or an unlawful discrimination for an employer;

> . . . because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, genetic information, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

Petitioners have not shown that the Board discriminated against them in any manner as contained in *N.J.S.A.* 10:5-12(a). Both petitioners are employed by the Board, therefore, it did

not refuse to hire or employ them. Nor did it discharge or require petitioners to retire or discriminate in compensation, terms, conditions or privileges of employment.

Nor have petitioners show that *N.J.S.A.* 10:5-12(d) is applicable here. That subsection of the statute reads as follows:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> . . . .
>
> c. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceedings under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or an account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

The petitioners have failed to show what, if any, reprisals the Board took against them. There is no evidence that the Board discriminated against petitioners under subsection (a) of the statute and, similarly, there is no evidence to show that the Board exercised any act of reprisal against petitioners individually or collectively. Individual Board members have a right to speak out on any topic affecting the operation, policies and administration of the schools under the direction and control of the Board. When faced with a fiscal crisis, all topics concerning the operation of its schools are open for discussion. That is the precise situation here. Petitioners' cannot demonstrate where the Board took any action of a retaliatory nature against them. The Board may have invoked petitioners' names and positions in its discussions. However, no duly adopted action was taken which would rise to an allegation of reprisal against petitioners.

Similarly, there is no evidence of a violation by the Board with respect to either of petitioners' tenured positions. As the Board observes, no action concerning petitioner Clarke's position as Assistant Superintendent of Schools may be considered by the Board absent the Superintendent's recommendation. *N.J.S.A.* 18A:17-16. No such recommendation by the Superintendent was offered to the Board. Nor did the Board certify tenure charges against petitioner Clarke or petitioner Woolley to the Commissioner. Therefore, neither of petitioners' positions was in jeopardy.

There is nothing in this record to demonstrate that the Board violated any provisions of OPMA. There was no action taken, nor was there any evidence that the Board members, individually or collectively, acted to circumvent the statutes embodied in *N.J.S.A.* 10:4-6 to –21.

I **CONCLUDE**, therefore, pursuant to *Brill, supra.*, summary decision must be entered on behalf of the Board and petitioners Petition of Appeal and Amended Petition must be dismissed.

ORDER

Accordingly, it is **ORDERED** that **SUMMARY DECISION** is hereby **ENTERED ON BEHALF OF RESPONDENT BOARD.**

It is **FURTHER ORDERED** that the herein **Petition of Appeal and Amended Petition of Appeal are hereby DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

19 May 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

May 24, 2000
DATE

D. M. Gretanaitis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4553-99
AGENCY DKT. NO. 86-4/99

ELLEN WOOLLEY AND MELVIN CLARKE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, THERESA THOMAS, DANIEL GALLAGHER, MATTHEW DORAN, JAMES HERZOG AND THERESA KELLY, INDIVIDUALLY AND JOINTLY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

In their exception arguments, petitioners primarily contend that the ALJ improperly granted summary decision to the Board as a consequence of his misinterpretation of the provisions of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* (NJLAD).[2]

[1] Petitioners requested, and were granted, an extension until June 16, 2000 to file exceptions in this matter. The Board, having indicated that it did not receive a copy of petitioners' exceptions until June 19, 2000, was accorded until June 26, 2000 to submit replies, *N.J.A.C.* 1:1-18.4(d). However, replies were not received on that date.

[2] For the first time, petitioners note that, "[w]hile this matter is pending before the Commissioner, the respondent board has voted to remove Clarke as Assistant Superintendent for Personnel from Personnel duties and transfer Woolley from the high school to an elementary guidance position. No explanation has been given for such drastic personnel actions." (Petitioners' Exceptions at 2, footnote 1) Since the Commissioner recognizes that "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions," *N.J.A.C.* 1:1-18.4(c), such evidence is not considered part of the record before him. This determination, however, does not prevent Petitioner Clarke from filing a Petition of Appeal to challenge the Board's recent action.

Petitioners maintain that the standards set forth in *Lehman, supra*, for sustaining such a claim have been met herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs that summary decision should be granted to the Board, since each count of petitioners' Amended Petition of Appeal must be dismissed for the reasons set forth herein.

The first two counts of petitioners' Amended Petition of Appeal allege violations of the NJLAD. To the extent the Commissioner has jurisdiction to hear and determine these allegations, *See Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 528 (1978), he finds with respect to the first count that, even accepting as true the facts alleged by petitioners, they have failed to assert that the "adverse employment actions" which they purport to have suffered (Initial Decision at 20) were actions taken *because of* their respective races, as prohibited by the NJLAD. (Initial Decision at 25) That is, the NJLAD "does not proscribe all discrimination, but only that which is bottomed upon specifically enumerated partialities and prejudices." *Jones v. College of Medicine and Dentistry of New Jersey*, 155 *N.J. Super.* 232, 236 (App. Div 1977), *certif. denied*, 77 *N.J.* 482 (1978). Here, petitioners argue that the "hostile work environment" they endured would not have occurred "but for" their reporting of the grade fixing scandal and their participation in the investigation subsequent thereto. (Initial Decision at 19) They *do not* allege an unlawful practice or discrimination *based on race,* or any other "invidious classification," *see, Peper v. Princeton University Bd. of Trustees*, 77 *N.J.* 55, 80 (1978), as prohibited by the NJLAD.

In the second count, petitioners contend that they have suffered unlawful reprisals as a consequence of their involvement in reporting the aforementioned grading scandal, in

violation of the NJLAD. As the ALJ notes on page 26 of the Initial Decision, the statute provides that:

> It shall be unlawful employment practice, or as the case may be, an unlawful discrimination: ***
>
> For any person to take reprisals against any person because he has opposed any practice or practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act. *N.J.S.A.* 10:5-12(d).

In their Amended Petition of Appeal, petitioners allege that they suffered such reprisals "for filing this lawsuit ***." (Amended Petition at 6, paragraphs 29, 30) However, in their exception arguments before the Commissioner, they *also* appear to attribute such retaliation to their involvement in uncovering the aforementioned grade-fixing scandal. (Petitioners' Exceptions at 4, 5). In any event, the retaliations which they claim to have suffered consist of the following: statements by Respondent Loggi to Petitioner Clarke that other respondent Board members "were running the district and 'they had the votes to do what they wanted'"; Clarke's exclusion, by Respondent Loggi, from attending "a very important meeting with officials from the Department of Education"; Clarke's attendance at a Board meeting on August 17, 1999 where he was *not* permitted to represent the administration, as he had in the past; Clarke's public "reprimand" from Theresa Kelly for issuing a "Rice" letter to an employee; the Board's failure to discipline *other* staff members when they made disrespectful comments and took offensive actions against Woolley; and Woolley's exclusion, during the 1999-2000 school year, from participation on the school management team at the high school. (Amended Petition. at 6, 7)

Although the NJLAD does not define "reprisals," the plain meaning of the word is "any action taken by one person either in spite or as a retaliation for an assumed or real wrong by another."[3] Further, the Commissioner recognizes that:

> ***claim of retaliation involves several tiers of proof. The initial tier requires the claimant to establish a *prima facie* case. This is done by demonstrating by a preponderance of the evidence that (1) claimant engaged in protected activity known to the employer, (2) claimant thereafter was subjected to adverse employment decision by the employer, and (3) there was a causal link between the two. (Citations omitted). *Jamison v. Rockaway Twp. Bd. of Educ.* 242 *N.J. Super.* 436, 445 (App. Div. 1990).

Even assuming, *arguendo*, that petitioners' dual argument as to the basis of the retaliation suffices to satisfy the first prong, and, further assuming petitioners' allegations are true, the Commissioner, like the ALJ, cannot find on the record before him that the petitioners have been subjected to adverse employment decisions "which would rise to an allegation of reprisal ***." (Initial Decision at 26)

Next, petitioners assert that respondents have violated the Tenure Employee's Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, as well as their "privacy rights," which rights, they aver, are protected by the tenure statute. In this connection, petitioners claim that respondents have made public statements indicating the Board's intent to terminate their employment. (Amended Petition of Appeal at 8) Notably, however, petitioners' exceptions do not challenge the ALJ's conclusion, herein affirmed by the Commissioner, that petitioners have failed to state a claim, which would, if true, constitute a violation of the tenure laws. Rather, petitioners merely assert that if their allegations are true, "this conduct by a public official is repugnant and should be punished." (Petitioners' Exceptions at 6) The Commissioner finds, therefore, with respect to the third count of the petition, that petitioners fail to state a claim upon which relief may be granted.

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[3] *Black's Law Dictionary*, Fifth Edition.

Finally, petitioners claim that respondents violated the Open Public Meetings Act, *N.J.S.A.* 10:4-1 *et seq.* (OPMA) "by making public statements regarding petitioners' removal and/or performance ***." (Amended Petition of Appeal at 9) However, since the Commissioner has incidental jurisdiction to hear and determine OPMA claims only "as they relate to controversies arising under the school laws," *Sukin v. Northfield Bd. of Education*, 171 *N.J.* Super. 184, 187 (App. Div. 1979), and noting that petitioners have failed to establish any such valid school law claim, *supra*, the Commissioner finds he is without jurisdiction to consider the fourth count of the Amended Petition of Appeal.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 10 2000

Date of Mailing: JUL 10 2000

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

226-00SEC

IN THE MATTER OF GREG R. NOTHOLT,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BRADLEY BEACH,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

July 10, 2000

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
Greg R. Notholt, Bradley Beach Board of Education Monmouth County	:	**SEC Docket No.: T13-00**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Greg R. Notholt was elected to serve a three-year term on the Bradley Beach Board of Education in April 1999; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on May 1, 1999; and

WHEREAS, the NJSBA conducted seven training sessions between April 1999 and April 2000 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 14, 2000, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he did not respond to the Order to Show Cause; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 23, 2000 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1999 to April 2000 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, he could have attended one of the many other sessions offered; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Notholt violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the board.

Dated: May 23, 2000

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 23, 2000.

Lisa James-Beavers, Executive Director

[225_eaststate:docs/orders/trng/(TrngRes2000.doc)]

AGENCY DKT. NO. 189-6/00

IN THE MATTER OF GREG R. NOTHOLT,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BRADLEY BEACH,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), on April 14, 2000 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to provide a timely response to the Order of the Commission; and

Whereas, the Commission voted on May 23, 2000, to recommend removal of the above-named Board member for failure to timely attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 23, 2000, subsequent to the Commission's meeting, correspondence from the above-named Board member was received in response to the Show

Cause Order explaining that, although he had all good intentions of honoring his commitment to the Board, his efforts to date had been directed at the survival of his new business, and further reporting that he has booked attendance at the October training session and has scheduled all of his other commitments around this date; and

Whereas, on May 24, 2000, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to order removal of the above-named Board member in light of his stated intent to attend a training session scheduled for October, which information was not before the Commission when it passed its removal resolution; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the date of this decision, pending his attendance at the October training session, but is hereby removed from said office, without further proceedings, should he fail to attend the October training session as scheduled.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 19 2000

Date of Mailing: JUL 19 2000

*This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

227-00

M.A.D., on behalf of minor child, R.L., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

July 10, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8415-99

AGENCY DKT. NO. 262-8/99

M.A.D. ON BEHALF OF MINOR CHILD R.L.,

Petitioner,

v.

BOARD OF EDUCATION OF MOUNT EPHRAIM, CAMDEN COUNTY,

Respondent.

Carl Ahrens Price, Esq., for petitioner

Kim C. Belin, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: March 24, 2000 Decided: May 23, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

Petitioner challenged the Board of Education's determination of residency. The petitioner appealed to the Department of Education and on October 4, 1999, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

STATEMENT OF THE CASE

Petitioner, M.D., the mother of R.L., said she has lived at 812 B. Road, Mt. Ephraim, all her life except for the period of time 1980-1985, when she lived with her first husband, R.L., Sr. The house at 812 B. Road is owned by her mother. She is now married to S.D.

R.L. started in the Mount Ephraim School System in the 4th grade. He went to Gloucester County Special Services School in 5th and 6th grades (for which Mt. Ephraim paid), then he returned to Mount Ephraim schools for 7th and 8th grade. He went to Haddonfield High School for 9th grade (1997-1998 school year), because he was living with his father that year. In September, 1998, M.D. registered R.L. in Mount Ephraim School District for 10th grade in Audubon High School, and in September, 1999, M.D. registered R.L. in Mount Ephraim School District for 11th grade in Audubon High School.

Petitioner said that R.L. maintains a close relationship with his biological father, and frequently stays with him overnight. On the mornings after he stayed with his father overnight, he would walk to school, or R.L., Sr. would drive him. M.D. said that R.L. was living with her at 812 B. Road, and that she and R.L., Sr. have joint custody of R.L.

William J. Bittner, residency investigator for Mount Ephraim School District, said that he observed D. V. and her son leave her house in Haddonfield, stop at another residence in Haddonfield and pick up R.L., and transport both boys to Audubon High School. He said he made this observation 11 or 12 times, between January and February, 1999. He said he never observed R.L. leaving school.

Richard Serfling, Superintendent and Principal of Mount Ephraim, said that residency charges had been filed against both R.L. (the instant matter) and against D. V's son.

R.L., Sr., testified that custody of R.L. was with his mother, M.D., when their divorce was finalized in 1987, but that custody was made joint in 1997. He said he claimed R.L. as a dependant on his tax returns since the divorce, but stopped paying child support in 1997, when he obtained joint custody. He said that R.L. had told both parents in 1997 that he wanted to go to

Audubon High School, to be with his friends. He said that, since 1998, R.L. would stay with him every other weekend and holidays, or if he was sick.

D.V. took the stand, but said that she had been advised by her counsel to remain silent.

Debra Rehn, Register of Mount Ephraim School District, said that no custody orders had been shown to the school in connection with R.L.'s registration.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences there from, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. A consent order of August 17, 1999, designates M.D. as the resident parent for her son, R.L. The consent order states that R.L. .Sr. is to share in the responsibilities of being a parent with M.D. As of August 12, 1997, custody of R.L. had been with his father, R.L., with visitation every other weekend with his mother, M.D.

2. The observation of the investigator for Mount Ephraim revealed that R.L. left his father's residence in Haddonfield for school in Audubon on February 17, 19, 23 and 26, 1999 and on March 31 and April 1, 1999, and on May 27, 28, June 1, June 2, June 3 and June 4, 1999.

3. R.L. attended Haddonfield High School as a freshman in 1997-1998. He attended Audubon High School as a sophomore in 1998-1999, and now attends Audubon High School as a junior in 1999-2000.

DISCUSSION

The connection between R.L. and both of his parents is commendable, however, it is evident from the investigator's reports that, for the late winter, spring and early summer of 1999,

R.L. still lived with his father. He began to live with his father in 1997, as reflected in the consent order, and attended Haddonfield High School for the 1997-1998 school year. R.L. then expressed a wish, testified to by both parents, to attend the same school (Audubon) as his friends. This was honored by his parents, in that the parent of another friend (V.) picked up R.L. up from R.L., Sr.'s house in Haddonfield and took him to Audubon High for the 1998-1999 school year.

The rapid succession of jointly obtained consent orders do track, to some extent, R.L. actual living arrangements and school attendance. Up to 1997, R.L. lived with his mother in Mount Ephraim and went to Mount Ephraim schools. In 1997-1998, he lived with his father in Haddonfield and went to Haddonfield High School. In 1998-1999, he went to Audubon High School. Where he lived that year is the subject of this case.

The custody order of August 17, 1999 (R-5) that gave residential custody to the mother, M.D., came about shortly after R.L., Sr. was advised (P-1, July 14, 1999) that the Mount Ephraim Board of Education was about to take action at their August 9, 1999 meeting to remove R.L.

However, there was no testimony as to R.L.'s living arrangements or transportation after June 4, 1999 – which presumably was near the end of the 1998-1999 school year, so no findings will be made on any period of time subsequent to June, 1999. With the transfer of residential custody to the mother (in Mount Ephraim School District) in August, 1999 and with the lack of evidence after June 4, 1999 to suggest otherwise, there is insufficient evidence to base a finding relative to R.L.'s district of residence for the 1999-2000 school year.

However, I **FIND** that R.L. was not living in Mount Ephraim during the 1998-1999 school year, but rather was living in Haddonfield.

Evidence was submitted after the hearing, at the request of this Administrative Law Judge, as to the tuition cost of Audubon High School, as the receiving district, and Mount Ephraim as the sending district. This amount is $6,128.58 for school year 1998-1999.

ORDER

It is therefore **ORDERED** that the tuition due from petitioner is $6,128.58.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 23, 2000
DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

5/24/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 26 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

M.D., mother of R.L.

R.L., Sr., father of minor child R.L., Jr.

For Respondent:

William Bitner, Investigator, Mount Ephraim School District

Richard Serfling, Superintendent/Principal

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Letter, Serfling to R.L., July 14, 1999, 3 pages

P-2 Letter, Wall to M.D., July 26, 1999

For Respondent:

R-1 Consent Order, August 12, 1997, 2 pages

R-2 Residency Investigative Report; Bittner, March 1, 1999

R-3 Residency Investigative Report; Bittner, June 10, 1999

R-4 Residency Investigative Report; Bittner, June 10, 1999

R-5 Consent Order, August 17, 1999, 2 pages

OAL DKT. NO. EDU 8415-99
AGENCY DKT. NO. 262-8/99

M.A.D., on behalf of minor child, R.L., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Although the parties did not file exceptions, by letter dated June 13, 2000, counsel for petitioner notified the Administrative Law Judge (ALJ), and the Bureau of Controversies and Disputes of the following:

> When we last appeared before [the ALJ] the hearing was not over but merely adjourned, in mid-testimony I might add, due to then present time constraints. At the conclusion of the day on February 24, 2000, Robert Lombardi, Sr., having been called by the [respondent], was on the witness stand giving direct testimony and [petitioner] had not yet had the opportunity to cross-examine him. Further, [petitioner] had not presented their rebuttal nor had we been able to re-examine Mr. Serfling as [the ALJ] ruled we could.

Petitioner's counsel thereafter requested that the ALJ withdraw her Initial Decision and allow the hearing in this matter to continue. This submission was deemed a motion to reopen the hearing in this matter, pursuant to *N.J.A.C.* 1:18.5(b). By letter dated June 21, 2000, the Board was accorded five working days to submit a reply to the motion. However, no response was filed. Accordingly, under these circumstances, the Commissioner determines to grant petitioner's

motion to reopen the hearing, and hereby remands this matter to the OAL for continued proceedings, as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 10 2000

Date of Mailing: JUL 10 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MONTGOMERY,	:	
IRVINGTON SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
_____	:	

JUL 18 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7082-98

AGENCY DKT. NO. 164-6/98

IN THE MATTER OF THE TENURE HEARING OF GEORGE MONTGOMERY, IRVINGTON SCHOOL DISTRICT, ESSEX COUNTY.

Raymond L. Hamlin, Esq., for the Irvington School District Board of Education (Hunt, Hamlin & Ridley, attorneys)

James F. Villere, Jr., Esq., for respondent

Record Closed: May 4, 2000 Decided: May 18, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

The Irvington School District Board of Education (Board) certified charges of unbecoming conduct against George Montgomery (respondent), a teacher with a tenure status in its employ, on May 20, 1998 to the Commissioner of Education for determination under *N.J.S.A.* 18A:6-10, et seq. Respondent was simultaneously suspended from his teaching duties without pay pending disposition of the charges. When the matter was transferred on July 23, 1998 to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, it was assigned Administrative Law Judge Mary Louise Lucchi-McCloud who became physically before she could conduct the hearing which had then been

scheduled to commence the week of May 17, 1999. On or about May 3, 1999 and, pursuant to *N.J.A.C.* 1:1-14.13 (b), the undersigned was assigned on a temporary basis to hear and render an initial decision. At that time discovery had not been completed and respondent's counsel had moved to allow a substitution of counsel, with respondent's approval. The scheduled hearing for the week of May 17, 1998 was adjourned pending completion of discovery and pending disposition of the motion. The motion for substitution of counsel was granted, and a significant amount of time had to be devoted to discovery because of the nature of the charges. During the time extended for discovery, the parties continued good faith negotiations seeking a settlement of the issues presented under the standards promulgated by the Commissioner of Education and approved by the State Board of Education in *Cardonick v Board of Education of the Borough of Brooklawn*, 1982 *S.L.D.* 842, aff'd. State Board of Education, 1982 *S.L.D.* 846.

When settlement efforts appeared futile in December 1999, the matter was scheduled for hearing during February, 2000. The hearing, which is incomplete, began February 16 and continued through February 17, 2000. After hearing the testimony of an administrative assistant and the superintendent of schools who brought the charges against respondent but who has since left the Board's employ, the parties renewed their good faith efforts to settle the matter. These efforts proved successful and a settlement was reached. The settlement agreement, though dated May 1, 2000 was received May 16, 2000, is attached hereto and incorporated herein as if set forth in full. This initial decision finds and concludes the settlement comports with the standards set out in *Cardonick*; the recommendation is reached that the Commissioner of Education approve the settlement.

CHARGES

On May 20, 1998 the Board determined to certify the following charges of conduct unbecoming a teacher to the Commissioner of Education for determination under *N.J.S.A.* 18A:6-10, et seq., *The Tenure Employees Hearing Law* which had been filed with its Board Secretary by the then superintendent of schools. The charges allege respondent engaged in conduct unbecoming a teacher in the following actions:

1. Drafting of a series of letters to the Superintendent of Schools, wherein numerous negative comments relating to his character and performance were addressed.

2. Drafting of a series of letters which inaccurately set forth the basis for the cancellation of a PTA meeting.

3. Drafting of a series of letters which alleged criminal and/or otherwise unlawful conduct on the part of Superintendent of Schools.

4. Drafting of a series of letters which alleged that the Superintendent of Schools was responsible for a deficit within the district.

5. Publishing of letters in the Irvington Herald[,] a local newspaper, which contained numerous inaccurate factual accounts, negative comments relating to the character and performance of the Superintendent of Schools, false allegations of criminal and/or otherwise unlawful conduct of the Superintendent of Schools and that the Superintendent of Schools was responsible for the deficit within the school district.

The Respondent, George Montgomery, a teaching staff member has also been charged with conduct subversive of discipline and morale of the school district which amounts to conduct unbecoming an employee. Said conduct subversive of discipline and morale of the school district which amounts to unbecoming conduct has been demonstrated by the Respondent's:

1. Drafting of a series of letters which utilized negative and belittling comments towards the Superintendent of Schools in his role as Chief School Administrator.

2. Publishing of letters which utilized negative and belittling comments towards the Superintendent of Schools in his role as Chief School Administrator and publishing said letters in the Irvington Herald[,] a local newspaper publication.

3. Actions in the drafting of letters to the Superintendent of Schools attacking his character and performance as the Chief School Administrator is contrary to district policy and standards for teaching staff members and has resulted in a negative impact upon morale of other teaching staff members and the Superintendent's ability to effectively direct, discipline and manage the school district.

BACKGROUND

For purposes solely of placing the recommended settlement in context, the background of the matter as discerned from the record is this.

Respondent has been a teacher in the Board's employ for more than twenty years, and a teacher for more than 30 years. Until the tenure charges were certified against him, he has not been the subject of discipline. The superintendent of schools, since departed from the Board's employ, had been the Essex County Superintendent of Schools between 1989 and 1995 before his employment with the Board as superintendent. The superintendent testified that during his tenure as the Essex County Superintendent he reviewed the proposed budgets of each of the then 23 school districts in Essex County for financial adequacy. Once he determined the proposed budgets were adequate to insure a thorough and efficient program of education in each district, he then authorized each board of education to advertise the proposal in anticipation of the annual school election.

The record of this case suggests a budget deficit developed in the Irvington School District at a time while the superintendent had been the county superintendent of schools. The superintendent testified that the Irvington District had been placed on Level II monitoring while he was the county superintendent. It appears that when the superintendent began his tenure with the Board as its chief executive officer, certain budget reductions had to be imposed in order to reduce or eliminate the deficit under a corrective action plan. Respondent had held a position entitled "staff developer", in addition to his teaching duties, which was eliminated as part of the budget reductions.

The budget reductions appear to be, in general, the origin for the dispute between the parties. The superintendent testified that respondent generally attended board of education meetings and was vocal on district expenditures. However, the superintendent did not seek to discipline respondent for his criticisms of board expenditures. There came a time in March 1998 when the superintendent determined a Parent Teacher Association (PTA) meeting was in conflict with a regional PTA founders day dinner. Respondent, as co-chair *pro tem* had scheduled the

PTA meeting. The superintendent canceled the meeting without prior consultation with respondent. Respondent sought to meet with the superintendent who, according to the evidence thus far, was otherwise too busy to see him. As the result of respondent's alleged conduct in the superintendent's outer office, the superintendent issued respondent a written reprimand. In response to the written reprimand, respondent penned the following letter to the superintendent which forms the basis for the tenure charges:

> Once again, and for what I hope will be the last time, you have trashed my civil liberties by overstepping your authority to the point of interfering with my Constitutional Right of free association.
>
> On Friday, March 12th, I was informed that you had, without consent or authority unilaterally canceled the PTA meeting, which as co-chairpersons pro tem, [M.K.] and I had scheduled for March 19th. Furthermore, you directed that the meeting could only be rescheduled by either of two people which were arbitrarily of your choosing. Clearly, you are attempting to fully orchestrate the control of the PTA, an organization which is inherently designed to be autonomous and structured to allow open public participation in our public school system.
>
> I can understand your fear that I, even temporarily, would be in a position to influence public opinion and alert the school community to the incompetence of your leadership and the resultant tragic consequences to their children, Such was not my intent at the time, but you have left me with little recourse but the truth.
>
> Mr. Carter, in your tenure as county and local Superintendent, you have been directly responsible for the financial collapse and educational disparities which have plummeted Irvington schools to the abyss of educational deprivation. As County Superintendent, it was your fiduciary responsibility to approve and monitor the Irvington School District's budget and fiscal management. Under your authority and your responsibility, the school district accumulated an unlawful deficit of $10 million dollars over a period of two years. Where were you? Why weren't you doing your job as County Superintendent? To now disavow prior knowledge and thus avoid culpability for the deficit is to admit dereliction of duty while County Superintendent.
>
> Since becoming Superintendent in Irvington, you have only compounded the catastrophic effect of your previous blunders. After allowing the deficit to accumulate, you now have forsaken education to make amends for your prior fiscal and managerial sins, You have unconscionably eliminated successful, educationally meritorious programs while allowing political plunder to continue. Under your watch as Irvington Superintendent of Schools, legal billings had escalated to well over a million dollars in a single year, the same year in which the most dire cuts in educational programs took place.

> Unbeknownst to the general public, you have destroyed the last remnant of hope for quality education. I am incredulously appalled by your callous single-minded solution to the deficit problem which you were irresponsibly (sic) responsible for in the first place. Literally hundreds of school employees lost their jobs irrespective of their success with children or the dire need for their services. The successful ESL Academy was abandoned at considerable cost to our children, but with no real savings to the school district. My own successful efforts to improve teaching in the math content areas were sacrificed to placate the vengeful egos of the self-serving, political empowered who have perpetuated the Peter Principle. How ironic that the term was so appropriately named.
>
> Programs and personnel which have existed in name or title only, became fictitious budgeted line items which later were manipulated to divert funding and suspicion. The district budget itself, an intricately fabricated illusion of propriety is immersed in deception and only feigns legitimacy under a pretense of education improvement, which never comes.
>
> And who better to administer the public debacle than yourself, experienced as an imaginary watchdog at the county level, so familiar with the obscuring techniques which provide meaningless documentation for the bureaucrats, who quite frankly, don't give a damn about Irvington or its children either?
>
> Most sadly, Mr. Carter, you have deceived and betrayed the trust of your own people. You have indirectly denigrated the perception of their schools, mortgaged the entitlement of their children, squandered their hope of opportunity and sold out their futures. You have created an educational deficit, an insurmountable legacy, paid by a generation of failure and lost potential.
>
> Mr. Carter, I can no more compromise my values than change the truth, You once asked me why I was so intent on upsetting the proverbial apple cart, given the fact that, like yourself, I was so close to retirement. My answer remains the same; selling rotten apples to innocent children is not my idea of making a living.

While the foregoing letter was submitted to the superintendent, respondent also had the letter published in the Irvington Herald newspaper on Mach 19, 1998. In addition, the following letter was published in the same newspaper on March 26, 1998 over respondent's signature:

> It now appears conclusive that Superintendent Peter Carter has successfully thwarted an attempt by an uppity teacher, George Montgomery, to participate in the Myrtle Avenue PTA. In a scything show of dictatorial power, Carter usurped control, mustered his flunkies, and banished the fear of opposing thought. It is doubtful whether Montgomery, now recovering from a severe official

> reprimand, will ever be allowed to exercise freedom of speech or free association again.
>
> Carter's Commandments, henceforth known as the Magna Carter, was issued to Montgomery on March 16th and is said to have ruined his Saint Patrick's Day. The lengthy, somewhat verbose document - but who am I to talk, even if I were allowed to talk - states that 'while we all welcome and encourage teacher participation, it is the parents who should be taking the lead with respect to PTA activities.' Mr. Carter, in a prior communiqué, made the determination of specifically which parents would be allowed to assume the leadership roles, so it is now suggested that the PTA acronym be changed to PCA - the Peter Carter Association. Obviously, the 'T' has become an anachronism.
>
> In a somewhat related incident, six parents showed up to attend the canceled PTA meeting of March 19. Discouraged by the cancellation, disgruntled by the inconvenience and dismayed by Mr. Carter's inept, trivial attempt at notification they returned home. It is questionable whether they will venture to participate again.

The foregoing letters form the basis for the charges of conduct unbecoming a teacher certified against respondent. Indeed, the specifications to the charges of conduct unbecoming make it abundantly clear that the letters published in the newspaper constitute the underlying conduct engaged in by respondent which motivated the charges to be certified against him. The superintendent did testify in the matter prior to the time of the settlement, as did two secretaries. The superintendent's testimony goes to the outrage he personally felt upon reading the letters and seeing them published in the newspaper, and the personal umbrage he took at being accused of being responsible for the deficit, and for the lower quality of education in the district during his superintendency, and for the questioning of his authority. He also testified that the publication of the letters undermined his authority simply by the fact of their publication, that the publication of the letters made his job more difficult, and that the publication of the letters showed respondent to be lacking in respect, professionalism, and loyalty. However, it must be noted that the superintendent also testified that the publication of the letters generated no reaction from the students, staff, or the public. Finally, the superintendent did not testify that respondent's performance in the classroom was harmed as the result of his letter writing.

THE SETTLEMENT

The settlement agreement recognizes the Commissioner's authority to review and approve all agreements which are intended to settle tenure charges that had been certified to him for determination. The standards necessary for such agreements to be approved are those set forth in *In re Cardonick*, 1982 *S.L.D.* 842, aff'd. State Board of Education, 1982 *S.L.D.* 846 and shall now be discussed.

1. The nature of the charges has to do with a teacher of more than twenty years experience, with no disciplinary record, expressing strong disapproval of certain actions engaged in by the superintendent of schools and having that expression published in a newspaper which presumably circulates within the district. The superintendent took umbrage and was and is outraged at the published criticism leveled at him - which he believes to be unfounded, false, and misleading. The charges of course implicate a teacher's right under the First Amendment to speak freely on matters of public concern, even to the extent of criticizing their immediate superiors, with the right of the Board of Education through its superintendent to operated its schools in an efficient manner. When such rights collide, they are subject to a balancing test under *Pickering v. Board of Educ.*, 391 *U.S.* 563, 88 *S. Ct.* 1731, 20 *L.Ed.*2d 811. The Board has the obligation to show at minimum that the speech it found offensive interrupted the efficient operation of its schools; not merely that it is of the personal view that its schools were interrupted. Respondent has the obligation to show that his speech is protected because it is a matter of public concern; and that it is not merely a personal grievance he sought to bring to the attention of the public. The charges are not at all related to respondent's classroom performance, or to conduct deemed unbecoming related to students.

2. The circumstances justifying the settlement of the charges are that the continued prosecution of the charges drains the district of valuable resources in the form of money it can better use on the school program; of human talent who must sit in a hearing room listening to testimony when they may better serve the pupils at the Irvington School District; the talents of respondent who is not providing his talents as a teacher to the district; of the adverse publicity a tenure case generates in the prosecuting district; and, the uncertainty of the outcome of the case to either party. The balance of rights of the parties in First Amendment cases, and in this case particular, is more easily articulated than applied. A lengthy hearing process would result if the

record must develop sufficient evidence to balance the rights of the parties. As an example, would respondent have to be granted leave to review in minute detail the budgetary records of the Board in order to prove the truth of his criticisms. If this were the case, then the Board could look forward to a lengthy hearing, and continuing disruption to its schools. Respondent could look forward to an uncertain future as a teacher of twenty years experience without any prior discipline. It is in the interests of both sides to settle this case.

3. Both parties agree to the settlement agreement as is evidenced by their signature affixed to the document. I further find respondent fully understands the settlement and that he embraces the settlement as a final disposition of the tenure charges against him. Both the Board and respondent have at all times been represented by more than competent counsel.

4. It is in the public interest that the settlement be approved. Respondent voluntarily agrees to teach as a teacher on special assignment during his last year of active service prior to retirement. So long as respondent is assigned duties within the scope of his teaching certificate and/or endorsements, it is in the interest of the public to have respondent so assigned as opposed to continuing with the tenure hearing. It is also in the public interest that respondent tender his retirement effective June 30, 2001 because between now and that date the Board shall receive value for payments of salary made him. Finally, it is in the public interest that the settlement be approved because all monies to be paid respondent will be for services rendered and consistent with the teachers' salary policy; there is no gift of public funds in this agreement. Respondent has had his pay resumed following the 120 day period of suspension without pay. It is in the public interest to have respondent perform service for the pay he is receiving.

CONCLUSION

For all the foregoing reasons, I **FIND** the proposed settlement agreement to be a fair disposition of the tenure charges brought against respondent in that the agreement with the standards announced in *In re Cardonick, supra*. I recommend the Commissioner of Education approve the settlement agreement as a fair and final disposition of the tenure charges certified by the Irvington School District Board of Education against George Montgomery.

I hereby **FILE** my initial decision with the **COMMISSIONER OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **Commissioner of Education** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

May 18, 2000
DATE

Daniel B. McKeown/RWS
DANIEL B. MC KEOWN, ALJ (t/a)

Receipt Acknowledged:

5/30/00
DATE

Debbie Antonelli/gp
COMMISSIONER OF EDUCATION

Mailed to Parties:

JUN 02 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lam

SETTLEMENT AGREEMENT

WHEREAS GEORGE MONTGOMERY and the IRVINGTON BOARD OF EDUCATION,("THE BOARD") having amicably agreed to resolve their differences, and hereby stipulate and agree that the matter entitled IRVINGTON BOARD OF EDUCATION vs. GEORGE MONTGOMERY, under docket number EDU-07082-98N, Agency Ref. No. 164-6/98, shall be settled upon the terms and conditions stated herein;

WHEREAS, the Board Members of the IRVINGTON BOARD OF EDUCATION, having the authority to act on behalf of the Board of Education, have agreed after due consideration to settle all claims related to the employment of GEORGE MONTGOMERY in connection with his duties and responsibilities as a teaching staff member and the decision to prefer tenure charges against GEORGE MONTGOMERY pursuant to **N.J.S.A.** 18A:6-11 and the IRVINGTON BOARD OF EDUCATION and GEORGE MONTGOMERY having determined that it would be in the best interests of the IRVINGTON BOARD OF EDUCATION and GEORGE MONTGOMERY to enter into such settlement.

WHEREAS the aforesaid settlement is subject to the aforesaid conditions set forth below;

NOW THEREFORE the parties mutually covenant and agree as follows:

1. GEORGE MONTGOMERY was hired as a teaching staff member of the Irvington Board of Education, on or about September 1, 1979.

2. On April 28, 1998, the Board of Education preferred Tenure Charges against GEORGE MONTGOMERY pursuant to **N.J.S.A.** 18A:6-11.

3. The IRVINGTON BOARD OF EDUCATION and GEORGE MONTGOMERY, through discussions between their respective counsel determined that it would be most beneficial to the parties involved to enter into the within agreement. Moreover, in furtherance of the within Settlement Agreement both parties agree that there were no findings made with respect to the proposed charges.

4. In furtherance of the within settlement, it is agreed by and between GEORGE MONTGOMERY and the IRVINGTON BOARD OF EDUCATION, that GEORGE MONTGOMERY shall retire effective June 30, 2001. To that end, GEORGE MONTGOMERY shall tender his letter of retirement on February 18, 2000, which same shall be voted upon and accepted by the IRVINGTON BOARD OF EDUCATION at its March 2000, meeting. Said tendering and acceptance by the IRVINGTON BOARD OF EDUCATION shall be contingent upon the Commissioner of Education's acceptance of the terms and conditions of the within agreement.

5. GEORGE MONTGOMERY shall continue to provide services to the IRVINGTON BOARD OF EDUCATION as a "Teacher on Special Assignment", under the terms and conditions of his certification during the term of the within agreement as requested or assigned by the current Superintendent of Schools or his designee.

6. GEORGE MONTGOMERY shall continue to receive salary benefits in

accordance with the within agreement through the date of his retirement of June 30, 2001. It is further agreed and acknowledged as of the execution of the within agreement that GEORGE MONTGOMERY's salary, for purposes of performing the job responsibilities of "Teacher on Special Assignment", shall be $85,294.00, for the academic year ending June 30, 2000 and $87,852.00, for the academic year ending June 30, 2001, all such salary predicated upon an eleven (11) month teaching schedule. GEORGE MONTGOMERY will also be paid all salary increments he would have received. In addition, GEORGE MONTGOMERY shall be covered by the IRVINGTON BOARD OF EDUCATION's health plan for teaching staff members during the period covered by the within agreement. GEORGE MONTGOMERY'S salary has been calculated in accordance with the teacher's salary guide which is currently in existence at the IRVINGTON BOARD OF EDUCATION. As indicated above the salary is predicated upon an eleven (11) month teaching schedule.

7. THE BOARD, after fully considering this matter, has concluded that it is in the best interests of the IRVINGTON BOARD OF EDUCATION to settle the within matter involving GEORGE MONTGOMERY in view of the fact that the Superintendent of Schools who brought the within action, namely, Peter Carter is no longer employed as Superintendent of the Irvington School District, in addition to the fact that there is a potential for the further escalation of substantial legal and administrative costs, personal time and that the parties' interest would be better served in resolving this matter through

the within settlement which resolves all issues involving the IRVINGTON BOARD OF EDUCATION and GEORGE MONTGOMERY which are currently in dispute.

8. The within settlement agreement shall satisfy in full the matter entitled; ***IRVINGTON BOARD OF EDUCATION vs. GEORGE MONTGOMERY***, under docket number EDU-07082-98N, Agency Ref. No. 164-6/98 and any other claims or demands which IRVINGTON BOARD OF EDUCATION now has or may have against GEORGE MONTGOMERY and that GEORGE MONTGOMERY now has or may have against the IRVINGTON BOARD OF EDUCATION, up to and including the date of this Settlement in addition to anything which occurs after the agreement is executed by the parties. Disputes concerning the within agreement shall be determined by a court of competent jurisdiction. Upon execution of the within agreement all matters involving GEORGE MONTGOMERY and the IRVINGTON BOARD OF EDUCATION shall be withdrawn with prejudice including all matters currently pending in the Office of Administrative Law and the New Jersey Appellate Division, which said matters involve an increment withholding, which have been resolved in the within agreement. It shall be noted that those matters which are currently pending in the New Jersey Appellate Division shall be adjourned pending acceptance of the terms of the within agreement by the Commissioner of Education and that in the event said agreement is accepted, that matter shall be withdrawn with prejudice as well.

9. GEORGE MONTGOMERY agrees not to participate in or attend any board

of education meetings, from the date of the execution of the within agreement and beyond unless directed by the IRVINGTON BOARD OF EDUCATION, the Superintendent of Schools or his designee.

10. GEORGE MONTGOMERY agrees to honor all duties and assignments as directed in good faith by the Superintendent of Schools in accordance with paragraph five (5) above.

11. The parties acknowledge that the dispute between them had at times been acrimonious. While this settlement is amicable, the parties recognize that ill feelings can return if care is not taken in the implementation of this settlement agreement. Both parties recognize that GEORGE MONTGOMERY has a constitutional right of free speech but that exercise of free speech contains within it the possibility, even if it does not breach this agreement, to renew animosity between the parties. A renewal of animosity is believed to lead inevitably to failure of the agreement. As a consequence, George Montgomery agrees in good faith that he will not directly or indirectly, publish or engage in activities whether union, non-union or otherwise, or disseminate in any medium of communication any expression which casts a negative light upon the Irvington School district, the IRVINGTON BOARD OF EDUCATION, and any current or former board of education employee. GEORGE MONTGOMERY agrees to perform the duties consistent with a Teacher on Special Assignment as directed by the Superintendent of Schools.

12. The IRVINGTON BOARD OF EDUCATION agrees that, if upon the

request of GEORGE MONTGOMERY, any third party makes an inquiry into his employment history with the IRVINGTON BOARD OF EDUCATION, after his retirement, that such inquiry shall be handled in a professional and courteous matter in accordance with the confidentiality provisions of this Agreement. Moreover, all inquiries if any, shall be directed solely to the Superintendent of Schools, who shall be the only employee of the IRVINGTON BOARD OF EDUCATION authorized to respond to such an inquiry. The IRVINGTON BOARD OF EDUCATION shall also prepare and have available for review a general letter acknowledging his employment from September 1, 1979 and through his retirement of June 30, 2001. Said letter shall also include that GEORGE MONTGOMERY was employed and retired in good standing. Both parties acknowledge that should anyone inquire about whether or not GEORGE MONTGOMERY was ever the subject of tenure charges, it will be the responsibility of the parties to acknowledge same and to advise that the matter was settled. There shall be no comment from any employee or agent of the IRVINGTON BOARD OF EDUCATION which casts a negative light upon GEORGE MONTGOMERY. Any deviation of this provision by the IRVINGTON BOARD OF EDUCATION, its employees, agents and/or servants, shall subject the board of education to penalties as determined by a court of competent jurisdiction, which may include damages, plus attorneys fees and cost of suit. (It should be noted that any violation of the provisions of paragraph 9 above shall serve to render null and void the IRVINGTON BOARD OF EDUCATION's obligations as

indicated in the within paragraph.)

13. GEORGE MONTGOMERY agrees to execute and deliver to THE BOARD a General Release and Waiver in the form prepared by counsel for THE BOARD. GEORGE MONTGOMERY expressly acknowledges that this Agreement and the General Release are intended to extinguish all claims which he may have against the IRVINGTON BOARD OF EDUCATION, resulting from anything which has happened up to the date of execution of the General Release by it and which were or could have been asserted, including those claims unknown to it and claims for attorneys' fees. GEORGE MONTGOMERY hereby acknowledges that the execution of this Agreement and the General Release which accompanies it shall absolutely bar any claims, action or suit against any releasee identified in the General Release.

14. In recognition of the sensitive issues at the heart of the within tenure hearing and the possibility that the agreement may be misconstrued by both the public and the district's employees, in the absence of full knowledge of the circumstances of settlement, subject to approval of the Commissioner of Education, the parties hereto, including each member of the Board of Education and their respective attorneys agree that, except as expressly provided below, each of them will forever keep confidential the terms of this Settlement Agreement and negotiations leading thereto and the substance of discussions leading to this settlement. It is further agreed that the parties and their respective attorneys may reveal only that the matter "was concluded" or that the matter was "resolved" to the

satisfaction of both parties. No other information concerning the settlement or the discussions leading to settlement may be revealed. Notwithstanding the foregoing, the parties hereto may discuss this settlement with their attorneys provided that they agree to be bound by this confidentiality provision.

15. It is understood that neither the execution of this Agreement nor any other action taken by the IRVINGTON BOARD OF EDUCATION in connection with this settlement constitutes an admission by THE BOARD of any violation of any law, duty or obligation, or that any decision or action with respect to GEORGE MONTGOMERY was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The BOARD specifically disclaims any liability to GEORGE MONTGOMERY.

16. The parties have entered into this Settlement Agreement solely to compromise the disputed claims. No findings of any kind have been made or issued by any court regarding the merits of the claims of this action and neither party purports to be the prevailing party in this action.

17. GEORGE MONTGOMERY and IRVINGTON BOARD OF EDUCATION further agree that they will not hereafter make public or disclose to any third party any part of the documents filed, except in accordance with paragraph 14 above..

18. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or provider of this Agreement and the parties agree that the Agreement shall not be

construed against any particular party.

19. This Agreement and the General Release referred to herein sets forth the entire agreement between GEORGE MONTGOMERY and the IRVINGTON BOARD OF EDUCATION, and supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement. This Agreement shall be construed in accordance with the laws of the State of New Jersey.

20. The parties acknowledge that they have consulted with their respective attorneys regarding this Agreement and the General Release that accompany it; that the terms of this Agreement and the General Release have been explained to them and that they have represented to their attorneys that they have read this Agreement and the General Release and fully understand them and agree to be bound by them.

21. GEORGE MONTGOMERY and the IRVINGTON BOARD OF EDUCATION shall not release any claims that either may have for the enforcement of this Agreement and that both maintain all rights to enforce this agreement should there be a breach by either party.

22. The respondent has been informed and understands the Commissioner's duty pursuant to ***N.J.A.C.*** 6:11-3.6 (a)(1) and ***In re Cardonick***, April 7, 1982, affirmed State Board of Education, April 6, 1983, 1990 S.L.D. 842, 846, concerning referral to the State Board of Examiners for review and possible action regarding his teaching certification. Given the parties' relevant position, it has been determined that the pursuit of

tenure charges is no longer in the public interest and would result in substantial and needless expenditure of legal costs and administrative resources.

23. This Stipulation of Settlement is subject to acceptance by and approval of the Commissioner of Education.

IN WITNESS WHEREOF the parties hereunder have signed this agreement as their voluntarily act and agree to be bound thereby.

Witness

GEORGE MONTGOMERY

Witness

ANDREA Mc ELROY, President
Irvington Board of Education

Dated:

RELEASE

RECEIVED
NEW JERSEY
ADMIN LAW

This Release, dated , 2000 is given 2000 MAY -4 A 10: 22

BY the Releasor(s) GEORGE MONTGOMERY

referred to as "I"

TO: IRVINGTON BOARD OF EDUCATION,

referred to as "You"

If more than one person signs this Release. "I" shall mean defendant and "You" shall mean plaintiff.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am aware and those not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened to now. I specifically release the following claims:

Any and all claims related to the matter currently pending before the Office of Administrative Law, under docket number EDU-07082-98N, ***Irvington Board of Education v. George Montgomery***, and matters entitled; ***George Montgomery v. Irvington Board of Education***, under docket numbers EDUOR-12289-95N and in the New Jersey Appellate Division under docket number A-003329-98T1.

2. Payment. I will continue in the employment of the Irvington Board of Education until my retirement effective June 30, 2001 pursuant to the terms of the Settlement Agreement. I agree that I will not seek anything further including any other payment from the Irvington Board of Education other than that which is the subject of the within Release ... benefits provided by the Collective Bargaining Agreement for the period 7/1/97 - 6/30/99.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

GEORGE MONTGOMERY (Seal)

James Villere, Esq. (Seal)

STATE OF NEW JERSEY, COUNTY OF ~~ESSEX~~ CAPE MAY SS:

I CERTIFY that on APRIL 10, 2000, 2000

GEORGE MONTGOMERY

appeared and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):
(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

James ~~Villere~~, Esq.

CRAIG F. PILCZUK
NOTARY PUBLIC of NEW JERSEY
My Commission Expires Feb. 28, 2004

OAL DKT. NO. EDU 7082-98
AGENCY DKT. NO. 164-6/98

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MONTGOMERY,	:	
IRVINGTON SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms, as clarified herein, since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a).

Term number 6 of the Settlement Agreement indicates that the salary to be paid to respondent shall be predicated upon an eleven-month teaching schedule. The record, as it currently exists, does not contain any information which would indicate that respondent, a middle school math teacher, was previously employed on an eleven-month basis. Therefore, the Commissioner emphasizes for the record the statement of the Administrative Law Judge (ALJ), found on page nine of the Initial Decision, which reads in pertinent part that "***all monies to be paid respondent will be for services rendered and consistent with the teachers' salary policy; there is no gift of public funds in this agreement." As such, the Commissioner cautions the

Board that it must assure that respondent's duties as a "Teacher on Special Assignment" are: (1) fully commensurate with an eleven-month work schedule; and (2) that the assignments are those of a teaching staff member.

Further, settlement term 12 stipulates various conditions for disclosure of employment information regarding respondent. The Commissioner accepts term 12 with the express qualification that the District *fully comply* with the conditions for public disclosure of employment information as set forth in Executive Order 11.

Lastly, settlement term 14 reads as follows:

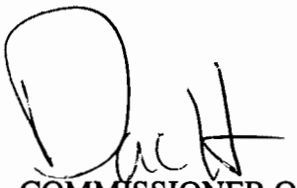
> 14. In recognition of the sensitive issues at the heart of the within tenure hearing and the possibility that the agreement may be misconstrued by the public and the district's employees, in the absence of full knowledge of the circumstances of settlement, subject to approval of the Commissioner of Education, the parties hereto, including each member of the Board of Education and their respective attorneys agree that, except as expressly provided below, each of them will forever keep confidential the terms of this Settlement Agreement and negotiations leading thereto and the substance of the discussions leading to this settlement. It is further agreed that the parties and their respective attorneys may reveal only that the matter "was concluded" or that the matter was "resolved" to the satisfaction of both parties. No other information concerning the settlement or the discussions leading to the settlement may be revealed. Notwithstanding the foregoing, the parties hereto may discuss this settlement with their attorneys provided that they agree to be bound by the confidentiality provision.

The Commissioner emphasizes to the parties that he is not bound by this settlement term. On March 28, 2000, the New Jersey Superior Court, Appellate Division, ruled that the filing of tenure charges and tenure charge documents are a matter of public record. *See, Dr. H. Benjamin Williams v. The Board of Education of the Atlantic City Public Schools et al.*, 329 *N.J. Super.* 308 (App. Div. 2000). Moreover, pursuant to *N.J.A.C.* 1:1-14.1(a), records of all hearings shall be open for public inspection unless, for good cause shown, the ALJ orders the sealing of the

record, or any part thereof. Furthermore, the Commissioner cautions the Board that any action it may take with respect to disclosure of information regarding this tenure matter must fully comport with the requirements of New Jersey's Right-To-Know Law, *N.J.S.A.* 47:1A-1 *et seq.*

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement, as clarified herein. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 14 2000

229-00

C # 229-00L
SB # 46-00

N.R. and F.R. on behalf of minor child, E.R., PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HARRINGTON PARK, BERGEN COUNTY, and DR. ROBERT B. WESTFIELD, SUPERINTENDENT, RESPONDENTS-RESPONDENTS.	:	DECISION

Decided by the Commissioner of Education, July 13, 2000

For the Petitioners-Appellants, Michael F. Rehill, Esq.

For the Respondents-Respondents, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

The State Board of Education affirms the determination of the Commissioner of Education that the district board's refusal to waive its policy requiring students entering first grade to attain the age of six on or before October 1 was not arbitrary, capricious, or unreasonable. We also concur that adoption of such policy was a lawful exercise of the district board's discretionary authority.

However, we find that adoption of such policy was under authority provided by N.J.S.A. 18A:11-1 (district boards shall make rules for the government and management of the public schools), rather than N.J.S.A. 18A:38-5 (no child under five shall be admitted to any public school and no board shall be required to accept by

Nov. 1, 2000

transfer any pupil not eligible by reason of age on October 1). In this respect, we stress that "...the Commissioner has construed the legislative authority conferred upon a local board of education to make and enforce rules for its own governance under N.J.S.A. 18A:11-1 to include policies adopted by it consistent with N.J.S.A. 18A:38-5." H.A.B. v. Manalapan-Englishtown Regional School District, 92 N.J.A.R. 2d (EDU) 640, 647. We therefore affirm the Commissioner's decision to dismiss the petition in this matter.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 03 2000

230-00

C # 230-00L
SB # 44-00

LAWRENCE TAVE,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 13, 2000

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Cerrato, Dawes, Collins, Saker, Brown & Wilder (Sanford D. Brown, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Roberta Van Anda abstained.

November 1, 2000

Date of mailing NOV 03 2000

IN THE MATTER OF MARTIN AROCHO,	:	
NEW BRUNSWICK BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MIDDLESEX COUNTY.	:	DECISION

July 13, 2000

IN THE MATTER OF MARTIN AROCHO,	:	**Before the School Ethics Commission**
NEW BRUNSWICK BOARD OF EDUCATION MIDDLESEX COUNTY	:	**Docket No.: C16-99**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed by Brian Villa on August 2, 1999 alleging that New Brunswick Board of Education member Martin Arocho violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by voting for a resolution that the Board contract with the Puerto Rican Action Board (PRAB) and by serving on the Board while being a member of the PRAB. The complainant alleged that respondent violated N.J.S.A. 18A:12-24(c) and (d). Mr. Arocho responded in his answer that he was a never a member of the PRAB, but explained that in November 1997, he became a salaried employee of the PRAB. On January 31, 2000, the Commission found probable cause that respondent violated N.J.S.A. 18A:12-24(c) by voting on the contract when he was an employee of the PRAB and dismissed the charge that he violated N.J.S.A. 18A:12-24(d). The Commission now finds that Mr. Arocho violated N.J.S.A. 18A:12-24(c) and recommends that the Commissioner of Education impose a penalty of censure.

The parties were invited to testify at the Commission's meeting of October 26, 1999. However, as the Commission did not have a quorum to discuss the matter, it had to reschedule for December 21, 1999. Counsel for Mr. Arocho was unavailable for the November meeting. In December, respondent appeared with counsel, along with Mr. Villa, and testified before the Commission. No decision was rendered at that meeting. The Commission's regularly scheduled meeting of January 25, 2000 was canceled due to the snowstorm that closed the offices of the State of New Jersey. Therefore, a special meeting of the Commission was held on January 31, 2000. At that time, the Commission rendered a decision finding probable cause that Mr. Arocho violated N.J.S.A. 18A:12-24(c). It directed staff to prepare a determination advising that it would accept a written submission as to whether Mr. Arocho's conduct constituted a violation of N.J.S.A. 18A:12-24(c) since the material facts were undisputed.

At the Commission's special meeting of January 31, 2000, the Commission found probable cause to credit the allegation that Martin Arocho violated N.J.S.A. 18A:12-24(c) when he participated voted in favor of a resolution to contract with the Puerto Rican Action Board (PRAB) when he was an employee of the PRAB. The Commission found no probable cause and dismissed the allegation that Mr. Arocho violated N.J.S.A. 18A:12-24(d). The Commission believed that Mr. Arocho could continue to hold his employment with the PRAB and serve on the Board without prejudice to his official board duties so long as he abstained from matters

concerning PRAB. The Commission found that the material facts were not in dispute regarding his employment and his vote on the resolution. Therefore, it invited respondent to submit a written statement on whether respondent's conduct violated N.J.S.A. 18A:12-24(c) of the Act.

The Commission received a timely submission from Mr. Arocho. Mr. Villa also submitted a written statement although he had not been requested to file one. The Commission considered it nonetheless before reaching its determination.

At its meeting of May 23, 2000, the Commission rendered this decision finding Mr. Arocho in violation of N.J.S.A. 18A:12-24(c) and recommending a penalty of censure.

STATEMENT OF FACTS

The Commission finds the following facts to be undisputed.

In November 1997, the PRAB hired Mr. Arocho as a Youth Outreach Worker. As a Youth Outreach Worker, he coordinates social services and community services of the organization. The program that he coordinates is funded by the New Jersey State Department of Community Affairs through a grant to the PRAB. Mr. Arocho's employment does not involve the PRAB's pre-kindergarten services to children in the City of New Brunswick.

On July 28, 1998, the New Brunswick Board of Education considered whether the Board should enter into a contract with the PRAB to provide pre-kindergarten services to four-year old children residing within the City of New Brunswick. The PRAB had previously provided such services to the Board. Mr. Arocho voted in favor of the contract.

Mr. Hendricks, on behalf of Mr. Arocho, agreed with the above facts, but asked the Commission to also include in the undisputed facts that the Board first contracted with the PRAB to provide pre-kindergarten services to the district in July 1993, prior to Mr. Arocho's employment with the PRAB in November 1997. He added that Mr. Arocho voted in favor of the contract in 1997 when he first became a board member and he was employed by the United States Postal Service. He also adds that the July 28, 1998 resolution to provide pre-kindergarten services was a renewal contract and the vote to do so was unanimous at six to zero (with one member absent). Mr. Arocho abstained on the vote in 1999. Again the vote to renew the contract was unanimous.

Last, Mr. Hendricks notes on behalf of Mr. Arocho that the PRAB is a non-profit charitable group with a stated mission to provide social services and community outreach for the Hispanic community in New Brunswick. Mr. Arocho was hired by PRAB to work under a grant provided by the New Jersey Department of Community Affairs, Division of Hispanic Services. He has no involvement in the pre-kindergarten program.

The Commission finds that the facts presented by Mr. Hendricks are undisputed and hereby incorporates them into its Statement of Facts in this case.

ANALYSIS

The question before the Commission is whether Mr. Arocho violated N.J.S.A. 18A:12-24(c) of the Act by voting on the contract with the PRAB. N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

The Commission concluded in its probable cause determination that Mr. Arocho had a financial involvement with the PRAB since he was employed by that organization. In his written submission, Mr. Arocho stresses that PRAB is a non-profit corporation and that his salary is not dependent on the contract with the Board since his salary is funded through the DCA. The Commission does not find these arguments persuasive in the context of N.J.S.A. 18A:12-24(c). Subsection c requires the Commission to inquire as to whether the public would reasonably expect that the school official could not be objective in light of his connection to the matter. The Commission finds that the public would reasonably conclude that he could not. Therefore, the Commission concludes that Mr. Arocho had an indirect financial involvement with PRAB receiving a contract with the Board that might reasonably be expected to impair his objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission finds that respondent Martin Arocho violated N.J.S.A. 18A:12-24(c) of the School Ethics Act.

In determining the penalty, the Commission considered that Mr. Arocho had been serving on the Board for over a year at the time of the vote, so he should have attended training for new board members, which is required to take place in the first year. However, the Commission also considered the fact that this was not a new contract, but a renewal of a contract to which the Board had been a party since 1993. Based on these factors and all of the facts and reasoning set forth above, the Commission recommends that the Commissioner of Education impose a penalty of censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of

Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and Mr. Villa.

Respectfully submitted,

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C16-99

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Mr. Arocho violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of the parties in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a censure would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Martin Arocho in violation of the Act and recommends that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on May 23, 2000.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 188-6/00

IN THE MATTER OF MARTIN AROCHO, :

NEW BRUNSWICK BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, MIDDLESEX COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. Comments with respect to the Commission's recommended penalty were timely submitted by respondent, and were duly considered by the Commissioner in rendering the decision herein.[1]

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c), the determination of the Commission as to violation of the Act is *not reviewable* by the Commissioner, and that only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

Upon thorough review of the record in this matter, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty for the reasons expressed in the Commission's decision.

[1] Complainant, Brian Villa, submitted comments to the Commission's decision by letter dated June 6, 2000. However, pursuant to *N.J.A.C.* 1:6C-1.1 *et seq.* and *N.J.A.C.* 1:1-18.4, Mr. Villa is not a party to the within matter so as to provide him with the requisite standing to file written exceptions to the Commission's decision.

IT IS HEREBY ORDERED that Martin Arocho be censured as a school official found to have violated the School Ethics Act.[2]

COMMISSIONER OF EDUCATION

DATE OF DECISION: JUL 19 2000

DATE OF MAILING: JUL 19 2000

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

J.C. AND C. C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6580-99

AGENCY REF. NO. 166-6/99

J.C. AND C.C. ON BEHALF OF

MINOR CHILD, J.C.,

Petitioners,

v.

BOARD OF EDUCATION OF WOODBINE,

CAPE MAY COUNTY,

Respondent.

J.C., parent of petitioner, **J.C.**

Ronald Sahli, Esq., for respondent (Shali & Padovani, attorneys)

Record Closed: May 19, 2000 Decided: May 23, 2000

BEFORE **EDGAR R. HOLMES,** ALJ:

The parents of J.C. moved before the Commissioner of Education (Commissioner) for an Order reversing the decision of the Board of Education (Board) to promote their daughter to the first grade. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13.

A decision on emergent relief was issued on August 26, 1999, granting the relief requested by the parent. The Commissioner returned the matter to the OAL for a plenary hearing. The Board wrote a letter to this Administrative Law Judge (ALJ) on September 29, 1999, indicating it would not seek a plenary hearing in the matter. The parent of J.C. has never responded in writing and has failed to make herself available for telephone conferences on at least two occasions. Moreover, due to the passage of time the matter is moot.

I therefore **ORDER** that the Decision on Emergent Relief become the Initial Decision in this matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/23/00
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

5/30/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 6580-99
AGENCY DKT. NO. 166-6/99

J.C. AND C. C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review of this matter, the Commissioner concurs with the Administrative Law Judge that this matter is now moot because the relief sought by the within petitioners, *i.e.,* the retention of their minor child, J.C., in kindergarten for the 1999-2000 school year, was effectively resolved by the Commissioner's Decision on Motion for Emergent Relief, issued September 3, 1999.

Accordingly, the Initial Decision of the OAL is affirmed and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 14 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION OF CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

ROBERT BARNES DRISCOLL,

PETITIONER,

v.

BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,

RESPONDENT.

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10091-99

ON REMAND EDU 8613-97 AND

EDU 10241-97 (CONSOLIDATED)

AGENCY DKT. NOS. 319-9/97

AND 402-10/97

IN THE MATTER OF THE TENURE HEARING IF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY/ROBERT BARNES DRISCOLL,

Petitioner,

v.

BOARD OF EDUCATION OF CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,

Respondent.

Ned Rogovoy, Esq., for petitioner (Waltman, Reilly & Rogovoy, attorneys)

James Waldron, Esq., for respondent

Record Closed: May 24, 2000 Decided: May 25, 2000

BEFORE **LILLARD E. LAW,** ALJ:

These matters were transmitted to the Office of Administrative Law on November 16, 1999, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an Addendum to the Stipulation of Settlement indicating compliance with *Cardonick* standards, which is incorporated herein by reference and attachment.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the *Cardonick* standard.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the

COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

25 May 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/30/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

MAY 24 11 45 AM '00

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

REMAND DKT. NO. EDUTH 10091-99S
PRIOR ORIGINAL OAL DKT. NOS. EDU 8613-97 and EDU 10241-97 (Consolidated)
PRIOR ORIGINAL AGENCY DKT. NOS. 319-9/97 and 402-10/97

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION) OF CAPE MAY COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY.

ROBERT BARNES DRISCOLL,

vs.

PETITIONER,

BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,

RESPONDENT.

ADDENDUM TO THE SETTLEMENT AGREEMENT, PROCEDURAL HISTORY AND STIPULATION OF FACTS

On October 17, 1997 and November 26, 1997 respectively, the above-captioned consolidated docket numbers were referred to the Office of Administrative Law and assigned to the Honorable Lillard E. Law for hearings, pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. Prior to the conclusion of the matter the parties entered into a "Settlement Agreement" and also a document called a "Procedural History and Stipulation of Facts". Collectively, the documents comprised 23 pages of recitals. On or about September 29, 1999 the submission of those documents closed the record and on September 30, 1999 Judge Law approved the settlement and forwarded the settlement documents and his Order Approving Settlement to the Department of Education for approval. On November 10, 1999 the Commissioner of Education issued a decision disapproving the settlement and remanding the entire matter to the Office of Administrative Law.

It is the Commissioner's decision dated November 10, 1999 and the Commissioner's concerns that are now hereby specifically addressed in this Addendum for the purpose of attempting to comply with the standards of review set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, as follows:

In the Commissioner's decision on page 5, at the next to the last sentence, the Commissioner focuses on the fact that it is still the Board's contention that they question whether the tenured employee, Robert Barnes Driscoll, "is fit to resume his teaching duties and poses no threat to his students or any other students in the District".

That statement the parties in this addendum wish to qualify by stating first that tenured employee Driscoll pled guilty to one count of attempted criminal trespass, a fourth degree crime, and subsequent thereto was examined by one of the leading psychological experts in the State of New Jersey as relates to sexually aberrant behavior, Dr. Philip Witt, Ph.D., a Diplomate in Forensic Psychology and Chief Psychologist at Avenel for several years, now in private practice with a distinguished curriculum vitae. Dr. Witt clearly opined that tenured employee Driscoll presented no risk to his students if placed back in his work environment and his written opinion was offered after extensive testing, risk assessment and interview which was further bolstered by the fact that the incident did not occur in a school setting nor had any incident occurred with tenured employee Driscoll over the 17 years that he had served in the district. Counsel for the Board requested all of Dr. Witt's reports and the report of Dr. Dougherty, which doctor was a psychologist who had treated tenured employee Driscoll subsequent to the occurrence of the incident. All of those reports were then submitted to an independent psychological expert hired by the Board, specifically Timothy P. Foley, Ph.D., Director of Criminal and Forensic Services at the Joseph J. Peters Institute. Dr. Foley issued a report to the Board advising that he found that the tests administered by Dr. Witt were adequate, that Dr. Foley did corroborate the findings of Dr. Witt, and did not recommend any further testing, therefore, confirming the fact that tenured employee Driscoll, if returned to the workplace, presented no risk to his students as relates to the conduct evidenced in the incident leading to his guilty plea of attempted fourth degree criminal trespass.

Therefore, when the original Procedural History and Stipulation of Facts states that Driscoll contends that he "is fit to resume his teaching duties and poses no threat to his students or any other students in the District", and the Board rejects that contention as the Commissioner points out and focuses upon in his November 10, 1999 opinion. It is requested that the Commissioner read those contentions as initial contentions and realize that any individual layman's contention, even if collective, would be superseded by the three expert opinions which the Administrative Law Judge would be forced to give greater weight if the matter was brought to trial. It is requested that the Commissioner understand that while the Board's original contention may have been and may still be, as individuals or collectively, that there is a question of fitness, their opinion must be superseded by the opinions of the experts, including the expert hired by them, who unanimously agree that Driscoll is fit to teach.

Secondly, the Commissioner, on page 6 of his typed opinion states that "there is no indication in the record that Respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6", to refer tenure determinations for possible revocation of certificate to the State Board of Examiners for independent review. While it should be noted with all due respect to the Commissioner, that the records sent for his review did not include the extensive in court recorded record before the Administrative Law Judge with counsel for the Board, tenured employee Driscoll and his counsel, in attendance. Both attorneys by signing this statement will swear, as I am sure will Judge

Law, that tenured employee Driscoll was advised of the independent review by the Commissioner and in turn of the then next and de novo independent review by the State Board of Examiners. This review was more than once related to tenured employee Driscoll and he acknowledged under oath that he understood that both of those reviews were independent. If His Honor the Commissioner would request and require something other than this representation, I am sure a transcript could be obtained whereby these representations could be confirmed.

CONCLUSION

The Board's probability of sustaining the position that tenured employee Driscoll is not fit to return to the classroom is highly unlikely in light of the facts in this case and the reports of three experts who have examined Driscoll. The probability that tenured employee Driscoll is fit to return to the classroom is highly probable and, therefore, the Board's early contentions against fitness could not prevail.

Secondly, the record will reflect that tenured employee Driscoll was clearly advised that there would be an independent review by the Administrative Law Judge, the Commissioner of Education and the State Board of Examiners.

For all of the above reasons it is requested that the Administrative Law Judge, the Commissioner of Education, and the State Board of Examiners review and approve this settlement agreement and its accompanying Procedural History and

Stipulation of Facts in light of *In re Cardonick*, as well as all the other tenure hearing matters cited by the Commissioner.

Respectfully submitted.

NED P. ROGOVOY, ESQUIRE
Attorney for tenured employee,
Robert Barnes Driscoll

JAMES A. WALDRON, ESQUIRE
Attorney for Board of Education
of the Cape May County Technical
School District

OAL DKT. NOS. EDU 8613-97 and EDU 10241-97 (CONSOLIDATED) AND
EDU 10091-99 (ON REMAND)
AGENCY DKT. NOS. 319-9/97 and 402-10/97

IN THE MATTER OF THE TENURE HEARING OF ROBERT BARNES DRISCOLL, BOARD OF EDUCATION OF CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY.	COMMISSIONER OF EDUCATION
ROBERT BARNES DRISCOLL, PETITIONER, v. BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY, RESPONDENT.	DECISION ON REMAND

The Settlement Agreement, Procedural History and Stipulation of Facts (*see* attached), Addendum to same, and Initial Decision On Remand issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 in this consolidated matter have been reviewed.

Upon review of the Addendum to the settlement agreement, which was remanded by the Commissioner to the OAL on November 10, 1999 for reconsideration and revision, as necessary, the Commissioner hereby approves the settlement terms as set forth in the two documents in their entirety, since they now comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990

S.L.D. 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is, therefore dismissed, subject to the parties' compliance with the terms of the settlement and Addendum. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 14 2000

234-00

G.M., on behalf of minor niece, B.S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to compel respondent to provide his niece a free public education.

Petitioner failed to appear at the hearing of the matter and the ALJ, after hearing testimony of respondent's witness and considering the evidence presented, and having provided petitioner an opportunity to explain his failure to appear at the hearing, concluded that petitioner's niece was not entitled to a free education from respondent.

The Commissioner adopted as his own the recommendation of the ALJ dismissing the petition for the reasons set forth therein, and ordered that petitioner remit $6,552.54 to the Board for tuition during the period of his niece's ineligible attendance at respondent's schools.

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12030-99

AGENCY DKT. NO. 321-10/99

G.M. ON BEHALF OF MINOR NIECE,

B.S.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WEST ORANGE,

ESSEX COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: May 10, 2000 Decided: May 26, 2000

BEFORE **EDITH KLINGER**, ALJ:

On October 20, 1999, petitioner, G.M., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of West Orange (Board), to provide his niece, B.S.G., with a free public education in the Township schools pursuant to *N.J.S.A.* 18A:38-1b.

On December 3, 1999, the Board filed its answer to the petition and on December 28, 1999, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled on May 9, 2000 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. A Notice of Plenary Hearing was mailed to each of the parties on January 24, 2000. On the scheduled hearing date, no one appeared for the petitioner. To date, the petitioner has made no contact with the Office of Administrative Law to explain the failure to appear.

Evidence was taken from respondent's witness on the record, and the record closed on May 10, 2000 after the petitioner was given the required 24 hours to come forward with an explanation.

Josefa Lopez, the registrar for the District, is responsible for all new enrollments. She testified as the witness on behalf of the Board.

On September 23, 1999, G.M. completed an Affidavit for Non-Resident Pupil Enrollment (Affidavit), to enroll his niece, B.S.G., in the eleventh grade at West Orange High School. The affidavit stated that he was the sole support of his niece who came to live with him because her parents were unable to support her in Haiti, her native land. An affidavit, allegedly from the child's mother, J.M.S.G., was completed in New Jersey on the same date. She stated that she could not support her daughter in Haiti and, therefore, B.S.G. had been sent to live with her uncle in West Orange.

The New Student Registration Information form (form), prepared at the time of enrollment, shows that B.S.G. did not come directly from Haiti to live with her uncle. She entered the United States in Orlando, Florida, and attended Jones High School there for a few years. Other information provided on the form shows that her mother and father own their own business(es) in Haiti but no additional information was given.

Based upon the total lack of information as to B.S.G.'s parents' business(es) and income(s), the Board denied her a free public education in the district on October 26, 1999. She has been attending school there during the course of this appeal.

Lopez calculated the tuition owed by G.M. based upon B.S.G.'s attendance in the district for 118 school days from November 1, 1999. The per diem rate charged is $55.53. This is the daily rate spent on each pupil in the district in grades nine through twelve. I **FIND** that the total calculated tuition due from G.M. is therefore $6,552.54 (118 x $55.53).

N.J.S.A. 18A38-1(b)(1) provides that a child, living in the home of another person who is domiciled in the school district, must, among other things, be kept and supported gratis by that person for a period longer than the school term. The sworn statement of the resident attesting to these conditions must be accompanied by the sworn statement of the child's parent or guardian that he or she is not capable of supporting the child due to a family or economic hardship. If the district denies the claim of entitlement to a free public education, the burden is on the resident to prove entitlement by a preponderance of the credible evidence.

If the resident fails to carry the burden of proof, *N.J.S.A.* 18A:38-1(b)(2) provides that the district can remove the child from school and assess the resident tuition for the student prorated to the period of ineligible attendance in district schools. Further, if the resident fails to appeal the Board's determination or, as in this case, abandons the appeal, the Board is entitled to remove the student and seek tuition for the period of ineligible attendance as though an appeal had never been filed. *N.J.A.C.* 6A:3-8.1(d)1.

Based upon the above, I **CONCLUDE** that G.M. has failed to prove that B.S.G. is entitled to a free public education in the Township of West Orange or, in the alternative, I **CONCLUDE** that G.M. has abandoned his appeal and the Board is entitled to relief according to the provisions of *N.J.A.C.* 6A:3-8.1(d).

ORDER

Accordingly, it is **ORDERED** that respondent assess tuition against G.M. in the amount of $6,552.54 pursuant to *N.J.S.A.* 18A:38-1(b).

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 26, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

6-2-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 6 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

EK/cb

APPENDIX

WITNESSES:

For Respondent:

Josefa Lopez

Exhibits:

R-1 Affidavit for Non-Resident Pupil Enrollment

R-2 Affidavit of Parent

R-3 New Student Registration Information

R-4 Calculation of Per Diem Tuition

OAL DKT. NO. EDU 12030-99
AGENCY DKT. NO. 321-10/99

G.M., on behalf of minor niece, B.S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge (ALJ) dismissing the petition for the reasons set forth in the Initial Decision. Petitioner is, therefore, ordered to remit to the Board the sum of $6,552.54, pursuant to *N.J.S.A.* 18A:38-1(b), for tuition during the period of B.S.G.'s ineligible attendance in the West Orange School District.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 17 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

235-00R In the State 235-00

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured clerk of respondent Board, along with her union, appealed the withholding of her increment for the 1997-98 school year.

After an Initial Decision was issued, the Commissioner remanded this matter to OAL for briefing and argument on the issue of jurisdiction, and for additional fact-finding, as necessary upon the exploration of such jurisdictional issues, in order to resolve this matter. The ALJ concluded that there is no statutory authority for the Commissioner to act on the increment withholding of non-teachers. Thus, the OAL has no jurisdiction over this matter. Petition was dismissed.

The Commissioner affirmed the opinion of the ALJ for the reasons set forth therein.

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12085-99
AGENCY DKT. NO. 290-8/97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent.

Victor P. Mullica, Esq., appearing for petitioner (Mullica & Mullica, attorneys)

Michael A. Gannaio, Esq., appearing for respondent (Giblin & Giblin, attorneys)

Record Closed: April 7, 2000 Decided: May 26, 2000

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDUARL HISTORY

The Commissioner of Education remanded the Initial Decision in this case for briefing on the issue of jurisdiction and any additional fact finding as may be necessary

to explore the jurisdictional issues. Petitioners argued that the Office of Administrative Law (OAL) has jurisdiction and respondent argued the opposite.

Eileen Wende, a tenured clerk of the Board of Education of the Township of Bergen (Board) appealed the withholding of her increment on June 27, 1997, by the Board. Petitioner filed a verified petition of appeal with the Commissioner on August 6, 1997 and the Board filed an answer on October 3, 1997. On October 21, 1997, the Commissioner of Education transmitted the matter to the OAL for a hearing on the issue of the withholding of the increment. The OAL held a hearing on September 16, 1998, February 22, March 24 and June 8, 1999. On September 8, 1999, the undersigned issued a written opinion ordering the decision of the Board denying an increment to the petitioner be reversed. On October 28, 1999, the Commissioner of Education remanded the matter questioning whether the OAL had jurisdiction to hear the issue because Ms. Wende is not a teacher but rather is a clerk. Since the jurisdictional issue was not raised at the OAL, the Commissioner remanded the matter for briefing and argument on the issue of jurisdiction, and for additional fact findings as may be necessary to explore the jurisdictional issues.

In a conference with the parties, it was agreed that no additional fact findings was necessary and a briefing schedule was set out. The final brief was filed on April 7, 2000.

FACTS

The material fact necessary to decide this decision is undisputed in that Eileen Wende is a tenured clerk and not a member of the teaching staff. Moreover, she is not required to hold a teaching license and does not hold a teaching license.

LEGAL DISCUSSION AND CONCLUSION

Teaching staff members have a right to appeal to the Commissioner of Education when they have had an increment withheld by their respective local Board of Education. *N.J.S.A.* 18A:29-14. *N.J.S.A.* 18A:29-1 to –14 addresses compensation of teaching staff members and each section must be read *in pari materia* with each other section. *N.J.S.A.* 18A:29-14 applies only to those person required to be licensed to hold a teaching position. *Bd. of Educ. of Tp. of Neptune v. Neptune Tp. Ed. Assn.*, 144 *N.J.* 16, 34 (1996). Non-teaching staff may have some rights to binding arbitration depending on the nature of the increment withholding as determined by Public Employment Relations Commission (PERC). *N.J.S.A.* 34:13A-22 to 29. See *Randolph Twp. Bd. of Educ. v. Randolph Educ. Assn.* 306, N.J. Super. 207 (App. Div. 1997). It is undisputed that petitioner is not a member of the teaching staff. Thus, petitioner has no right to appeal to the Commissioner of Education from an increment withholding. Accordingly, I **CONCLUDE** that the OAL has no jurisdiction in this matter.

Petitioner argued that fundamental fairness as well as economy of governmental efforts should prevent petitioner from having to retry her claim in another public forum, if one is available to her. However, where, as here, there is no statutory authority for the Commissioner to act on the increment withholding of non-teachers, there is no alternative but to dismiss the matter.

ORDER

I hereby **ORDER** that this matter be **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 26, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

6-2-00
DATE

Debbie Antanaitis /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 6 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 12085-99
AGENCY DKT NO. 290-8/97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND EILEEN WENDE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record and Initial Decision on remand have been reviewed. Based upon the particular facts established in this matter, the Commissioner adopts as his own the Initial Decision and dismisses the petition for lack of jurisdiction for the reasons expressed therein. [1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 17 2000

[1] *See Randolph Tp. v. Randolph Ed. Ass'n.*, 306 *N.J. Super.* 207 (App. Div. 1997), *certif. denied*, 153 *N.J.* 214 (1998), and *Randolph Bd. of Educ. v. Educ. Ass'n.*, 328 *N.J. Super.* 540 (App. Div. 2000).

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

236-00

BOARD OF EDUCATION OF THE CITY OF ABSECON, ATLANTIC COUNTY,

PETITIONER,

V.

M.L.G. AND L.G.-P., on behalf of minor child, B.G.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought a determination that it is not responsible to provide B.G. a free public education pursuant to law and reimbursement from respondents of tuition paid on B.G.'s behalf to the R.E.A.C.H. Charter School.

The ALJ concluded that respondents failed to demonstrate that B.G. was a *bona fide* resident of Absecon and thus entitled to a free public education from the District. The ALJ further concluded that M.L.G.'s securing of an order of custody of B.G. was solely for the purpose of establishing residency in Absecon in order to entitle B.G. to a free education from the District. As such, the ALJ concluded that B.G. is not domiciled in the Absecon School District and, thus, not entitled to a free education from the District. In addition, the ALJ ordered that respondents reimburse petitioner tuition paid to the R.E.A.C.H. Charter School on behalf of B.G.

The Commissioner reversed the decision of the ALJ. The Commissioner concluded that an analysis pursuant to *N.J.S.A.* 18A:38-1(b) was inappropriate once it was determined that M.L.G. had legal custody of B.G. Consistent with decisional law, the Commissioner further held that the motives of respondents in obtaining an order transferring custody of B.G. to M.L.G. are not subject to inquiry, and, absent a showing of fraud or other exceptional circumstances, B.G., pursuant to the order awarding custody to M.L.G., is domiciled in Absecon and entitled to a free public education from the District pursuant to *N.J.S.A.* 18A:38-1(a). Finally, the Commissioner determined that petitioner is not entitled to reimbursement of tuition.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.EDU 10944-99

AGENCY REF. NO. 339-11/99

BOARD OF EDUCATION OF THE
CITY OF ABSECON, ATLANTIC COUNTY,

Petitioner,

v.

M.L.G. AND L.G.-P. ON BEHALF OF
MINOR CHILD, B. G.

Respondents.

Louis Greco, Esq., for petitioner

M. L. G., for respondents, *pro se*

Record Closed: March 15, 2000 Decided: April 18, 2000

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Absecon (Board) alleges that pupil, B.G., is not a resident of its school district and, therefore, is ineligible to attend or enroll in its schools free of charge. The Board requests that the Commissioner of Education (Commissioner) declare pupil B.G. to be ineligible to attend its schools and seeks an order requiring the parent to pay tuition for the period B.G. has attended its schools while a non-resident.

Respondents submitted its Answer to the Board's claims and filed a Cross-Petition with the Commissioner asserting, among other things, that B.G. is a *bona fide* resident of the Board's school district. Respondents seek the dismissal of the Board's Petition of Appeal.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was heard on March 15, 2000, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on March 15, 2000.

ISSUE

The sole issue for determination by this administrative tribunal is whether petitioner is legally domiciled within the Board's school district, pursuant to *N.J.S.A.* 18A:38-1.

BURDEN OF PROOF

Pursuant to *N.J.S.A.* 18A:38-1b. (1), the burden of proof lies with respondents under the preponderance of the evidence standard.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witness, I **FIND** the following **FACTS.**

L.G.-P., mother of minor child, B.G., testified that prior to December 1997, she and B.G. resided in the City of Pleasantville, Atlantic County, New Jersey. B.G. was enrolled and attended the schools under the direction and control of the Board of Education of the City of Pleasantville. In or about December 1997, L.G.-P. left her residence in Pleasantville and moved with B.G. to Absecon where they lived with M.L.G., L.G.-P.'s aunt. While living in Absecon, B.G. continued to attend the Pleasantville Public Schools through June 1998. There is nothing on the herein hearing record to demonstrate that respondent advised the Pleasantville Board of Education of B.G.'s change of residence beginning in or about December 1997.

L.G.-P. testified that in or about March 1998, she left Absecon for Virginia to attend graduate school. She did not reveal which graduate school she was to attend or what program she was to be enrolled. She asserted that she did not have employment and that she was to live with someone in Virginia. She stated that she was unemployed while in Virginia for a period of time of two or three months and did not have enough money to care for B.G.

Subsequently, B.G. enrolled in the R.E.A.C.H. Charter High School as an Absecon Board pupil on October 7, 1999, B.G.'s mother completed an Absecon Board Affidavit of Non-resident Parents Who Have Surrendered Custody of their Child to a Resident of the District (Affidavit). Therein L.G.-P. asserted that on October 7, 1999, she gave custody of B.G. to M.L.G., B.G.'s great-aunt. In response to Question 5, which asks,

> I/We am/are not capable of supporting or providing care for said child for the following reasons. (P-2)

Respondent answered "N/A (not applicable). L.G.-P. testified she did not answer Question 5 of the Affidavit because she did not believe the information was any of the Board's business.

The record shows that L.G.-P. is employed by the City of Norfolk, Virginia.

Tina Davisson, Absecon Board's Administrator/Board Secretary testified, among other things, that she is responsible for reviewing pupil residence cases. The Registration Form for B.G. for the 1999-2000 school year was brought to her attention where it listed the Pleasantville Schools as the last school attended by B.G. (P-1). Ms. Davisson testified, credibly, that she subsequently met with respondent M.L.G., who identified herself as B.G.'s great-aunt. M.L.G. stated to Ms. Davisson that B.G.'s mother had moved to Virginia and left B.G. in M.L.G.'s care. Ms. Davisson explained the school residence requirements to M.L.G.

On October 7, 1999, B.G.'s mother had signed the Affidavit where she testified that she believed that it was not any business of the Board's as to whether or not she was capable of supporting or providing for B.G. (P-2) Thereafter, on October 12, 1999, M.L.G. signed a sworn statement that she was the owner of the property, where B.G. resided and that B.G. had resided there since May 29, 1993 (P-3).

I **FIND** M.L.G.'s sworn statement in P-3 to be incredible in view of B.G.'s mother's testimony that she and B.G. lived in the City of Pleasantville, New Jersey, until December 1997. M.L.G.'s sworn statement asserts that B.G. had lived with M.L.G. since May 29, 1993. L. G.-P.'s sworn testimony contradicts M.L.G.'s sworn statement and, under the circumstances of this matter, L.G.-P.'s sworn statement is to be believed and M.L.G.'s sworn statement is not to be believed.

M.L.G. did acknowledge, in P-3, that she understood, among other things, that she would be responsible for B.G.'s tuition in the event B.G. was found not to be domiciled within the Board's school district.

Ms. Davisson testified, credibly, that a subsequent meeting was held in or about November 1999, with M.L.G., the Board's Superintendent of Schools, the Board Secretary and the Board's attorney. M.L.G. was asked about the employment status of B.G.'s mother and M.L.G. advised the gathering that B.G.'s mother was employed by the City of Norfolk, Virginia.

M.L.G. was then asked if B.G.'s presence in M.L.G.'s home presented a hardship and M.L G. stated, "no," there was no financial hardship. M.L.G. stated that B.G. remained with M.L.G. as a matter of choice rather than move with his mother to Virginia. B.G.'s friends lived in Pleasantville. The Superintendent of Schools, Ralph P. Ferrie, who attended the meeting in November 1999 with M.L.G. credibly corroborated Ms. Davisson's testimony.

M.L.G. testified on her own behalf and on behalf of B.G. and his mother L.G.-P. She challenged the Board's Secretary's assertion that there was no financial hardship to L.G.-P. M.L.G. admitted that no financial hardship was present when B.G.'s mother was employed. However, she stated that prior to L.G.-P.'s employment, a financial hardship did exist. M.L.G. asserted that B.G.'s mother could not provide for B.G. prior to her employment, therefore, M.L.G. assumed responsibility for B.G.

M.L.G. testified, among other things, that L.G.-P. answered Question Number 5 on the Affidavit with an "N/A" out of ignorance. M.L.G. stated that L.G.-P. did not understand the importance of the question or her answer.

M.L.G. testified that she contacted an attorney who gave her advice as to how to complete the necessary legal papers for M.L.G. to assume custody of B.G. M.L.G. asserts she now has legal custody of B.G., therefore, neither she nor L.G.-P. should be required to pay any tuition since B.G. is now a legal resident of Absecon. L.G.-P.s. testimony was similar to M.L.G.'s testimony.

CONCLUSION

The Board contends that B.G.'s legal custody is not dispositive of the issue to be determined by this tribunal. B.G.'s legal custody is a fact, however, the Board argues, it is not relevant to the test, as set forth at *N.J.S.A.* 18A:38-1b.(1). The Board contends that B.G. does not meet that part of the statutory test which states, in part, that B.G.'s mother ". . . is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district . . . " *N.J.S.A.* 18A:38-1.(1).

The facts of this matter shows, by L.G.-P.'s own admission, that she was unemployed for a period of two to three months. Thereafter, she was gainfully employed on a full-time basis with the City of Norfolk, Virginia. Respondents can not demonstrate any economic or financial hardship. In addition, the proofs herein shows that B.G. did not join his mother in the move to the Commonwealth of Virginia because his friends are in New Jersey, not Virginia.

I **CONCLUDE** that respondents have failed to carry their burden of proof, by a preponderance of the credible evidence, that B.G. was a *bona fide* resident of the Board's school district. I **FIND and CONCLUDE** that the testimony of M.L.G. and L.G.-P., asserting economic and financial hardship to be without merit. As the Court said in the matter of *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (*App. Div.* 1958), "A trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony."

I **FIND and CONCLUDE** that respondents have failed to demonstrate any financial or economic hardship. Rather, the proofs show that B.G. preferred to remain in New Jersey instead of moving to Virginia with his mother because B.G.'s friends lived in Pleasantville, New Jersey. I **FIND and CONCLUDE** that the transfer of custody from his natural parent, L.G.-P., to his great-aunt, M.L.G. was done solely for the purpose of establishing B.G.'s residency within the Board's jurisdiction in order for B.G. to attend the R.E.A.C.H. Charter School at the Board's expense.

In the matter of M.A.M. as Parent and Natural Guardian of M.M. v. Board of Education of the Black Horse Pike Regional School District, Camden County, 1974 *S.L.D.* 845, the Commissioner addressed and distinguished "residence" and "domicile" by quoting from *State v. Benny,* 20 *N.J.* 238 (1955), where it was said:

> **** It is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word "home," *Stout v. Leonard,* 37 *N.J.l.* 492

> (*E & A* 1874; *Cromwell v. Neeld,* 15 *N.J. Super.* 296 (*App. Div.* 1951).

> Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile. **** 1974 *S.L.D.* at 849.

There is no question that B.G. has established his "residence" with M.L.G. However, *N.J.S.A.* 18A:38-1b.(1) requires that B.G. to be domiciled within the Board's school district. M.L.G. has failed to demonstrate that her home is the one and only domicile of B.G..

I **CONCLUDE**, that B.G. is not domiciled within the Board's school district and, therefore, is ineligible for "receiving a free public education within the district." *N.J.S.A.* 18A:38-1b.(1).

I **CONCLUDE** further that M.L.G. and/or L.G.-P. is/are liable for the tuition of B.G.'s attendance at the R.E.A.C.H. Charter School which is calculated to be $6,589 per year, in ten equal monthly installments.

I **CONCLUDE** that respondents Cross-Petition is without merit and should be dismissed.

ORDER

Accordingly, it is **ORDERED** that respondent, B.G. be **DECLARED** a non-resident pupil under *N.J.S.A.* 18A:38-1b.(1). It is **FURTHER ORDERED** that B.G. through his great-aunt, M.L.G. and/or his mother, L.G.-P., be required to pay the tuition for his attendance at the R.E.A.C.H. Charter School under payment by the Board for the 1999-2000 year, in the amount of $658.90 per month for each month B.G. has attended the school.

It is **ORDERED** that respondents' Cross-Petition is hereby **DISMISSED** for the reasons expressed above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 April 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4/20/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 24 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

Tina Davisson

Ralph Ferrie

For Respondents:

M.L.G.

L.G.-P.

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Absecon Public Schools Registration Form 1999/2000

P-2 Affidavit

P-3 Absecon Public Schools, sworn statement, 10/12/99

For Respondents:

R-1 Answer and Cross-Petition

R-2 Letter, 11/12/99

R-3 Superior Court of New Jersey, Chancery Division, dated 12/3/99

OAL DKT. NO. EDU 10944-99
AGENCY DKT. NO. 339-11/99

BOARD OF EDUCATION OF THE CITY OF ABSECON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.L.G. AND L.G.-P., on behalf of minor child, B.G.,	:	DECISION
RESPONDENTS.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. It is noted that on May 4, 2000, after issuance of the Initial Decision, a letter was received from Ellen M. Boylan, Esq. (Education Law Center), indicating that she was now representing respondents who had, until that point, proceeded *pro se* in this matter. Respondents' counsel requested an extension of time to file exceptions because she needed to obtain and review the transcripts of the matter. An extension was granted for the filing of exceptions to May 30, 2000. This resulted in the need for the Commissioner to obtain an extension of time from the OAL until July 20, 2000 for issuance of the final decision. Because of a delay in obtaining the transcripts, respondents' counsel requested and was granted a second extension for the filing of exceptions until June 12, 2000. Exceptions were timely filed on that date. Petitioner's reply exceptions were also timely filed.

In their exceptions, respondents argue that the Administrative Law Judge (ALJ) erred in not finding that B.G. is domiciled in Absecon, as it is undisputed that he resides with M.L.G. in Absecon and she obtained legal custody of him on December 2, 1999. Further,

respondents argue that the ALJ failed to consider the equities in this matter and the Board's obligation to provide M.L.G. with written notice specifying the reasons for denying admission to B.G. Moreover, it is respondents' position that the ALJ miscalculated the amount of tuition owed by respondents for B.G.'s attendance at the R.E.A.C.H. Charter School.

More specifically, respondents aver that the ALJ's failure to establish Absecon as B.G.'s domicile in the Absecon School District is plainly erroneous and contrary to established case law, arguing, *inter alia*, that it is undisputed B.G. has resided with M.L.G. in Absecon since March 1997 (Tr. 3/15/00, at 16 and 32; Initial Decision at 7), and that M.L.G. applied for legal custody of B.G. in November 1999, which the court granted on December 2, 1999. As to this, respondents argue that it is well-established that, once legal guardianship is established, the only inquiry for a board of education is whether the guardian and child are domiciled in the school district pursuant to *N.J.S.A.* 18A:38-1(a) and cite in support thereof *Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997; *L.A. v. Board of Education of the Town of West Orange*, 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.*2d (EDU) 124, *aff'd* by the State Board of Education 97 *N.J.A.R.*2d 554 (1997).

Respondents further urge that the instant matter is wholly unrelated to the criteria for establishing affidavit student status pursuant to *N.J.S.A.* 18A:38-1(b), urging that since the domicile of the child follows the parent or guardian having legal control over him or her, B.G.'s domicile became Absecon once M.L.G. obtained legal custody of him. Respondents state:

> The ALJ accords no legal effect to the custody order, finding instead that custody was transferred to M.L.G. "solely for the purpose of establishing B.G.'s residency within the Board's jurisdiction." Initial Decision at p. 6. However, the Commissioner

> has explicitly rejected the appropriateness of inquiring into the district resident's motives for establishing custody of a student. [*Y.L., supra* at 12.] Absent a showing of fraud on the part of the district resident, [*V.H., supra*] at 125, and where it does not appear that the custody order is a temporary one, the custody order must be accepted on its face. [*L.A., supra*] at 269. (Respondents' Exceptions at 3)

Respondents further aver that the instant matter is distinguishable from case law dealing with the issue of a resident's legal custody of a student and eligibility to attend school free of charge under the provisions of *N.J.S.A.* 18A:38-1; *See e.g., Cranford Township Board of Education v. A.McG. et al.*, 95 *N.J.A.R.*2d (EDU) 74 (1994) (wherein the Commissioner upheld the denial of admission because evidence established that the resident obtained a custody order solely to gain school admission for children who actually resided with their mother in another town); *R.N. v. Board of Education of the Borough of Haddon Heights*, Number 161-98, Agency Docket No. 14-1/97, decided April 24, 1998 (wherein the Commissioner upheld the denial of admission even though the district resident had legal guardianship because there was no evidence that the child lived with the resident). Whereas, in the current matter, "*** there is no evidence of fraud. In fact, the Board concedes that M.L.G. and B.G. reside in Absecon and that B.G.'s mother, L. G-P., resides in Virginia. Petition, ¶ 2; T16-12." (*Id.* at 4) Respondents, therefore, argue that since M.L.G. has had legal control over B.G. since December 2, 1999, he has been domiciled in Absecon since that date and is entitled to attend the Board's schools under *N.J.S.A.* 18A:38-1(a).

Respondents further argue that it would be inequitable to hold M.L.G. liable for payment of any tuition under the facts of this case for the period between October 13, 1999, when M.L.G. attempted to enroll B.G. in the Absecon schools, and December 2, 1999, when the custody order was entered. Of this, they aver that the evidence established that M.L.G. simply

did not understand the requirements of *N.J.S.A.* 18A:38-1; *i.e.*, that in order to enroll a child in school, the district resident must establish either legal control over the child, or the elements of affidavit student status. Respondents aver that as soon as M.L.G. understood that she had to obtain legal custody of B.G. to establish his domicile, she did so. Of this, respondents urge that:

> Under these circumstances, where there is no allegation that the child lives with the district resident solely to obtain an education in the district's schools; where the resident acted as the sole custodian and *de facto* guardian of the child for 21 months prior to obtaining legal custody; and where the resident obtained custody as soon as she understood the requirements of the school residency statute, it would be unfair and contrary to the purpose of the school residency statute to assess tuition against M.L.G. Indeed, a reading of the residency statute which fails to recognize the educational entitlement of students such as B.G., who are living in nontraditional families and may not fit as neatly as either domiciled students or affidavit students, conflicts with the student's fundamental right to a public education under the Education Clause of the New Jersey Constitution. (Respondents' Exceptions at 5)

Moreover, it is respondents' contention that, in this case, assessment of tuition would be particularly inequitable in light of the Board's failure to meet its obligation to explain to M.L.G. the basis for the denial of admission, including the obligation to provide written notice of the reasons for denial, citing in support thereof, *J.A. v. Board of Education of South Orange-Maplewood*, 318 *N.J. Super.* 512 (App. Div. 1999). As such, respondents urge that, without knowledge of the reasons for denial, M.L.G. had no opportunity to cure the deficiencies in the application. They also assert that the Board did not make an effort to assist M.L.G. with B.G.'s application for admission.

Lastly, respondents maintain that the Board failed to meet its burden of establishing an accurate accounting of tuition. Initially, respondents assert that, while there is no dispute B.G. attended R.E.A.C.H. Charter School in September, October and November, 1999,

the Board admits that "[d]uring the initial weeks of school [for the 1999-2000 school year] B.G. remained registered as a Pleasantville student ***" Petition ¶ 5. Thus, respondents argue that Pleasantville apparently paid B.G.'s tuition at the R.E.A.C.H. Charter School for at least part of the school year, yet the Board provided no evidence of when Pleasantville stopped paying and it assumed responsibility for B.G.'s tuition. Respondents further assert that, while the Board Business Administrator testified that the State paid only .5 percent of B.G.'s tuition at R.E.A.C.H. for the 1999-2000 school year, the Board in fact received $1,133 in State aid for every student enrolled in the district.

In reply, the Board urges, *inter alia,* that *N.J.S.A.* 18A:38-1 clearly prohibits free attendance at school where the evidence demonstrates that the child's presence is solely for the purpose of receiving a free public education within the district, and asserts that:

> [t]he evidence in the record shows that the purported "custody" order was obtained by M.L.G. only long after commencement of the legal proceedings. Prior to that time, she had indicated only that B.G. did not want to leave the area when his mother moved away. No more, no less. The "custody" order in question is an obvious "over-the-counter" document obtained by M.L.G. and her niece (B.G.'s mother) "solely for the purpose of receiving a free public education within the district", as was obvious to the [ALJ]. (Board's Reply Exceptions at 1-2)

In support of this contention, the Board points to the testimony of its Business Administrator that M.L.G.'s explanation as to why B.G. remained in Absecon when his mother moved to Virginia was that "'B. was just staying out of choice because he had all of his friends locally at the Pleasantville High School, so now he wanted to stay with his friends and was living at Mrs. G."s [sic] so he could continue school with the same group of friends [Tr. at 12].'" (*Id.* at 2) The Board goes on to state that "[t]he solution pursued for B.G. was to enroll in the local

charter school at the expense of the Absecon school district. The only 'hardship' in this case is B.G.'s desire to attend school locally." (*Ibid.*)

As to respondent's exceptions regarding Absecon's failure to inform and/or assist M.L.G. with B.G.'s application, the Board urges that counsel for M.L.G. is attempting to enter facts into the record which were not pled prior to hearing or elicited in the testimony at the time of hearing, nor were they argued at the hearing. The Board further asserts that respondents' argument about "notice of reason" is refuted by the testimony of both its Superintendent and Business Administrator and that "the self-serving 'custody' order presented at trial makes it clear that M.L.G. was fully aware of the reasons why school admission was denied and tuition sought. Due process does not operate in a vacuum. M.L.G. was obviously aware of the problems. Why else would they attempt to cover their trail with the custody order?" (*Ibid.*)

Lastly, the Board urges that the tuition calculation made by its Business Administrator is proper.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the Initial Decision of the ALJ, as set forth herein. Initially, the Commissioner finds that as of December 2, 1999, when M.L.G. was granted legal custody of B.G., he was entitled to attend the Absecon schools free of charge pursuant to the requirements of *N.J.S.A.* 18A:38-1(a). As was determined by the Commissioner and affirmed by the State Board of Education in *L.A., supra,* and *V.H., supra,* as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b); the "affidavit student" provision.

Thus, in the instant matter, once M.L.G. assumed legal and physical custody of B.G., the only appropriate inquiry for the Board was whether M.L.G. and B.G. were domiciled in

the district pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as the Board does not dispute that M.L.G. is domiciled in Absecon, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, *Mansfield Twp. BOE v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that B.G. is entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) as of the date M.L.G. acquired legal custody of him. *See* also *Y.L., supra.* In so finding, the Commissioner notes that there is no claim of fraud on the part of petitioner. *See, L.A., supra; V.H., supra;* and *Y.L., supra.* Further, as was stated in *L.A.*, and affirmed by the State Board, "the motives pertinent to the custody order are not determinative. The order must be accepted on its face." *L.A., supra,* 97 *N.J.A.R.*2d at 269. *See* also *Y.L., supra.* Moreover, unlike the circumstances found in *Cranford, supra*, there is no claim that B.G. is not residing with M.L.G.

Further, the Commissioner finds and determines that, in light of the circumstances particular to this matter, an order for tuition from October 13, 1999, when M.L.G. sought to enroll B.G. in the Absecon school district, to December 2, 1999, the date upon which she acquired legal custody, is not warranted.[1]

Accordingly, for the reasons stated herein, the Petition of Appeal is hereby DISMISSED.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 20 2000

[1] The record reveals that M.L.G. applied to the Superior Court of New Jersey for custody of B.G. on November 17, 1999.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

237-00
SEE ALSO
238-00

SHEILA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 1155-99

AGENCY DKT. NO: 498-11/98

SHEILA WHITE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Charles I. Auffant, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 24, 2000 Decided: May 31, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 12, 1999, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5-31-00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

6/6/00
DATE

Debbie Astmanis/pp
DEPARTMENT OF EDUCATION

JUN 8 2000
DATE

Mailed to Parties: J. Mazzi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

CHARLES I. AUFFANT
ATTORNEY AT LAW
661 Franklin Avenue
Nutley, New Jersey 07110
(973) 661- 4545
Attorney for Defendant Sheila White

Sheila White	:	COMMISSIONER OF EDUCATION
	:	OAL Docket No. EDUOR 11499-97N
Petitioner	:	Agency Ref. No. 425-10/97
	:	OAL Docket No. EDUOR 01155-99N
vs.		Agency Ref. No. 498-11/98
	:	
State-Operated School District of the City of of the City of Newark	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE
Respondent	:	
	:	

The State-Operated School District of the City of Newark ("Newark" or "District") and Sheila White ("White"), agree to the following items in full resolution of these matters:

WHEREAS, White challenges the basis for the District's action in withholding White's increments for the 1997-1998 and 1998-1999 school years; and

WHEREAS, the District has served White with a 90-day tenure charge notice for inefficiency; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. White agrees to submit to the District, in writing and upon execution of this Agreement, a resignation from her employment effective immediately. Said resignation shall be held in escrow by counsel for petitioner until this document has been fully executed.

2. White shall withdraw, with prejudice, the appeals filed in relation to the 1997-1998 and 1998-1999 increment withholdings, upon execution of this Agreement by the State District Superintendent, specifically OAL Docket Nos. EDUOR 11499-97N and EDUOR-01155-99N.

3. The District shall withdraw the 90-day tenure inefficiency notice against White, upon execution of this Agreement by the State District Superintendent .

4. The District and its employees shall, at all times, provide White with a neutral reference, confirming her position, dates of employment, and that her separation was due to her voluntary resignation. (attached hereto is the form which will be put in Ms. White's personnel file to accomplish this purpose.)

5. The District shall restore White's 1998-1999 withheld increment upon execution of this Agreement by the State District Superintendent.

6. White acknowledges that the payments reflected in this Agreement constitute the full financial obligation of the District with regard to her 1997-1998 and 1998-1999 increment withholdings and any appeal therefrom. White acknowledges that she shall receive no additional payments. In exchange for the above consideration, White, on behalf of herself, her heirs, successors, and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities arising from the withholding of her increments as set forth in OAL Docker No. EDUOR-11499-

97N and EDUOR-01155099 and the District's issuance of a 90 day inefficiency notice related to her employment with the District.

7. This Agreement is subject to the approval of the State District Superintendent.

8. The parties enter this Agreement voluntarily and without coercion, after consultation with their respective counsel.

Sheila White

Dated:

State-Operated School District of the City of Newark

By:

Dated:

ac

NOTICE TO FILE

Re: **ALL OUTSIDE INQUIRIES**

Ms. Sheila White was employed by the Newark Public Schools an teacher K-8 from 1985 until 2000. Her separation was due to her voluntary resignation.

Cherie L Maxwell

Cherie Maxwell
Attorney for Newark Public Schools

Charles I. Auffant
Attorney for Sheila White

OAL DKT. NO. EDU 1155-99
AGENCY DKT. NO. 498-11/98

SHEILA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Voluntary Settlement Agreement, Waiver and Release and Initial Decision of the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the settlement terms* and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 20 2000

* A review of the settlement terms indicates that the State-operated District served a 90-day tenure charge notice for inefficiency on petitioner. It is noted for the record that no tenure charges were certified to the Commissioner.

238-00
SEE ALSO
287-00

SHEILA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

July 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11499-97

AGENCY DKT. NO: 425-10/97

SHEILA WHITE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Charles I. Auffant, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 24, 2000 Decided: May 31, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 9, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5/31/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

6/6/00
DATE

Debbie Antanaitis/tp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 8 2000
DATE

J. J. Mazzi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

CHARLES I. AUFFANT
ATTORNEY AT LAW
661 Franklin Avenue
Nutley, New Jersey 07110
(973) 661- 4545
Attorney for Defendant Sheila White

Sheila White	:	COMMISSIONER OF EDUCATION
	:	OAL Docket No. EDUOR 11499-97N
Petitioner	:	Agency Ref. No. 425-10/97
	:	OAL Docket No. EDUOR 01155-99N
vs.		Agency Ref. No. 498-11/98
	:	
State-Operated School District of the City of of the City of Newark	:	VOLUNTARY SETTLEMENT AGREEMENT, WAIVER AND RELEASE
Respondent	:	
	:	

The State-Operated School District of the City of Newark ("Newark" or "District") and Sheila White ("White"), agree to the following items in full resolution of these matters:

WHEREAS, White challenges the basis for the District's action in withholding White's increments for the 1997-1998 and 1998-1999 school years; and

WHEREAS, the District has served White with a 90-day tenure charge notice for inefficiency; and

WHEREAS, the parties agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation; and

WHEREAS, the parties further agree that the terms of this agreement will not present any risk of harm to students and/or the safe operation of the school district.

NOW, THEREFORE, the parties agree as follows:

1. White agrees to submit to the District, in writing and upon execution of this Agreement, a resignation from her employment effective immediately. Said resignation shall be held in escrow by counsel for petitioner until this document has been fully executed.

2. White shall withdraw, with prejudice, the appeals filed in relation to the 1997-1998 and 1998-1999 increment withholdings, upon execution of this Agreement by the State District Superintendent, specifically OAL Docket Nos. EDUOR 11499-97N and EDUOR-01155-99N.

3. The District shall withdraw the 90-day tenure inefficiency notice against White, upon execution of this Agreement by the State District Superintendent .

4. The District and its employees shall, at all times, provide White with a neutral reference, confirming her position, dates of employment, and that her separation was due to her voluntary resignation. (attached hereto is the form which will be put in Ms. White's personnel file to accomplish this purpose.)

5. The District shall restore White's 1998-1999 withheld increment upon execution of this Agreement by the State District Superintendent.

6. White acknowledges that the payments reflected in this Agreement constitute the full financial obligation of the District with regard to her 1997-1998 and 1998-1999 increment withholdings and any appeal therefrom. White acknowledges that she shall receive no additional payments. In exchange for the above consideration, White, on behalf of herself, her heirs, successors, and assigns, hereby fully releases and forever discharges the District, its representatives, agents, officers and employees, for any and all actions, claims and liabilities arising from the withholding of her increments as set forth in OAL Docker No. EDUOR-11499-

97N and EDUOR-01155099 and the District's issuance of a 90 day inefficiency notice related to her employment with the District.

7. This Agreement is subject to the approval of the State District Superintendent.

8. The parties enter this Agreement voluntarily and without coercion, after consultation with their respective counsel.

Sheila White

Dated:

State-Operated School District of the City of Newark

By:

Dated:

NOTICE TO FILE

Re: **ALL OUTSIDE INQUIRIES**

Ms. Sheila White was employed by the Newark Public Schools an teacher K-8 from 1985 until 2000. Her separation was due to her voluntary resignation.

Cherie L Maxwell

Cherie Maxwell
Attorney for Newark Public Schools

Charles I. Auffant
Attorney for Sheila White

OAL DKT. NO. EDU 11499-97
AGENCY DKT. NO. 425-10/97

SHEILA WHITE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Voluntary Settlement Agreement, Waiver and Release and Initial Decision of the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the settlement terms* and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 13 2000

Date of Mailing: JUL 20 2000

* A review of the settlement terms indicates that the State-operated District served a 90-day tenure charge notice for inefficiency on petitioner. It is noted for the record that no tenure charges were certified to the Commissioner.

239-00

C.K., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

July 24, 2000

OAL DKT. NO. EDU 4163-00
AGENCY DKT NO. 169-5/00

C.K., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

On June 20, 2000, the record and a notice of withdrawal of the Motion for Emergent Relief in this matter were transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2.

Prior to his review of the notice of withdrawal, the Commissioner received a letter from petitioner on July 3, 2000, seeking to vacate the above-mentioned withdrawal of her Motion for Emergent Relief.

Accordingly, the Commissioner remands this matter to OAL for determination of the effect of petitioner's letter of July 3, 2000, and for further proceedings, as appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 24 2000

Date of Mailing: JUL 24 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

240-00

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, BOBBETTE TRIBBLE AND MARTHA CAIN,	:	DECISION
RESPONDENTS.	:	

July 24, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 9155-98

AGENCY DKT. NO: 195-6/98

TEANECK BOARD OF EDUCATION,

Petitioner,

v.

EDGEWATER BOARD OF EDUCATION,
BOGOTA BOARD OF EDUCATION,
HACKENSACK BOARD OF EDUCATION,
BOBBETTE TRIBBLE and MARTHA CAIN,

Respondents.

Joanne L. Butler, Esq., for petitioner
(Schenck, Price, Smith & King, attorneys)

Greg K. Vitali, Esq., for respondent, Edgewater BOE
(Lindabury, McCormick & Estabrook, attorneys)

Richard A. Brovarone, Esq., for respondent, Bogota BOE

Cherie L. Maxwell, Esq., for respondent, Hackensack BOE
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Bobbette Tribble, *pro se*, respondent

Martha Cain, *pro se*, respondent

Record Closed: May 17, 2000 Decided: June 7, 2000

BEFORE **THOMAS E. CLANCY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 24, 1998, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement, the counterparts of which have been executed by the parties.

Having reviewed the contents of the attached Stipulation of Settlement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6/7/00
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

Receipt Acknowledged:

6/9/00
DATE

D Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 2000
DATE

J. Mazzi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 9155-98
AGENCY DKT. NO. 195-6/98

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, BOBBETTE TRIBBLE AND MARTHA CAIN,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the Initial Decision and the parties' signed Stipulation of Settlement and Mutual Dismissal have been reviewed. Because there is an absence of sufficient specific terms in the parties' settlement agreement so as to permit the Commissioner's review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 24 2000

Date of Mailing: JUL 25 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

241-00

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

July 24, 2000

OAL DKT. NO. EDU 6975-99
AGENCY DKT. NO. 186-7/99

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and Stipulation of Settlement and Dismissal, returned by the Office of Administrative Law, have been reviewed. This agency being a party to the matter, the Stipulation of Settlement and Dismissal is deemed the final decision pursuant to *N.J.A.C.* 1:1-19.2(b) and (c), and the case is accordingly dismissed.

COMMISSIONER OF EDUCATION

JUL 2[illegible] 2000 Date ofDecision

JUL 27 2000 Date of Mailing

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Respondent
South Amboy Board of Education

RECEIVED
STATE OF NEW JERSEY
2001 JAN -2 A 11: 34

THE SOUTH RIVER BOARD OF EDUCATION, Petitioner, v. NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE SOUTH AMBOY BOARD OF EDUCATION, Respondents.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION BEFORE THE COMMISSIONER OF EDUCATION AGENCY REFERENCE NO. 186-7/99 OAL DOCKET NO. EDUOS 06975-99S **STIPULATION OF SETTLEMENT AND DISMISSAL**

This Stipulation of Settlement and Dismissal is entered in between Petitioner South River Board of Education ("South River Board") with principal offices at 15 Montgomery Street, South River, New Jersey 08882, Respondent South Amboy Board of Education ("South Amboy Board"), with principal offices at 240 John Street, South Amboy, New Jersey 08879, and the New Jersey State Department of Education ("Department"), with principal offices at 100 Riverview Executive Plaza, Route 29, Trenton, New Jersey 08625-0500.

WITNESSETH

WHEREAS, on or about 1-5, 1999, the South River Board filed a Petition of Appeal before the Commissioner of Education disputing the determination of the Department that the South River Board was responsible for the 1998-1999 tuition costs

for Michael Koehlepp, a student who was incarcerated on October 15, 1998; and

WHEREAS, the Petition alleged that the South Amboy Board was the responsible board; and

WHEREAS, by correspondence dated July 8, 1999, the Department notified the South River Board that the South Amboy Board was an indispensable party to this matter and therefore needed to be named as a respondent; and

WHEREAS, on or about July 21, 1999, the South River Board filed an Amended Petition naming the South Amboy Board as a respondent; and

WHEREAS, the aforesaid parties desire to settle this dispute inasmuch as the documents exchanged during discovery, including an Affidavit by Rosalie Koehlepp, mother of Michael Koehlepp, indicate that Ms. Koehlepp in fact resided in South Amboy on October 15, 1998.

NOW, THEREFORE, the parties agree as follows:

1. The South Amboy Board acknowledges that Rosalie Koehlepp resided in South Amboy on October 15, 1998, and that pursuant to the applicable statutes and regulations, the South Amboy Board is responsible for Michael Koehlepp's tuition costs for the 1998-1999 school year.

2. The Department will deduct $14,780.00 from the South Amboy Board's State Aid for the 2000-2001 school year in full payment of Michael Koehlepp's tuition costs for the 1998-1999 school year.

3. The Department will reimburse the South River Board in the amount of $14,780.00 as repayment for the tuition costs previously deducted in error from the South River Board's State Aid for payment of Michael Koehlepp's tuition costs for the 1998-1999 school year.

4. Upon the full execution of this Stipulation of Settlement and Dismissal, the South River Board of Education will withdraw its Amended Petition with prejudice.

SOUTH RIVER BOARD OF EDUCATION ATTEST:

Signature
John H. Ambrogi
Print Name

Superintendent of Schools
Title

April 10, 2000
Date

Signature
DAYTON F. FAUNCE
Print Name

Board Secty/Bus Admin
Title

April 10, 2000
Date

SOUTH AMBOY BOARD OF EDUCATION ATTEST:

Signature
Cindy A Zammit
Print Name

President
Title

5/8/00
Date

Signature
KENNETH J. KOLKOSZKA
Print Name

BD. SECRETARY
Title

5.8.00
Date

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION ATTEST:

Signature
MELVIN L. WYNS
Print Name

DIRECTOR
Title

5/23/00
Date

Signature
Arlene G. Lutz
Print Name

Deputy Attorney General
Title

5/23/00
Date

242-00

JOYCE HOLLOWAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged respondent's determination to convert her position from full-time to part-time for the 1998-1999 academic year, and its failure to offer her the position of Technology Coordinator, which was awarded to a teacher with fewer years of experience.

The ALJ determined that petitioner was not entitled to the Technology Coordinator position because she lacked seniority in the appropriate category. The ALJ also determined that the Board was entitled to exercise its discretion in denying petitioner the position.

The Commissioner concluded that the record is insufficient to determine the appropriate certification required for the position of Technology Coordinator, or to evaluate respondent's contentions as to the requirements of the position. (*Adler* State Board decision) In addition, the Commissioner determined that the record contains insufficient information as to the endorsements held by the person who was appointed to the position of Technology Coordinator and his work history so as to enable him to appropriately consider petitioner's claims. The Commissioner therefore remanded the case to the OAL for additional fact finding.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7411-98
AGENCY DKT. NO. 342-7/98

JOYCE HOLLOWAY,
Petitioner,
v.
SADDLE RIVER BOARD OF EDUCATION,
Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

John G. Geppert Jr., Esq., for respondent Saddle River Board of Education
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: December 15, 1999 Decided: June 8, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by an art teacher who alleges respondent Saddle River Board of Education ("Board") violated her statutory rights in connection with a reduction in force. The Board reduced petitioner's assignment as an art teacher from full-time to part-time for the 1998-99 academic year. Petitioner Joyce Holloway ("Holloway") contends that she should have been offered an assignment as a technology coordinator, but that the Board gave the assignment to another teacher with fewer years of service in the district. Basically, the pleadings raise three issues: First, whether the Board violated Holloway's tenure rights. Second, whether the Board

violated her seniority rights. Third, whether the Board acted arbitrarily, capriously and unreasonably by selecting someone who has fewer academic qualifications as a computer teacher. In its defense, the Board avers that Holloway's only claim for preferred eligibility results from her actual service as an art teacher. Since Holloway never served as a technology coordinator, the Board maintains that selection of a different candidate was an appropriate exercise of its managerial prerogative.[1]

Procedural History

On July 20, 1998, Holloway filed her verified petition with the Commissioner of Education ("Commissioner"). The Board filed its answer on July 29, 1998. Subsequently, on August 12, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on November 5, 1998.[2] Both parties filed post-hearing briefs on December 3, 1999. Holloway filed a reply brief on December 10, 1999 and the Board on December 15, 1999. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the relevant facts are undisputed. **I FIND** the following facts:

Joyce Holloway began her employment for the Saddle River School District in September 1967. At the time of initial hire, she held an instructional certificate with an

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[1] Shortly after approval of the reduction in force, the Board abolished its middle school and entered into an agreement to send its sixth, seventh and eighth grade students to the Ramsey school district. Originally, Holloway joined the Ramsey Board of Education as a respondent, contending that the receiving district failed to honor its obligation to recognize and preserve her tenure and seniority rights. Prior to hearing, however, Holloway reached a partial settlement with the receiving district and withdrew whatever claims she may have against the Ramsey Board of Education.

[2] Petitioner mailed notice of the pendency of this appeal to James Furno, the district's technology coordinator, on March 30, 1999.

endorsement in art.[3] Throughout her career, Holloway's only assignment in the district was as a teacher of art. In early 1998, the Board instructed Superintendent of Schools James Dwyer to recommend areas of reduction for the upcoming budget. Due to declining enrollment in art classes, Dr. Dwyer recommended a reduction in art. Although the Board had not yet decided to send it students to Ramsey Middle School, it was actively engaged in investigating that possibility. On May 4, 1998, Dr. Dwyer gave Holloway written notice that the Board was not offering her reemployment beyond June 30, 1998 until its staffing needs had been clarified.

By resolution adopted June 16, 1998, the Board voted to reduce Holloway's employment to a 4/10th position for the 1998-99 school year. Holloway sustained a salary loss of approximately $45,000 and also lost paid health benefits worth approximately $6,800. She had thirty-one years of service in the district at the time of the reduction. The school administration placed Holloway on a preferred-eligibility list for rehire as an art teacher.

Meanwhile, Holloway took graduate-level computer courses at the New York Institute of Technology and received a Master of Science Degree in instructional technology on June 19, 1996. She graduated "with distinction" and maintained a 3.9 grade point average. The school district had been supportive of her endeavor and reimbursed her for a portion of the tuition costs. Afterwards, in or about August 1998, Holloway obtained an endorsement in elementary education.[4] However, she did not

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[3]There are three types of certificates, namely instructional, administrative and educational services. *N.J.A.C.* 6:11-2.3. "Special endorsements" on the certificate coincide with educational subjects or assignments that share common traits. *N.J.A.C.* 6:11-6.1. For example, an art teacher is required to hold an instructional certificate with an endorsement in art. *Dennery v. Bd. of Educ.*, 131 *N.J.* 626, 635 (1993). An endorsement in art "authorizes the holder to teach art in all public schools." *N.J.A.C.* 6:11-6.2(a)(2).

[4] An endorsement in elementary education "authorizes its holder to serve as elementary school teacher in grades nursery though eight in all public schools" and "to teach common branch subjects such as reading, writing, arithmetic, and spelling in the secondary school." *N.J.A.C.* 6:11-6.2(a)(6).

possess the elementary endorsement at the time of the reduction and had never taught under that endorsement.[5]

Saddle River School District had a preexisting job title known as "technology coordinator." Insofar as the record reflects, no particular qualifications are required for the job, other than an instructional certificate.[6] Nonetheless, prior holders of the title have been elementary classroom teachers holding an endorsement in a substantive academic subject. Judith Kuhn, the immediate predecessor in the title, held an instructional certificate with endorsements in elementary education and in mathematics. In late May or early June 1998, Kuhn resigned from employment by the Board to accept a job in the private sector. Thus, a vacancy arose in the title of technology coordinator as of September 1998

A written job description for technology coordinator specifies that its duties include: training staff members on computer hardware and software; developing lessons that integrate classroom curriculum with technology; overseeing the technology budget; and troubleshooting problems with lab and classroom computers. Dr. Dwyer emphasized the importance of being able to help students transfer knowledge acquired in the computer laboratory to the classroom.

To fill the vacancy, Dr. Dwyer selected James Furno, who held an instructional certification with endorsements in English, social studies and secondary reading. Having come to the district in April 1977, Furno had 21.21 years of seniority.[7] He had been a classroom teacher at various grade levels in the district. More importantly, he had practical experience integrating computer instruction into his own classroom and had helped other teachers with computers in their classrooms. Additionally, Furno had expressed interest in an assignment involving computers if one were to become

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[5] While Holloway had previously taught at both the elementary and the secondary level, she did so solely as an art teacher.

[6] The title "technology coordinator" is not recognized in the Department's rules. Local school districts are required to submit an unrecognized title to the county superintendent of schools "for determination of the appropriate certification." *N.J.A.C.* 6:11-3.3(b). It is unclear whether the Board followed this procedure.

[7] This seniority calculation includes credit for time spent in the military.

available. While he had unspecified "training" in computer use, he does not hold any formal degree in computer instruction. Like Holloway, Furno had no prior service as a technology coordinator.

At the commencement of the 1999-2000 school year, the Board again offered to employ Holloway in a 4/10th capacity as an art teacher. By then, however, she had reached a settlement with the Ramsey Board of Education and had accepted a full-time teaching position as an art teacher in Ramsey. While the settlement papers were not made part of the record, counsel represents that the Ramsey school board did not recognize her tenure status.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board was free to choose whichever qualified teacher it wanted for the title of technology coordinator.

Important conceptual differences exist between "tenure" and "seniority." Tenure is a status designed to protect teachers "from dismissal for unfounded, flimsy or political reasons," *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 73 (1982), and to afford teachers "a measure of security in the ranks they hold after years of service." *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Its benefits are conferred by statute rather than contract. *Shelko v. Mercer Cty. Special Servs Sch. Dist.*, 97 *N.J.* 414 (1984). Pursuant to *N.J.S.A.* 18A:28-5, a teacher acquires tenure by (1) working in a position for which a teaching certificate is required; (2) holding the appropriate certificate; and (3) serving the requisite period of time. *Spiewak*, at 74. Thus, tenure is achieved by a teaching staff member who serves a probationary period either in a specifically designated "position," such as teacher, or in "positions which require them to hold appropriate certificates[.]" *Ellicott v. Frankford Bd. of Educ.*, 251 *N.J. Super.* 342, 347 (App. Div. 1991). *Accord*, *Howley v. Ewing Bd. of Educ.* 6 *N.J.A.R.* 509 (Comm'r Dec. 20, 1982. Having acquired tenure, a teacher may not be dismissed except for cause after certification of tenure charges, *N.J.S.A.* 18A:6-

10, or as the result of a reduction in force for reasons of economy and efficiency. *N.J.S.A.* 18A:28-9.

As distinguished from tenure, seniority accrues in specific "categories" of certification fixed by regulation. *N.J.S.A.* 18A:28-10, -12. *See N.J.A.C.* 6:3-5.1. Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368 (1983). Hence, seniority must be regarded as a consequence of tenure.

Both Holloway and Furno have attained tenure in the position of teacher. Achievement of tenure, however, does not confer greater rights to one tenured teacher over another. Cases cited by Holloway in support of her tenure claim involve disputes between *tenured* and *nontenured* teachers. In *Bednar v Westwood Bd. of Educ.*, 221 *N.J. Super.* 239 (App. Div. 1987), for example, the court held that an art teacher's statutory tenure rights prevented the school district from reducing his hours while retaining a full-time nontenured art teacher. Similarly, in *Capodilupo v. West Orange Twp. Bd. of Educ.*, 218 *N.J. Super.* 510 (App. Div. 1987), the court ruled a tenured teacher who taught physical education is entitled to retention as against a nontenured teacher with the same certification. Recently, in *Ellicott,* the court reiterated that a teaching staff member with an educational-services certificate had preference over a nontenured teaching staff member in all positions for which her certificate qualified her. None of these cases, however, address priority between teachers who both possess tenure, which must be determined in accordance with the seniority rules.

Seniority is measured by years of employment in specific job categories, "which are normally narrower than the subject fields which are endorsed on teachers' certificates." *Bednar,* 221 *N.J. Super.* at 242. Historically, teachers in New Jersey could obtain seniority credit irrespective of actual experience. Changes in the seniority regulations adopted in 1983 emphasize that "actual experience in particular positions should be the critical determinant in awarding seniority." *Lichtman*, 93 N.J. at 368. The essential purpose of the new regulations was "to limit each teacher's seniority entitlement in a district to those subject fields or levels at which the teacher has actually

taught." *Revision of Seniority Regulations: A Position Statement of the New Jersey Department of Education*, at 3 (June 1983). Current regulations clarify that any person holding an instructional certificate with subject-area endorsements shall have seniority within the secondary level "only in such subject area endorsement(s) under which he or she has actually served," *N.J.A.C.* 6:3-5.1(l)(17)(i), or, if a position at the elementary level requires a special subject field endorsement, "only in the elementary category and only for the period of actual service under such . . . special subject field endorsement." *N.J.A.C.* 6:3-5.1(l)(18)(ii).

Holloway argues that she should have been offered the technology-coordinator assignment because she holds an instructional certificate and has more years of elementary seniority in the district. State regulations do not presently prescribe any particular endorsement for persons qualified to teach computer-related subjects. A data-processing endorsement allows its holder to teach keypunching, computer operation and programming, *N.J.A.C.* 6:11-6.2(a)(4)(iii), although it is not the only endorsement relevant to the expanding field of computers. While the State Board of Education has noted that a specific endorsement may be necessary when a computer course involves highly advanced and technologically sophisticated skills, it has not yet determined by rule the specific endorsement it had in mind. *Taxman v. Piscataway Twp. Bd. of Educ.*, 93 *N.J.A.R.* 3d (EDU) 189, 191 (Comm'r Feb. 8, 1993). Many districts treat computer instruction as part of the mathematics department and require computer teachers to hold a mathematics endorsement. *E.g.,Taxman*, *supra*. Apparently Saddle River did not specify any endorsement, although traditionally in the district the title of technology coordinator has been occupied by an elementary-classroom teacher holding an endorsement in an academic area of instruction.

Some support for Holloway's position may be derived from *Brueck v. Fairview Bd. of Educ.*, 97 *N.J.A.R.*2d (EDU) 283 (Comm'r Jan. 10, 1997), wherein a teacher with more seniority in music had greater entitlement to a computer assignment than a teacher with less seniority in elementary education. *Brueck* is readily distinguishable, however, in that the elementary teacher had no seniority whatsoever in the secondary category, and thus lacked any colorable claim to computer courses taught at that level.

Brueck, at 288. In addition, the legal analysis failed to consider the regulatory language of the regulation limiting seniority to "the subject area endorsement(s) under which he or she has actually served."

Holloway served under an endorsement as teacher of art and her assignment was exclusively as an art teacher. Moreover, her duties as an art teacher, which relate to teaching art to students, are totally dissimilar from those of a technology coordinator, which involve training other teachers in computer use, integrating computer technology into the classroom and troubleshooting computer problems. Therefore, Holloway's seniority rights are limited to the category of art teacher.

Although Holloway claims seniority in the general category of "elementary" teacher, her seniority category is much narrower. She did not obtain her elementary-education endorsement until after the reduction had occurred. A teacher's preferred reemployment rights are based upon the scope of the teaching certificate and endorsement held on the date of the layoff determination. *Francey v. Bd. of Educ.*, 286 *N.J. Super.* 354 (App. Div. 1996). Accordingly, the Board acted properly by placing Holloway on the preferred-eligibility list in the category of art teacher. *See, e.g., Rieder v. Caldwell-West Caldwell* Bd. of Educ., EDU 7609-97 (Jan. 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html, *adopted* (Comm'r March 10, 1999), *aff'd* (St. Bd. July 7, 1999) http://www.state.nj.us/njded/legal/index.html (Spanish teacher had preferred eligibility rights to the position of teacher of Spanish).

Lastly, Holloway urges that the Board acted arbitrarily, capriciously and unreasonably by not selecting the teacher who has the best qualifications in computer education. In general, "courts cannot supplant educators." Judges must refrain from interfering with the judgments of professional educators, "unless those judgments are palpably arbitrary or depart from governing law." *Dennery v. Bd. of Educ.*, 131 *N.J.* 636, 643 (1993). Proofs amply demonstrate that the Board wanted an elementary-classroom teacher with an academic specialty and that Furno, who fit the bill, had achieved notable success using computers in a classroom setting. Whether or not

someone else might have chosen otherwise, it cannot be said that the Board acted arbitrarily in selecting Furno for the job.

Order

It is **ORDERED** that the relief requested by Holloway is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 8, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6-12-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 15 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

AI

APPENDIX

List of Witnesses

1. Joyce Holloway, former art teacher, Saddle River school district

2. Dr. James Dwyer, former superintendent of schools, Saddle River school district

List of Exhibits

No.	Description
J-1	Copy of memorandum to Joyce Holloway from James J. Dwyer, dated May 4, 1998
J-2	Copy of memo to Joyce Holloway from Allan C. Reiffe, dated June 22, 1998, with attachments
J-3	Excerpt of the seniority list of the Saddle River public school district, dated June 30, 1998
J-4	Copy of job description to technology coordinator, undated
P-1	Copy of letter to Dr. Dwyer from Joyce V. Holloway, dated May 14, 1998, with attachments
P-2	Copy of calculation of damages, undated
P-3	Copy of letter to James Furno from Alfred E. Maurice, Esq., dated March 29, 1999, with attached certification of service

P-4 (a) Copy of petitioner's first set of interrogatories and document production requests, undated

(b) Copy of respondent's answers to petitioner's interrogatories and productions of documents, undated

OAL DKT. NO. EDU 7411-98
AGENCY DKT. NO. 342-7/98

JOYCE HOLLOWAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner cannot, at this time, accept the findings and conclusions of the ALJ. Rather, the Commissioner finds that, based on a recent decision of the State Board of Education, it is necessary to remand this matter to determine the appropriate endorsement, if any, for the position of Technology Coordinator; an assignment which petitioner contends she should have been offered by virtue of her seniority in the District.

In *Florence Adler v. Board of Education of the Township of Shamong, Burlington County*, decided by the State Board of Education July 7, 2000, the State Board reviewed the curriculum guide relative to the Computers/Technology Course to which the petitioner therein claimed an entitlement. The Board noted:

> Given the character of the computer course designed by the district, elementary certification was appropriate for this assignment. In so concluding, we stress that the fact that there is no specific endorsement for computer courses does not mean that any instructional certification will qualify an individual to teach such courses in all cases. Rather, individuals must possess certification that is appropriate to the assignment and, as here, that certification must be determined by careful reference to the particular curriculum that the district has adopted in a given case.
>
> (Slip Opinion at 4-5)

In the instant matter, the record does not include substantive information about the district's curriculum, such as a curriculum guide; it merely includes a "job description" for the position of technology coordinator which does not specify needed credentials or job experience and lists eight duties "[i]n addition to other duties enumerated in the Saddle River Board of Education's policy manual" which will be performed by the Technology Coordinator.[1] (Exhibit J-4) Thus, the Commissioner can neither assess the certification required for the disputed issue, nor evaluate the Board's claim that the position of Technology Coordinator requires "the ability to integrate computer technology with substantive instructional academic subject areas in order to teach teachers how to perform these tasks in their own classrooms." (Board's Proposed Findings of Fact and Conclusions of Law at 4, ¶ 13)[2]

---

[1] Those duties are:
1. Train staff members on computer hardware and software.
2. Develop lessons that integrate classroom curriculum with technology.
3. Oversee the technology budget.
4. Preview new software and hardware.
5. Attend technology conferences and workshops with the support of the Board of Education.
6. Troubleshoot problems with lab and classroom computers.
7. Keep administrators informed about technology activities and problems.
8. Create long-term and short-term technology plans and goals for the school with the help and support of the administration. (Exhibit J-4)

[2] The Commissioner also notes that the Board apparently did *not* require the holder of the position to possess an elementary education endorsement, and that the record contains no evidence that the Technology Coordinator position, an unrecognized title, was approved by the County Superintendent of Schools, as per *N.J.A.C.* 6:11-3.3. That approval process would include submission of a detailed job description and a determination of the appropriate certification and title for the position. *N.J.A.C.* 6:11-3.3.

Additionally, the record provides an inadequate account of James Furno's endorsements and work history prior to the date of the reduction in force. Specifically, the Commissioner seeks clarification as to the reading endorsement Furno holds.[3] The record on remand should identify: 1) the title of the endorsement and, if no longer recognized, what it authorized the holder to teach; 2) what grade levels Furno was actually teaching under that endorsement as an "elementary teacher of secondary reading," (Exhibit J-3); and 3) what years he taught under that endorsement.

Accordingly, in order to fairly consider petitioner's claim, the Commissioner remands this matter to OAL for expansion of the record and additional fact finding in accordance herewith.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 27 2000

Date of Mailing: JUL 27 2000

[3] Although the ALJ identifies it as a "secondary reading" endorsement (initial decision at 4), the Board refers to it simply as an endorsement in "Reading." (Board's Proposed Findings of Fact and Conclusions of Law at 19)

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

243-00

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY KOMOROWSKI,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	

SYNOPSIS

Petitioning District certified tenure charges of unbecoming conduct against respondent teacher. The District sought respondent's dismissal from his teaching position, alleging that respondent engaged in a series of discussions with students in his fifth-grade Gifted and Talented technology course, at the beginning of several classes, concerning methods of torturing and killing student L.S. The District also alleged that respondent brought to school a document showing how to purchase guns over the Internet.

The ALJ determined that the District substantiated Charges 1 through 10, and, in part, Charge 11. The ALJ concluded that respondent had, on several occasions during class time, engaged in discussions with students of methods of torturing and killing student L.S. The ALJ also determined that respondent had brought an advertisement selling guns to school and showed it to an administrator. The ALJ concluded that such conduct encouraged an environment in which violence was considered acceptable and fostered a moral climate of disrespect for life and bodily integrity. The ALJ recommended a penalty of dismissal, noting that, while respondent did not intend to harm L.S. or incite violence among his students, his conduct in condoning and directing the discussions of violence evidenced a lack of necessary self-control and restraint mandated by his position.

The Commissioner affirmed the decision of the ALJ, concurring that respondent "breached his responsibilities as a teacher and engaged in conduct unbecoming a professional teaching staff member." The Commissioner ordered respondent dismissed from his tenured teaching position as of the date of this decision and directed a copy of this decision be forwarded to the State Board of Examiners for action as it deems appropriate.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9993-99
AGENCY DKT. NO. 275-9/99

IN THE MATTER OF THE TENURE HEARING OF HENRY KOMOROWSKI, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Charlotte Kitler, General Counsel, for State-Operated School District of Jersey City, Hudson County, petitioner

Arnold M. Mellk, Esq., for Henry Komorowski, respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: May 5, 2000 Decided: June 8, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the State-Operated School District of Jersey City, Hudson County ("District"), certified tenure charges of conduct unbecoming a teacher and unprofessional conduct against respondent, Henry Komorowski. The District submits that Komorowski's conduct warrants his dismissal from employment. Respondent denies any charges of wrongdoing.

On September 27, 1999, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On October 13, 1999, a prehearing conference was held pursuant to *N.J.A.C.* 1:1-13.1. Hearings were held on January 19 and 20 and February 4, 2000. The parties filed post-hearing briefs and the record closed on May 5, 2000.

THE CHARGES

The District filed eleven charges of unbecoming conduct against Komorowski. The charges are summarized as follows:

1. Komorowski has been employed by the Jersey City School District as a teacher of industrial arts, at Public School No. 27, since November 1, 1994.

2. During the 1998-99 school year, Komorowski was assigned to teach several courses, including a technology course for fifth-grade students. The fifth-grade technology course was scheduled for one period weekly for two marking periods. One of the fifth-grade technology courses for the latter two marking periods of the 1989-99 school year included students in the Gifted and Talented program.

3. In conducting the fifth-grade technology course for the Gifted and Talented program, Komorowski began the class by discussing with certain students ways of torturing and/or killing one particular male student, L.S. The discussions included the following means of torture and/or killing: cutting the boy's body apart with a saw; shooting the boy with a gun or pistol; using a flamethrower on the boy; sticking a sword into the boy; guillotining the boy; clubbing the boy to death; and drawing and quartering him.

4. The discussions of ways to torture and/or kill the student, L.S., took place at the beginning of class, for approximately fifteen minutes. These

discussions continued for the duration of the fifth-grade technology course, through early June 1999. At that time, L.S. told his mother of the situation and the mother brought the matter to the attention of District officials.

5. When questioned by District officials, Komorowski admitted that he and students in L.S.'s fifth-grade technology class had engaged in discussing ways of torturing and/or killing L.S.

6. When questioned by the school principal about discussion of ways to torture and/or kill L.S., Komorowski admitted that he had used L.S. as an "example." He simply indicated, in a letter of June 8, 1999, that from that time on, L.S. "[would] not be used as an example during classroom discussions."

7. Komorowski admitted that he himself had suggested certain ways of killing L.S., including cutting the boy's head off with a guillotine; dissolving his body in bleach; and tying the boy's arms and legs to four horses, beating the horses and making them run in four different directions, thereby ripping the boy apart.

8. Komorowski further admitted that he had intentionally conducted the discussions of ways of torturing and/or killing L.S. He stated that the discussions were intended to get the attention of the students and put them in a relaxed mode.

9. Mr. Komorowski has also produced a document showing how to purchase guns over the Internet. Mr. Komorowski's students have access to computers and the Internet. Mr. Komorowski produced the gun advertisement at P.S. 27 during the week of April 26, after spring break and after the gun killings at Columbine High School in Littleton, Colorado, on April 20, 1999, which made national news.

10. Mr. Komorowski has been entrusted with the responsibility of teaching and informing students, which means teaching them not only specific course content but also sufficient social, ethical and behavioral standards to enable the students to become good citizens in society.

11. Mr. Komorowski, through his actions in conducting and condoning class discussions of ways to torture and/or kill a particular student in his class as well as through his distribution of an advertisement for the purchase of guns, has encouraged an environment in which violence is considered acceptable and has fostered a moral climate of disrespect for life and bodily integrity. His actions show tolerance, and even support, for means of inflicting bodily harm. Mr. Komorowski, through these actions, has demonstrated a callous indifference to the health, welfare and safety of his students and a gross disregard of the proper standards of civilized behavior to be impressed upon students. Mr. Komorowski, through these actions, has breached his responsibilities as a teacher and engaged in conduct unbecoming a professional teaching staff member, thereby warranting dismissal as an employee of the Jersey City School District.

ISSUE

If any of the tenure charges is sustained, is dismissal or a lesser penalty warranted?

SUMMARY OF EVIDENCE

The District presented the testimony of Sandra Frierson-Howard, Francis X. Dooley, Deborah S. Alexander and Linda Gallina. Respondent presented the testimony of Melinda Gallina, Mary Foley, Sandra Webster, Paul Spagnoletti, Joanne Youman and Catherine Coyle.

Sandra Frierson-Howard is the principal of P.S. 27. On June 7, 1999, Mrs. S. complained that Komorowski participated in class discussions about ways to torture and

kill her son, L.S. Howard investigated the allegations. She held a group discussion with approximately ten students who were enrolled in the class with L.S. Howard asked the students if they had discussed ways of killing L.S. The boys responded, "Yes." Further, they said that they looked forward to these discussions every week and viewed the talks as fun and held in jest. The girls remained quiet about the matter.

Thereafter, Howard informed Komorowski of Mrs. S.'s complaint. Howard asked Komorowski if he discussed ways of torturing and killing L.S., such as by using guns or pistols, dissolving his body in bleach, cutting his body parts with a chain, shooting him with machine guns, and using a flamethrower. Komorowski admitted to participating in the discussions. He responded that the discussions lasted about fifteen minutes and that they were held in "fun." They did not, however, occur during every class. Komorowski admitted that he used poor judgment in discussing these topics.

Then, Howard met with Mrs. S. and Komorowski in the assistant principal's office. Howard described Mrs. S. as upset and "heated" because her son was being "ridiculed." Howard ended the meeting and asked Mrs. S. and Komorowski to submit written statements about the incident. Mrs. S. submitted P-1 and Komorowski submitted P-2.

Next, Howard reported the matter to her supervisor, Francis X. Dooley. Dooley is the assistant superintendent of schools and has been employed with the District for twenty-six years. After Dooley met with Howard, he spoke with Mrs. S. and reassigned L.S. to a computer class. Thereafter, Dooley met with Howard and Komorowski. Dooley asked Komorowski whether he discussed torturing and killing L.S. by dissolving him in bleach, using a chain saw, guillotining the boy, and using a wood chipper. Komorowski admitted that he participated in the discussions. Komorowski described the discussions as "silly major" or "major silly." They were a way to get the students' attention. Komorowski conceded that he used poor judgment.

Thereafter, on June 11, 1999, Komorowski and his union representative met with assistant superintendent Dr. Deborah S. Alexander and Dooley. They discussed the

same items that were raised in the prior meetings with Howard and Dooley. Alexander asked Komorowski if he discussed in the classroom ways of torturing and killing L.S. Komorowski admitted that he participated in the discussions.

Henry Komorowski candidly testified about the meetings that he attended with school administrators. During his meeting with Alexander, Komorowski "viewed" Mrs. S.'s letter, P-1. The letter states in part:

> Dear Mrs. Frierson-Howard:
>
> On the evening of Friday, June 4, 1999, my son [L.S.] informed me . . . that during his Technology class, his teacher Mr. Komorowski and his classmates were discussing ways to kill him. . . . He said that for many weeks and at every Friday class, the first topic of discussion was always various ways that he could be tortured and killed. . . .
>
> [L.S.] said Mr. Komorowski had come up with the idea of putting his body through a wood chopper and having his head cut off with the guillotine ("a quick kill and fairly painless"). . . .
>
> I pressed [L.S.] for other ways he had heard over the weeks that he could be killed. Here is a partial list of what he could remember:
>
> - Dissolving his body in bleach
> - Cutting his body apart with a chain saw or rotary saw
> - Shooting him with machine guns, pistols and shotguns
> - Using a flamethrower
> - Clubbing him to death
> - Sticking him with a sword
> - Cutting his body with an axe.
>
> [P-1.]

Komorowski prepared a response to the allegations contained in P-1, which states in part:

> I like to link Applied Technology topics to regular courses of study as a way of supporting classroom teacher efforts in math, science, and social studies.
>
> On about ½ dozen occasions during 3rd and 4th marking periods, the 5th-grade G&T class was brought into planned or sometimes spontaneous presentations.
>
> Situation: According to [L.S.]'s mother [Mrs. S.] on June 7, [L.S.] was uncomfortable and later became distressed over some spontaneous presentations during my class.

> I do acknowledge that I used [L.S.] as a character example. He was always responsive, spontaneous, and seemed to enjoy the attention. At no time did he express that he did not want to be included.
>
> My Reaction: As a result of the meeting of Mrs. Frierson-Howard, [Mrs. S.], and myself, [L.S.] will not be used as an example during classroom discussions.
>
> [P-2.]

Komorowski denied any wrongdoing. He maintained that the charges were a distortion of what occurred during class and that the discussions were taken out of context. He described the classroom situation. Generally, the students entered the room, placed their belongs, *e.g.*, coats and book bags, into closets, and prepared for class. Usually the boys were the first students to take their seats. While they waited for the lesson to begin they would engage in "quiet talk" or "pre-class chatter." Once or twice, the students initiated pre-class chatter involving L.S. They were cartoon-type stories that were presented as friendly, silly imagery. L.S. actively participated in the discussions.

Komorowski maintained that the discussions were spontaneous and tied to the curriculum. For example, the discussion about bleach flowed from a demonstration where a turtle had just eaten some food on a lab table. This learning experience involved biology, environment and chemistry. Komorowski discussed the nature and size of germs and how various public buildings such as hospitals and restaurants deal with the germ problem. He then used bleach to clean the table and explained how it dissolved germ presence. "I said, if [L.] fell into one of these tanks he could be dissolved." This demonstration lasted about fifteen minutes.

The guillotine discussion was also spontaneous. As the students entered the classroom, Komorowski overheard the boys saying, "Let's use a flamethrower or let's shoot him with a machine gun or pistol." Komorowski interrupted the discussion and addressed the boys, saying:

> What are you doing? Stop. What is this, the French Revolution or something, we're trying to get rid of enemies of the state . . . the conversation is stopped. The French Revolution, at least they had a scientist, I mean [L.] can be our famous scientist, Lavoisier, I said. Well, the French Revolution was kind of perverse because they were trying to

> kill so many people that it got disgusted with the old ways and a guy named Guillotin developed the machine called the guillotine to chop people's heads off very nicely. And supposedly painlessly. So, if [L.] were a famous scientist in the French Revolution because you guys can all be scientists because you're very bright and we put his head in the guillotine he'd be like Lavoisier.

The discussion continued with Komorowski telling the class that drawing and quartering was common during the time of the French Revolution and was used to cause pain. On the other hand, the guillotine was painless. He then began the scheduled lesson.

Komorowski also testified about the charge concerning the advertisement to purchase guns over the Internet. He was concerned about easy access to guns over the Internet. Therefore, he conducted a search on his home computer and found an advertisement for gun sales. He showed the advertisement to the English teacher, Mrs. Foley, and the assistant principal, Mrs. Spagnoletti. He suggested that "Banning of Internet Gun Sales" might be an excellent topic for the eighth-grade monthly writing prompt. Also, the best essays could be sent to the students' congressmen. Spagnoletti rejected the idea as "too hot" for the students' grade level.

FINDINGS OF FACT

Based on the evidence, I **FIND** as **FACT**:

1. Since November 1, 1994, Komorowski has been employed by the Jersey City School District as a teacher of industrial arts/applied technology and assigned to Public School No. 27.

2. Komorowski acquired his teaching certificate through the alternative route.

3. During the 1998-99 school year, Komorowski was assigned to teach several courses, including a technology course to fifth-grade students.

4. During the fifth-grade technology class, Komorowski participated in discussions with certain students about ways of torturing and/or killing one

particular male student, L.S. The discussions included cutting the boy's body apart with a saw, shooting him with a gun or pistol, using a flamethrower on him, sticking a sword into him, guillotining him, clubbing him to death, and drawing and quartering him.

5. Komorowski showed an administrator a document depicting directions for purchasing guns over the Internet.

DISCUSSION AND CONCLUSIONS

Based on the whole of the evidence, I **CONCLUDE** that the District has sustained tenure charges 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 contained in the Statement of Charges. I **CONCLUDE** that the District has sustained in part tenure charge 11.

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. Thus, tenured employees are protected "in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control." *In re Maratea*, 1966 *S.L.D.* 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee that may help to explain the situation. *In re Romanoli*, 1975 *S.L.D.* 352.

Petitioner has the burden of proof to establish claims against the tenured teacher by a fair preponderance of the evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). The District charged Komorowski with unbecoming conduct and unprofessional conduct. Charges 3, 4, 5, 6, 7 and 8 are based in part on discussions

Komorowski held with students in his fifth-grade class. The allegations contained in charges 9 and 11 concern an advertisement to purchase guns over the Internet.

"Unbecoming conduct" is broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998), quoting *In re Emmons*, 63 *N.J. Super.* 136, 140 (1960). Behavior that constitutes unbecoming conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartman v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 32, 40 (App. Div. 1992), quoting *Asbury Park v. Department of Civil Serv.*, 17 *N.J.* 419, 429 (1955). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974).

Charges 3 through 8 allege that Komorowski discussed in class ways of killing and torturing a student, L.S. Although the parties dispute the frequency and the duration of the discussions, Komorowski conceded that the discussions happened. Consequently, I reject respondent's arguments that the charges are based on hearsay and "no competent evidence" and that they "ignore the record below." Komorowski testified that the discussions occurred perhaps six times and for less than five minutes each. He maintained that the discussions were spontaneous and that they were taken out of context. Sometimes they were initiated by Komorowski to divert discussions already in progress. For example, he initiated the discussion about the guillotine after he overheard the boys talking among themselves. At other times, Komorowski used L.S. as an example during the class lesson.

The record reflects that the discussions centered on L.S. and involved several boys in the class. Komorowski described the boys as aggressive and believed that L.S. enjoyed being the center of attention. Komorowski also believed that he acted appropriately in bringing up the subject of the guillotine. His intent was to redirect the

discussion among several students who were talking about ways to kill L.S., *e.g.*, using a flamethrower, chopping his head with an axe, and shooting him with a machine gun or pistol. However, Komorowski did not stop the students from talking about ways to kill L.S. Instead, he joined in the boys' discussion and redirected their attention to the guillotine. Komorowski also believed that using L.S. as an example would make him feel good about himself.

Komorowski's reasoning is flawed. His references to L.S. and the guillotine actually perpetuated an existing discussion revolving around violent behavior. I agree with petitioner that comparing a student to a person who was beheaded does not build self-esteem. Komorowski showed extreme poor judgment when he used L.S. in a description of drawing and quartering. A belief that these discussions "were harmless and appropriate instructional strategies 'should be a matter of grave concern to those who have the authority to decide on [his] continuing as a teaching staff member.'" Petitioner's Brief at 35, quoting *In re Lucarelli*, 97 *N.J.A.R.*2d (EDU) 537, 542.

Komorowski recognized the eager and inquisitive nature of the young pupils in his class. Discussions about ways to kill L.S., whether they were held among the boys themselves or with input from Komorowski, should have been stopped immediately. Instead, Komorowski used L.S. as an example. Even during a legitimate class lesson, the teacher's conduct was not appropriate. Moreover, under cross-examination Komorowski acknowledged that the topics and/or discussions about bleach and the guillotine were not specifically noted in his lesson plans for the fifth-grade Applied Technology course. Spontaneity in the classroom produces invaluable learning experience when used appropriately. However, a teacher using a student as an example in discussions of killing and torture demonstrates the exercise of extreme poor judgment, callous indifference to the safety of the students and gross disregard of the proper standards of civilized behavior expected from a teacher.

Indeed, members of the teaching profession hold a sacred position in our society. They have daily contact with their students, molding habits and nurturing young minds. Thus, teachers must be held to a high standard of conduct. Parents, law enforcement

officials and the general public expect teachers to teach students "reading, writing and arithmetic" and to convey social and moral values appropriate to the setting. Clearly, teachers influence the opinions of their pupils and, indeed, teachers are role models. Also, teachers encourage students to set goals and then help to steer them on a path to achieve those goals. Further, teachers are entrusted with the care and custody of school children. Thus, they play important roles in the community. In *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 *S.L.D.* 97, 98-99, the Commissioner recognized that:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

Thus, it is essential that teachers avoid conduct that is in violation of the public trust or that creates a justifiable impression among the public that such trust is being violated. Teachers are expected to exercise self-restraint and control.

Based on his candid testimony and demeanor, I am persuaded that Komorowski had no intent to harm L.S. or incite violence among his students. Nevertheless, a teacher may demonstrate unfitness in many ways. Conduct-related speech that is merely irresponsible or insensitive under ordinary circumstances may constitute unbecoming conduct when spoken by a teacher to his students. *See In re Motley*, http://lawlibrary.rutgers.edu/oal/html/initial/edu7421-97.html (finding a teacher's referring to impressionable children in derogatory language a gross distortion of his appropriate teaching function, representing unfitness to discharge his duties and responsibilities amounting to unbecoming conduct).

Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. *See Redclay v. State Bd. of Educ.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E. & A. 1944). Here, the record reflects a pattern of instances where Komorowski made irresponsible and

insensitive utterances regarding ways to torture and kill a student. Komorowski's testimony and demeanor persuades me that he hadn't a clue that those comments and discussions could be psychologically and emotionally harmful to young and impressionable students. Indeed, while Komorowski claimed to be upset over an advertisement to purchase guns over the Internet, he took a contrary position by conducting class discussions on ways to torture and kill a particular student Such conduct adversely affects his charge to teach students sufficient social, ethical and behavioral standards to help them become good citizens in society. Indeed, as the District notes, Komorowski's "conduct in condoning and directing those class discussions evidences a lack of the kind of self-restraint and controlled behavior which is compelled by his position . . . holding influence over the lives of children." Petitioner's Brief at 36-37. A teacher who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept responsibility for his actions and must accept the consequences of his actions. *In re Nash*, 1971 S.*L.D.* 284, 296. Although the District failed to prove that showing a gun advertisement to an administrator constitutes conduct unbecoming, it has presented compelling evidence that Komorowski's conduct in discussing ways to torture and kill a student demonstrated a callous indifference to the health, welfare and safety of his students.

Based on the totality of the evidence, including the arguments presented by the parties, I **CONCLUDE** that Komorowski's conduct encouraged an environment in which violence was considered acceptable and fostered a moral climate of disrespect for life and bodily integrity. Thus, I **CONCLUDE** that Komorowski, through these actions, has breached his responsibilities as a teacher and engaged in conduct unbecoming a professional teaching staff member.

Penalty

The District contends that Komorowski's conduct warrants dismissal as an employee of the Jersey City School District. Factors to be considered in assessing an appropriate penalty include the nature and gravity of the offense, any extenuating or

aggravating circumstances, and maintaining discipline and proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 420-22 (App. Div. 1967). Except for the pending charges, Komorowski's record is unblemished.

Komorowski received satisfactory scores on two performance evaluations, which he presented at the hearing. Catherine Coyle, the associate superintendent of the District, hired Komorowski in 1994 under the alternative certification route. She observed Komorowski during several classes and found him to be a very good teacher. Coyle also helped to train Komorowski through meetings and providing him with documents. She acknowledged that he attended courses on teaching skills and strategies to obtain the proper certification to teach in the District.

Komorowski's colleagues testified that he was an asset to the school and a good teacher. Joanne Youman, an experienced educator and employed by the District for twenty-seven years, was Komorowski's mentor for school year 1994-95. She observed him in class and found him to be enthusiastic and excellent with the students. Sandra Webster, district supervisor of the Applied Technology Department, believed that Komorowski was an excellent teacher, innovative and had a good rapport with the students.

Based on the whole of the record, I **CONCLUDE** that the mitigating factors do not support Komorowski's continued employment with the Jersey City public schools. Consequently, I **CONCLUDE** that the appropriate penalty is removal from his tenured teaching position.

ORDER

It is **ORDERED** that Henry Komorowski be removed from his teaching position with the State-Operated School District of Jersey City and that all of his tenure rights be extinguished.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 8, 2000
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6-12-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner
Sandra Frierson-Howard
Francis X. Dooley
Dr. Debra Alexander

For Respondent
Linda Gallina
Henry Komorowski

Exhibits:

Petitioner

P-1 Letter from Ms. S.

P-2 Response from Mr. Komorowski

P-3a Lesson Plan Book
3b

P-4 Statement of Position

Respondent

R-1 Evaluation Form of Kormorowski, dated December 17, 1998

R-2 Evaluation Form of Kormorowski, dated April 29, 1999

OAL DKT. NO. EDU 9993-99
AGENCY DKT. NO. 275-9/99

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY KOMOROWSKI,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The entirety of respondent's exceptions contend that the District "failed utterly" to meet its burden of proving respondent was guilty of unbecoming conduct. (Respondent's Exceptions at 1) To this end, respondent sets forth the following seven exceptions: 1) the ALJ selectively presented her summary of evidence in a manner biased to him; 2) the ALJ's finding of fact that he participated in discussions about ways of killing L.S. by cutting his body apart with a saw, shooting him with a gun, using a flamethrower, sticking a sword to him, guillotining him, drawing and quartering him and clubbing him to death is not based on the record below; 3) the ALJ incorrectly found that the District sustained charges three and four; 4) the ALJ failed to consider both the content of the guillotine discussion and the context in which it occurred; 5) the ALJ failed to consider both the content of the bleach discussion and the context in which it occurred; 6) the ALJ's conclusion that respondent "demonstrated a callous indifference to the health, welfare and safety of his students" (*id.* at 16) is not based on the record below and,

moreover, contradicts her own findings; and 7) the ALJ's recommendation of dismissal is inconsistent with both the alleged harm and relevant case law.

As to his final point, respondent notes that there has been no finding of harm to L.S. He compares this case to *In re Tenure Hearing of Ribacka, School District of Sussex-Wantage Regional*, 1978 *S.L.D.* 929, wherein, despite extensive testimony from persons who witnessed respondent's alleged mentally and physically harassing conduct and its effects upon a student, the tenure charge was dismissed, and notes the differing result that was reached by the ALJ herein despite what respondent perceives as a lack of necessary proofs. (*Id.* at 19) Respondent advances that in another similar case, *In re Tenure Hearing of Demarco, School District of Glassboro,* 1980 *S.L.D.* 204, notwithstanding a finding from the hearing examiner that the respondent therein had actually threatened the student with bodily harm, the Commissioner found that removal was too harsh a penalty. (Respondent's Exceptions at 19-20)

By contrast, respondent maintains that, here, the ALJ ignored the facts, disregarded his teaching ability and his record in the District, and arrived at an unduly harsh conclusion. Based on his strong reputation as a teacher and his unblemished record, and in recognition of the fact that the District did not bring a single witness who had *actual* knowledge of the frequency, duration, content or context of any of the discussions that occurred, respondent urges the Commissioner to recognize that the District has not proven its charges "let alone that the conduct alleged is so serious, or that there are any aggravating circumstances, that would warrant [his] *** dismissal." (*Id.* at 25)

In reply, the District counters that: 1) there is ample evidence in the record to support the ALJ's findings that respondent participated in the discussions, as found, and he also, at times, initiated the discussions, and did not stop them when they "were taking place among the

boys but joined in the discussion and redirected their attention to other violent conduct such as beheading the particular student by guillotine" (Petitioner's Reply Exceptions at 8); 2) the ALJ's presentation of the testimony was not biased -- rather her presentation of the evidence suggests that she did not find respondent's explanations credible or sensible. (*ibid.*); 3) contrary to respondent's contention that there was no testimony that any student found the discussions to be harmful or objectionable, Ms. Frierson-Howard testified that L.S. told her that he was upset when respondent "spoke to him personally in class and mentioned taking his limbs, attaching them to four horses and beating the horses," (*id.* at 11-12); and 4) the recommended penalty of dismissal is warranted.

With respect to penalty, the District distinguishes *Ribacka, supra*, and *Demarco, supra*, from the within matter. In the former, the District argues, the board had not proven any improper conduct so as to warrant a penalty. In the latter, although the Commissioner affirmed that the teacher had made a threat against a student using profane and vulgar language, he also noted that the single incident took place while on a ski trip, a less structured setting than the classroom. Additionally, in *Demarco*, the students were 14 or 15 years of age. (*Id.* at 12-13)

The District asserts that:

> [t]he unbecoming conduct of respondent Komorowski in this case did not take place *** at an unstructured extra-curricular activity outside the classroom[,] nor did it consist of a single incident. Indeed, the respondent's conduct is far more similar to [that in *IMO Tenure Hearing of Zielenski*, 1977 *S.L.D.* 786] *** where the teacher was removed for using profanity in class when a student was late in handing in an assignment (citation omitted) and for maintaining classes in an inefficient and "careless, defiant and indifferent manner," (citation omitted). The Commissioner found that Zielenski had used profanity "which was heard by other pupils in the classroom," (citation omitted), and which "constituted gross misconduct" demonstrating "respondent's disregard for her professional responsibilities and public trust," (citation omitted).*** (*Id.* at 13)

The District underscores that, by respondent's own admissions and statements, the discussions herein took place every other week, and were sometimes initiated by him, in his classroom, with students who were approximately ten years old. (*Id.* at 14)

Similarly, the District advances that respondent's dismissal is consistent with a line of cases where teachers have been dismissed for grave failure to exercise proper care and control of the classroom. (*See*, Petitioner's Exceptions at 14-15, citing *In the Matter of the Tenure Hearing of Sheridan,* 92 *N.J.A.R.* 2d (EDU) 257 (1992); *Morris School District v. Brady*, 92 *N.J.A.R.* 2d (EDU) 410 (1992); *Board of Education of Princeton Regional Sch. Dist. v. Campbell*, 93 *N.J.A.R.* 2d (EDU) 196, *aff'd* 93 *N.J.A.R.* 2d. (EDU) 604 (1993), *aff'd* 95 *N.J.A.R.* 2d (EDU) 211 (App. Div. 1995); and *Flemington-Raritan Regional School Dist. v. Van Gilson*, 93 *N.J.A.R.* 2d (EDU) 378 (1993). The District then concludes that respondent's unblemished record and supportive testimony from supervisory and administrative staff should be viewed in light of his relatively short service in the District, and urges the Commissioner to adopt the Initial Decision of the ALJ recommending respondent's dismissal.

Upon careful and independent review of the record in this matter, which included transcripts from the hearing conducted on January 19, January 20 and February 4, 2000, the Commissioner affirms the recommended decision of the ALJ. The Commissioner concurs that the District has established charges 1, 2[1], 3[2], 4[3], 5, 6, 7, 8, 9 and 10 by a preponderance of

[1] The Commissioner notes that the first two "charges" are actually statements of fact.

[2] Respondent disputes that he participated in the discussions noted in the third charge. Based on his review, the Commissioner finds that the record supports the conclusion that, although respondent's students initiated a number of the conversations referenced therein (*i.e.*, killing L.S. by utilizing a flame thrower, by clubbing him to death, with a sword, and with an ax; *see* Tr.(1/20/00) at 67 - 68), *respondent himself* introduced the idea of dissolving L.S. in a vat of bleach (*id.* at 59), killing L.S. by guillotine (*id.* at 66) and drawing and quartering him (*id.* at 66-67), notwithstanding his contention that these comments were made within the context of "a lesson." Further, although respondent asserts that he attempted to stop these conversations when initiated by students in his class (*id.* at 68), the Commissioner is not so persuaded that respondent in fact attempted to do so. Had respondent been conscientious about deterring such discussions, he would not, have used L.S. as an "example" in *his* classroom lessons.

credible evidence. Like the ALJ, the Commissioner determines to sustain charge 11, in part, since the District has failed to establish that the gun advertisement which respondent obtained from the Internet was distributed to *any* students. Rather, as the record makes clear, respondent brought the advertisement to Ms. Frierson-Howard, who testified that she threw it away. (Tr. (1/19/00) at 34-35) Therefore, the Commissioner cannot attribute to respondent any deleterious effects of the advertisement on students. Neither does the District present any evidence to contradict respondent's testimony concerning his intended use for the advertisement.[4]

Nonetheless, the Commissioner finds that the record supports the ALJ's findings, including her observation that respondent has no "clue that [his pattern of irresponsible and insensitive utterances] *** and discussions could be psychologically and emotionally harmful to young and impressionable students." (Initial Decision at 13) Therefore, like the ALJ, the Commissioner concludes that respondent "has breached his responsibilities as a teacher and engaged in conduct unbecoming a professional teaching staff member." (Initial Decision at 13) For the reasons set forth in the initial decision, the Commissioner concurs that dismissal is the appropriate penalty in this matter.

Accordingly, the Initial Decision of the ALJ is adopted as set forth herein. Respondent is hereby dismissed from his tenured position as a teacher in the State-operated School District of the City of Jersey City as of the date of this decision. A copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

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[3] The Commissioner finds that, although the record does not confirm the length of time these discussions took place, it *does* support the conclusion that they were held in the beginning of class and that they continued periodically throughout the semester.

[4] Having so found essentially eviscerates the effect on the penalty imposed herein of Charge 9, although sustained, which states: "Mr. Komorowski has also produced a document showing how to purchase guns over the Internet. Mr. Komorowski's students have access to computers and the Internet. Mr. Komorowski produced the gun advertisement at P.S. 27 during the week of April 26, after spring break and after the gun killings at Columbine High School in Littleton, Colorado, on April 20, 1999, which made national news." (Initial Decision at 3)

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: JUL 27 2000

Date of Mailing: JUL 27 2000

[5] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

243-00

EDU #9993-99N
C # 243-00
SB # 48-00

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY KOMOROWSKI,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	

Decided by the Commissioner of Education, July 27, 2000

For the Petitioner-Respondent, Charlotte Kitler, Esq.

For the Respondent-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 6, 2000

Date of mailing DEC 08 2000

244-00

DEBORAH HAUPTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 27, 2000

OAL DKT. NO. EDU 3799-99
AGENCY DKT. NO. 399-9/98

DEBORAH HAUPTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 8, 2000, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 27 2000

Date of Mailing: JUL 27 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

245-00

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

PETITIONER,

V.

CAPE-ATLANTIC LEAGUE AND THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district appealed the decision of NJSIAA affirming the Cape-Atlantic League's (CAL) denial of petitioner's application to continue to play an independent schedule in football, which it had done for the past four years. Petitioner argues that its request must be granted in order to protect the health and safety of its students, as the schools in the CAL are much larger than those it played as an independent, and the risk of injury increases when playing physically and numerically larger teams.

Respondents, NJSIAA and CAL, argue that petitioner was permitted to utilize an independent schedule in order to build its program, with the understanding that it would ultimately resume playing a league schedule after it did so, which they argue has occurred. In this regard, they note petitioner's 6-4 record in the 1999 football season. Respondents posit that their determinations conform with their Bylaws and Constitutions and, because they are not arbitrary, capricious or unreasonable, NJSIAA's decision should be affirmed by the Commissioner.

The Commissioner affirmed the decision of NJSIAA. The Commissioner noted that petitioner was afforded extensive due process, but had failed to demonstrate at any of the numerous levels of appeal that CAL's legitimate interest in having member schools compete within the league and not to permit independent schedules of indefinite duration was arbitrary, capricious or unreasonable or contrary to respondents' Constitutions or Bylaws. Rather, petitioner's arguments demonstrated only that its win-loss record could suffer if the decision on appeal is affirmed. Therefore, the Petition of Appeal was dismissed.

July 28, 2000

AGENCY DKT. NO. 130-4/00

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAPE-ATLANTIC LEAGUE AND THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENTS.	:	
	:	

For Petitioner, Bruce M. Gorman, Esq. (Gorman & Rauh)

For Respondent, New Jersey State Interscholastic Athletic Association, Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

For Respondent, Cape-Atlantic League, Michael P. Stanton, Esq.(Taht, Stanton & McCrosson)

PROCEDURAL HISTORY

This matter came before the Commissioner of Education by way of a Petition of Appeal filed by the Wildwood Board of Education (petitioner) on April 24, 2000, seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee, dated April 5, 2000, which affirmed the determinations of the Cape-Atlantic League (CAL) and the NJSIAA Special Committee for Leagues and Conferences (Special Committee) denying petitioner permission to implement an independent football schedule or, in the alternative, to leave the CAL immediately, rather than comply with the two-year waiting period required by the CAL's Constitution.[1] Procedural deficiencies in complying with *N.J.A.C.* 6A:3-1.1 *et seq.* had to be corrected by petitioner before the matter could move forward. This was accomplished on May 2, 2000.

[1] In its petition, Wildwood seeks only reversal of the determinations precluding it from playing an independent schedule in football. The request to withdraw immediately from the CAL was not pursued before the Commissioner.

On May 2, 2000, respondent NJSIAA filed its answer to the Petition of Appeal and the Statement of Items Comprising the Record pursuant to *N.J.A.C.* 6A:3-7.2 and, as a courtesy, a copy of the record itself.[2] Respondent CAL filed its Answer on May 8, 2000. On the same day, a request by petitioner to the Commissioner, dated May 5, 2000, that NJSIAA be ordered to prepare minutes of its Special Committee's "off the record" deliberations and to add those minutes to the record, was received.[3] On May 11, 2000, respondents were afforded an opportunity to reply to the request. NJSIAA did so by letter dated May 12, 2000, urging that the Commissioner deny the request, as it does not prepare minutes of such deliberations. NJSIAA further noted that the entire hearing of the Special Committee, including introductions, testimony, ruling and vote, was on the record. Moreover, NJSIAA argues, after the vote, the Special Committee's decision was memorialized in a written decision containing detailed findings of fact and conclusions. On May 17, 2000, the Commissioner denied petitioner's request.

On June 5, 2000, petitioner submitted its brief in support of its position. Reply briefs were filed by the CAL on June 16, 2000 and by NJSIAA on June 19, 2000; whereupon, the record in this matter was closed.

The findings of fact and conclusions determined by the NJSIAA Special Committee at its March 24, 2000 meeting, and adopted by the Executive Committee on April 5, 2000 are as follows:

> Wildwood High School, located in Cape May County, is a founding member of the Cape-Atlantic League. The Cape-Atlantic League consists of 23 schools in Cape May and Atlantic Counties.
>
> The Schools in the Cape-Atlantic League range in size from Group I (Wildwood High School, population 235) [4] and Parochial B (St. Joseph's High School, population 262), to Group III (Middle Township High School, population, 709).[5] The League is divided

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[2] *N.J.A.C.* 6A:3-7.2(c) requires that petitioner obtain from NJSIAA a copy of the hearing transcript(s) of its proceedings and other documents identified as comprising the record on appeal which are to be affixed to petitioner's brief as an appendix.

[3] *N.J.A.C.* 6A:3-7.2(d) provides that any appeal from the NJSIAA shall be based exclusively on the record established in the internal proceedings before the NJSIAA, as specified in the Statement of Items Comprising the Record or as determined by the Commissioner in the event of a dispute. Supplementation of the record is not permitted except as directed by the Commissioner.

[4] NJSIAA classifies schools for competition purposes by enrollment, with Group I having the smallest enrollments and Group IV the largest.

[5] This description is of CAL's small school division. The League itself also includes Group IV schools. *See* Exhibit 30 at 61.

into a large school American Division and a small school National Division. Wildwood is the smallest school in the League.

From 1986 to 1996, Wildwood's record in football was 9-61. Due to the fact that Wildwood was not competitive within the League, League members voted in 1996 and again in 1998 to allow Wildwood to pursue an independent football schedule. Each vote allowed Wildwood to play as an independent for two years, and the League's permission had to be renewed again in 2000 or Wildwood could be required to play a regular League schedule.

Wildwood's football record improved during the years it competed in an independent schedule. In 1999, its football team posted a 6-4 record. Its opponents were mostly Division I schools, including Group I power Florence, but also included Princeton High School, a Group III school.

Wildwood's request to continue playing an independent football schedule came before a meeting of the League's athletic directors and principals on November 5, 1999. The approval required a two-thirds majority to pass, but did not receive a simple majority. Ten schools voted in favor of the school's request, 12 voted against it.

On December 1, 1999, the Cape-Atlantic League Executive Committee, a committee made up of representative superintendents, principals and athletic directors, met to consider Wildwood's appeal of the League's decision. The Executive Committee voted 8-2 to deny Wildwood's appeal. According to a letter prepared by the League Secretary, several factors were considered by the Executive Committee, including the following:

- Wildwood applied for, and was granted, an independent schedule for the last two cycles in order to rebuild the program.

- The football team had a winning season this year and a larger varsity squad than several other National Conference schools. The number of freshmen and sophomore athletes was taken into consideration. Additionally, the team had 1000 yard rushers and nearly qualified for the State play-offs.

- Wildwood presented plans for upgrading the training facility and the school has significantly upgraded the playing facility.

- The team has a stable coaching staff and Wildwood has taken measures to adequately compensate the coaches to maintain that stability.

- Past requests for an independent schedule were approved contingent upon a school developing a plan to improve and come back into the League.

- Despite numerous appeals and regardless of reason, the League has not granted a request to play an independent schedule to any other school, in any sport, for the past two years.

- The CAL Constitution and By-Laws provide an avenue of relief from a varsity schedule if a member school feels it cannot compete in a given sport.

[December 2, 1999 letter from Cape-Atlantic League Secretary Michael C. Adams to Wildwood Principal Walter Dull.]

On January 14, 2000, Wildwood appealed the Executive Committee decision back to the League. Again, Wildwood needed a two-thirds vote, but did not obtain a simple majority. This time 14 schools voted to uphold the Executive Committee decision, 8 voted against.

At the same January 14, 2000 meeting, after the League denied Wildwood's request for a third time, the school requested permission to leave the conference. The Cape-Atlantic League Constitution allows a school to leave the conference with two year's notice, or in the alternative to leave immediately with the unanimous approval of the League schools. Five Cape-Atlantic schools voted against allowing Wildwood to leave the League immediately, and therefore Wildwood did not obtain the necessary unanimity.

At the January 14, 2000 meeting, League officials noted that Wildwood had independently scheduled schools that were larger than many Cape-Atlantic schools; Wildwood had not invested in a weight room, which could help improve their football program; that the League would assist Wildwood in allowing the school to play a junior varsity-only schedule; and that the League would allow Wildwood to drop its football program entirely.

On November 9, 1999, four days after the Cape-Atlantic League turned down Wildwood's initial request to remain independent in football, the school applied for membership in the Tri-County

Conference. The Tri-County Conference consists of 16 schools in Salem, Gloucester and Camden Counties.

On December 16, 1999, a subcommittee from Tri-County Conference visited Wildwood to inspect the school's athletic facilities. The subcommittee reported its findings to the Conference schools.

The Tri-County Conference still has not taken formal action on Wildwood's application for admission. On January 6, 2000, the Tri-County Conference athletic directors voted to hold the school's application until March 2, 2000. On that date, the application was tabled pending the results of NJSIAA review of this matter.

Cape-Atlantic League representatives noted that the League had recently denied one of its members, St. Augustine Prep, the right to participate in an independent schedule for basketball. The prep school wanted to make its own basketball schedule because of the strength of its program. League officials also noted that two schools, St. Augustine Prep and Middle Township, had made it clear to the League that if Wildwood were granted an independent schedule, they too would request an independent schedule for football, based on the perceived inadequacies of their football programs.

League officials also noted Pleasantville, another small Cape-Atlantic League school, had disbanded its football team and then rebuilt it from the ground up playing a junior varsity schedule.

Wildwood has been competitive in other sports. The school's girls basketball team won the state Group I championship this year, and last year school teams also had winning records in girls cross-country, boys basketball and boys golf.

The Cape-Atlantic League's actions were consistent with the League's constitutional process. The school's application was first heard by the League's athletic directors and principals, who voted 12-10 to deny the request (2/3 vote in favor was needed to pass); it was then heard by the Executive Committee of superintendents, principals and athletic directors, which voted 8-2 to deny the appeal; and was heard for a final time by principals and athletic directors at a League meeting, at which Wildwood's request was denied by vote of 14 opposing--8 in favor (2/3 majority in favor needed to pass).

The Constitution of the Cape-Atlantic League has been reviewed and approved by the NJSIAA, as have the constitutions of all leagues and conferences in the state.

The process before the Cape-Atlantic League was fair. The League gave Wildwood three opportunities to argue its case before League officials. Each time, the League turned down Wildwood's request.

CONCLUSIONS

1. As a member of the Cape-Atlantic League, Wildwood has agreed to comply with the Constitution and Bylaws of that league. The League provides a process for approving any school's independent sports schedule and a process for a school leaving the League. In both instances, the League applied an appropriate process when it reviewed and subsequently denied Wildwood's request to play an independent football schedule and request to leave the League immediately.

2. The NJSIAA will not overturn a validly determined decision of a league or conference unless that decision violates the mandate of the Commissioner of Education; unfairly deprives the school of membership in a league or conference; or violates the Constitution and Bylaws of the NJSIAA. The Cape-Atlantic League did none of these when it voted not to allow Wildwood to play an independent football schedule and not to leave the League immediately.

3. The Cape-Atlantic League has given Wildwood four reasonable options: continuing the school's football program within the small school division of the League; continuing with a junior varsity program; maintaining the school's status as a member of the League while dropping football; or leaving the League in two years.

4. The Special Committee on Leagues and Conferences voted 4-1 to deny Wildwood's appeal. The League's decision was the result of a valid constitutional process that Wildwood was bound to follow, and violated neither the Commissioner's mandate nor the NJSIAA Constitution and Bylaws. Wildwood is a member of the League. It has adopted the League's Constitution and Bylaws, and is bound by its agreement to comply with those rules. Further, Wildwood is not without options. If the school determines that it cannot compete in the League in football, it has the option of dropping the sport or competing at a less competitive junior varsity level. The League

> Constitution allows the school to leave in two years, if it so desires. (Exhibit 28 at 3-6)

PETITONER'S POSITION

Petitioner first argues that the determinations made by respondents constitute an arbitrary and capricious violation of Article II Section 5 of the Constitution of the Cape-Atlantic League, entitled Philosophy and Goals, which reads: "Section 5 To uphold the Constitution, By-Laws, Rules and Regulations of the [NJSIAA]." Petitioner also argues that the determinations are contrary to Article II Section 2 of the Constitution of the NJSIAA, which reads "Section 2 To equalize athletic opportunities by standardizing rules of eligibility for individuals and classifying for competitive purposes the institutions which are members of the Association." (*NJSIAA Handbook, 1999-2000* at 20) Further, NJSIAA Bylaws, Article III Section 5 state:

> Secondary schools are grouped for competitive athletics according to enrollments. The main objective of this grouping procedure is the health and safety of the students as well as balance in numbers among all groups. Therefore, groupings will be established for all schools only on basis of their enrollments and may not be changed at the request of the school. Such requests tend to circumvent the purposes of grouping. (*Id.* at 32)

Petitioner avers that by forcing it to play football against much larger schools, respondents have placed the health and safety of Wildwood High School students at risk, thus violating the above-cited articles; *i.e.*, Article III Section 5 of the NJSIAA Constitution expressly provides that the objective of grouping according to enrollments is to protect student health and safety. Thus, by definition, compelling petitioner to play against much larger schools in the CAL places its students at risk.

Petitioner urges, *inter alia*, at pages 18 to 22 of its brief, that the following be considered by the Commissioner:

1. Wildwood has only 235 students (107 males). The average population of the eight schools petitioner would play in the

CAL is 586, or 2.5 times its size. Seven of the eight schools are more than twice as large as Wildwood, and several are three times as large. Five of the eight schools are either Group III or about to become Group III. Thus, CAL's National Division fails to comply with NJSIAA's Article II Section 2 or Article III Section 5.

2. In order to field a team, petitioner must play freshmen, who are either 13 or 14 years of age, which thrusts them in varsity games against seniors who are 17 and 18; thus increasing the odds of injury. Further, because of the small male population at Wildwood High School, it cannot field a junior varsity or freshman team. Consequently, the freshmen who play varsity enter games against older and larger boys without the skills and experience necessary to protect them. If freshmen do not play, petitioner then has only 17 upperclassmen on the team, which would force them to play both offense and defense, thus increasing the possibility of exhaustion and injury.

3. It seeks an independent football schedule because football, unlike most interscholastic sports, is a contact sport wherein athletes of varying sizes compete against one another.

4. Compelling petitioner to compete in the CAL National Division does not provide equal athletic opportunity and is thus contrary to Article II Section 2 of NJSIAA's Constitution. Thirty-four losing seasons in a row, and a ten-year record of 2-33 in CAL, clearly connote an inability of petitioner to compete in CAL in football. Also, being outscored 1,057 to 210 (a ratio of 5:1) over a ten-year period in CAL indicates a noncompetitive situation. It does not constitute an equal athletic opportunity to be "slaughtered" by 40-50 points. For example, in 1994, petitioner lost 4 games to CAL schools by scores of 44-6, 28-0, 56-0 and 25-8. Each of the schools winning those games have grown larger, while Wildwood has grown smaller.

Petitioner next argues that respondents' refusal to allow an independent football schedule violates Article II Section 1 of their respective Constitutions, which espouse to foster and develop amateur athletics among member schools/secondary schools of the State. It is petitioner's position that applying such a standard to the four options afforded petitioner herein

can only lead to the conclusion that respondents' determinations are arbitrary and capricious. More specifically, petitioner maintains that option 1 (continuing in the CAL's small school division) is unreasonable because the "small school division" consists of schools three times its size. (Petitioner's Brief at 25) The second option (continuing in the CAL as a junior varsity program) is, according to petitioner, problematic because it already attempted this option in 1987 and found it "an abject failure." (*Ibid.*) Moreover, petitioner argues, this option deprives its present students, particularly the seniors, of an opportunity to play varsity football; concomitantly denying them the chance to attract football scholarships because no college recruiters scout junior varsity games. Most significantly, petitioner argues that moving to junior varsity belies the declining population base at its high school, which makes it unlikely that doing so would encourage more athletes to play football. As such, option 2 will neither foster nor develop amateur athletics in football which will, accordingly, violate respondents' Constitutions.

Petitioner deems option 3 (maintaining the CAL membership but dropping football) to be "the most offensive" option offered by respondents, since it does not foster and develop amateur athletics, averring, *inter alia*, that "[i]f no other aspect of this case is arbitrary and capricious, this option most certainly is." (Petitioner's Brief at 27)

As to option 4 (leaving the League in two years), petitioner sets forth two problems, the first being that it has no place to go at the present time, for although it has made application to the Tri-County Conference, that conference has declined to act on the application. It asserts that, if its application is not accepted by Tri-County, Wildwood will find itself an independent in all sports, which is a "generally untenable position." (*Id.* at 28) Moreover, the option does not address the 2000 and 2001 seasons.

Given the above, petitioner urges reversal of respondents' determinations. It further argues that the standard of review set forth in *N.J.A.C.* 6A:3-7.4 requires that respondents' actions be overturned because there is no credible evidence in the record to support the position taken by respondents. As to this, petitioner avers that the minutes of the January 14, 2000 meeting of the CAL contain no findings of fact, nor does the League set forth any specific reason for the denial. Petitioner believes the true reason for the denial was that if Wildwood is allowed to play an independent schedule, then other schools may wish to do so, an argument which petitioner asserts does not constitute a valid reason to violate the health and safety requirements of respondents' Constitutions and Bylaws. In this regard, petitioner states:

> That argument belies the fact that there is no other Group I school in the [CAL]. Wildwood and only Wildwood has this problem. The *real* issue is that certain schools in the league (St. Augustine, Middle Township) have basketball programs which consistently win State Titles. Those schools have been seeking permission to *upgrade* their schedule so that they may play more competitive teams. Their desire to play an independent schedule has nothing to do with the health and safety of the students. (emphasis in text) (Petitioner's Brief at 31)

Petitioner further argues that the fact that Pleasantville reverted to a junior varsity program and then returned to the League does not constitute credible evidence supporting a determination that its application should be denied. Pleasantville has 655 students, and thus, a competitive population base; whereas petitioner has only 235 students. In support of this, petitioner cites to the comment of a NJSIAA Special Committee member who stated, "***as long as they're a group with a hundred seven [males], they are never going to be competitive in their leagues. It's a numbers' game, ***with a hundred and seven kids playing Group IIs and Group IIIs, it's not going to happen." (Exhibit 27 at 64). It is petitioner's position that it has presented statistical and historical data which conclusively demonstrate that it cannot compete in CAL football and that the health and safety of its students will be jeopardized if it is required to

do so, and it asserts that there is no evidence to the contrary presented by respondents, including the NJSIAA.

As to the NJSIAA, petitioner further avers, *inter alia*, that Dr. Killeen, Chair of the NJSIAA Special Committee, testified briefly before the Executive Committee and offered no facts, only conclusions, the most relevant one being that the CAL had not violated the NJSIAA Constitution and Bylaws. Petitioner believes the following statement by Dr. Killeen reflects his lack of enthusiasm for his position which reads:

> The Special Committee voted on this item, and the vote was four to one to deny Wildwood's appeal. That's basically the thinking of the committee on the complex issue, complex presentation of facts. Some issues are not easy to determine. I would categorize this as that way. (Exhibit 30 at 56-57)

Finally, petitioner concludes that, absent credible evidence to rebut its unrefuted statistical evidence, the Commissioner should overturn respondents' actions and permit it to play an independent football schedule.

RESPONDENT CAL'S POSITION

The CAL urges, *inter alia*, that petitioner was granted full due process by both the CAL and the NJSIAA, pointing out that Wildwood had three hearings before the CAL, one before the NJSIAA Special Committee on Leagues and Conferences and one before the NJSIAA's Executive Committee. The CAL further avers that, at each of these hearings, petitioner had a full and complete opportunity to present its arguments and they were reviewed by numerous individuals involved in the fields of education and athletics. At all five hearings it was determined that petitioner should not be permitted to play an independent football schedule or to withdraw immediately from the CAL.

The CAL also argues that the decisions it made, and those made by the NJSIAA, were based on sufficient credible evidence to support its decision in this matter. Moreover, the

CAL urges that it has provided petitioner with four reasonable options as discussed above, and that all the rules of the CAL have been applied in a reasonable manner. Consequently, it asserts that the Commissioner, pursuant to *N.J.A.C.* 6A:3-7.4, has no basis to overturn the decision.

RESPONDENT NJSIAA'S POSITION

The NJSIAA first argues that the hearings before the CAL and the NJSIAA provided petitioner an "extraordinary degree" of due process and that the decisions of those bodies were based on the record. The NJSIAA maintains that, pursuant to the League and Conference Position Statement (*NJSIAA Handbook, 1999-2000* at 133-135), the role of the Executive Committee in reviewing a decision of a league or conference "will be limited to determine [sic] whether the actions of the conferences were arbitrary or capricious or in violation of the NJSIAA Constitution and Bylaws. The NJSIAA and its Executive Committee will not substitute its judgment concerning such issues for that of the conference." (*Id.* at 135) In the instant matter, the NJSIAA provided Wildwood with two hearings at which it was represented by counsel, had an opportunity to present witnesses, was able to cross-examine witnesses from the CAL and the Tri-County Conferences, was permitted to make opening and closing statements and could submit documentary evidence. Further, the proceedings were stenographically recorded and the Special Committee issued a comprehensive decision within two days. The same procedures were accorded before the NJSIAA Executive Committee, which voted overwhelmingly to adopt the Special Committee's report. As to this, the NJSIAA states:

> Both the Special and the Executive Committee were neutral fact finders. The Executive Committee was comprised of 34 separate individuals, each of whom represented a separate constituency. These constituencies included each of the counties in the state, parochial schools, the School Boards Association, the Principals and Supervisors Association, the Council of Catholic Diocesan Superintendents, the Scholastic Coaches Association, the Officials Associations, the Association of Independent Schools, and other groups intimately involved in education. See, NJSIAA Constitution, Article V, Sections 1 to 2d. All Executive

> Committee members were well versed in the problems faced by school boards and school administrators in administering athletic programs. None had any special interest in Wildwood's case. The five Executive Committee members who did have a conflict of interest all abstained. (Ex. 30, p. 63). (NJSIAA's Reply Brief at 14)

According to the NJSIAA, at no time during the hearing process did Wildwood make a claim before it that the CAL violated its constitutional process, nor did anything other than provide Wildwood appropriate opportunities to be heard. Yet, at page 14 of its brief, petitioner insinuates that the CAL officials turned down petitioner's requests because they feared disruption of their own football schedules, a claim belied by the CAL's actions which would allow Wildwood to either drop football or play junior varsity, either of which would disrupt the CAL football schedules.

The NJSIAA further argues that its decision is supported by sufficient credible evidence in the record, reiterating that petitioner's evidence has now been reviewed five times (three hearings before the CAL and two before the NJSIAA), and each time were rejected. It is the NJSIAA's position that the record supports its determination for five reasons:

> First, CAL procedures allow a school to seek permission to play an independent schedule for two years at a time. The CAL followed those procedures with respect to Wildwood's request. The CAL granted Wildwood's request twice, but after due deliberation, decided not to grant it a third time. The decision was inherently discretionary, and was made after proper procedures were followed. Second, the CAL only granted Wildwood permission to play an independent football schedule on the condition that it use the opportunity to improve its program and that the school develop a plan to improve and come back into the League. It was never meant to be a permanent solution. Third, the objective evidence showed that Wildwood had improved its football program. The team had a winning record (6-4) in 1999, almost qualified for the state playoffs, and had a larger varsity squad than several other schools in the CAL National Conference. The school competes successfully in other sports, including girls basketball, which won a State Championship last year. Fourth, another school, Pleasantville, went through a similar rebuilding process and now has a successful football program that has been reintegrated into the CAL. Fifth, League administrators have a legitimate interest in

> keeping the CAL vital, and are concerned about repeated requests by Wildwood and other schools for special exceptions to compete outside the League in specific sports. (*Id.* at 14-15)

The NJSIAA next argues that it applied its rules in a reasonable manner, averring, *inter alia*, that there was nothing arbitrary or capricious about the CAL decision, which was based on the CAL's desire to, as expeditiously as possible, carry out the policy expressed in 1996 to reintegrate Wildwood with the rest of the schools in the conference that have football programs. The NJSIAA further avers that the decision was a reflection of a legitimate policy determination to stem the tide of schools seeking independent schedules in certain sports. Moreover, the CAL determined that the Constitution and Bylaws to which all schools, including Wildwood, had committed themselves should be enforced – a special exception had been made for petitioner for four years, and it is now time for Wildwood to compete once more in the CAL, as it had agreed to do.

The NJSIAA asserts that the crux of the issue, and the flaw in petitioner's argument in this matter, is that Wildwood mistakenly believes that it has an absolute right to participate in interscholastic sports, even though petitioner acknowledges it cannot compete and does not want to compete against schools in its own league. As to this, the NJSIAA maintains that the Commissioner has long recognized that there is no right to participate in interscholastic sports and cites as support *Bd. of Ed. of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU) 182, 188 (1992). NJSIAA's Reply Brief at 17. The NJSIAA further emphasizes that, despite petitioner's claim to the contrary, Wildwood is not being forced to play football by anyone other than the Board itself. Furthermore, it is the NJSIAA's contention that petitioner wants the NJSIAA and the Commissioner to absolve it of its responsibilities as a member of the CAL and to ignore NJSIAA's regulations, which state that:

> The Executive Committee wants to strongly emphasize that a school should not have the right to appeal its placement in a

> division because the school believes that it should be given a "weaker" or "stronger" schedule. The ability of member schools to have a winning season, or to obtain state or national prominence in its particular sport, is simply not a concern of the Association. (*NJSIAA Handbook, 1999-2000* at 134)

Lastly, the NJSIAA argues that, despite its admitted poor performance, Wildwood insists on fielding a football team.[6] Of this, the NJSIAA states:

> Despite its agreement to abide by [CAL] and NJSIAA rules, [petitioner] insists on setting its own football schedule, a schedule that will allow it to avoid schools it does not want to compete against. Fifty-two NJSIAA schools have chosen not to participate in football. Some of those schools have made that decision based on their size and inability to compete; some have made it based on the lack of interest among students; for others the decision has been the result of financial considerations. Not all CAL schools compete in football. (Ex. 27, p. 54). Yet despite its record, Wildwood stubbornly insists on continuing to compete in the sport. At the same time, it resists forming teams in other sports, such as soccer, which don't require the same number of players or amount of resources. Wildwood's excuse that soccer is a "suburban" sport and Wildwood is a "city" school rings hollow. (Ex. 27, p. 39-41). Wildwood admits that JV is not unsafe (Ex. 14, p. 4). If Wildwood were truly interested in the "safety" of its students forced to play the "behemoths from Buena" (Pb 21), it would drop the sport or play JV. (NJSIAA's Brief at 18)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188 (1992). That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. Nor may the Commissioner substitute his judgment for that of the NJSIAA, even if he were to decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA,* 1987 *S.L.D.* 259. Further, the burden of proof rests with the person

[6] By way of a footnote on page 17 of its Reply Brief, NJSIAA states with respect to this issue, that on December 6, 1999, NJSIAA member schools approved an amendment to the Association's Bylaws which allows

challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960).

The standard of the Commissioner's review in NJSIAA determinations has been explicitly delineated in *N.J.A.C.* 6A:3-7.4, a regulation recently adopted by the State Board, which reads:

> (a) In determining appeals from NJSIAA decisions, the Commissioner's scope of review shall be appellate in nature.
>
> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his or her judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner.

Upon careful and independent review of the record of this matter, the Commissioner affirms the determination of the NJSIAA to uphold the CAL's denial of petitioner's request that it be allowed to continue the independent football schedule which it was granted by the CAL for the past four years and, in the alternative, to be allowed to leave the CAL immediately, rather than in two years as required by the CAL's Constitution. In so holding, the Commissioner initially notes his agreement with both respondents that petitioner was provided extensive due process in this matter, particularly since NJSIAA's Leagues/Conference Position Statement clearly stipulates that:

> The Association will continue to exercise its supervisory role to assure *membership* by applicant schools in appropriate conferences and leagues. However, unless it can be shown that there has been a violation of the order of the Commissioner that there be an opportunity for a full schedule of interscholastic sports, there will be no appeals from conference and league *scheduling*. (emphasis in text) (*NJSIAA Handbook, 1999-2000* at 134)

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small schools to enter into cooperative sports programs in football and indicates that two such programs have already been approved, *i.e.*, Keyport-Henry Hudson and Palisades-Leonia.

The arbitrary, capricious or unreasonable standard of review is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education and the NJSIAA. The standard defined by the New Jersey Courts states:

> In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) ***Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citation omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) (*Bayshore Sewerage Co. v. Dept. of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974))

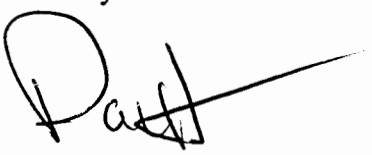
In applying the requisite standard of review to the instant matter, the Commissioner may not substitute his judgment for that of the NJSIAA, even if he believed an erroneous conclusion had been reached by the NJSIAA, because the record establishes that respondents did not take willful or unreasoning action, without consideration and in disregard to the circumstances. The record demonstrates the CAL granted petitioner's request for an independent football schedule for four years beginning in 1996 (two cycles of two years each), in order for it to build its football program in light of the dismal ten-year win-loss record it had compiled in competing in the CAL, a record which petitioner sets forth at length in its submissions. Thorough review of the record, however, convinces the Commissioner that the CAL was not arbitrary, capricious and unreasonable in determining that Wildwood had improved its football program after four years of independent scheduling, which included competition against Group I, Group II and Group III schools, and having achieved a winning record for the

1999 season to the point that a return to the CAL was reasonable.[7] In so holding, the Commissioner concludes that the CAL has a legitimate interest in having its member schools compete within the league and not to allow indefinite independent schedules for particular sports for individual schools within the league.[8]

Consequently, the Commissioner finds that petitioner has not met its burden in this matter, having failed to demonstrate that respondent's actions herein were violative of respondents' Constitution and Bylaws, or that the actions of the CAL and NJSIAA were arbitrary, capricious and unreasonable.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[9]



COMMISSIONER OF EDUCATION

Date of Decision: 7/28/00

Date of Mailing: 7/31/00

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[7] In 1999, petitioner had a 6-4 record with independent football scheduling against Group I schools Clayton, Riverside, Florence, Palmyra, Pennsville and Bordentown, Parochial B schools McCorristin and St. James, Group II school Cinnaminson and Group III school Princeton. (Petitioner's Brief at 12)

[8] The Commissioner notes that petitioner's statistical and historical account of Wildwood's football program from 1986-1999 consists of information regarding its win-loss record. There are no data/information provided relative to student health and safety concerns raised by petitioner with respect to competing against large schools in the CAL that would support a determination that playing a league schedule will increase the risk of injury to petitioner's athletes beyond that which is inherent in all football games. (*Id.* at 4-13)

[9] This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

246-00

M.F. AND P.J.F., on behalf of minor children,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, parents of three children attending respondent Board of Education's school, challenged the determination of respondent that their children are not domiciled in the District, and thus are not entitled to a free public education in the District's school. Respondent filed a counterclaim for tuition reimbursement for the alleged period of ineligibility.

Prior to the hearing of the case, the ALJ denied petitioners' motion to add the Knowlton School District as a party. Petitioners had sought to add the district to establish that one of its employees told them to enroll their children in respondent's District, and to elicit testimony as to the district wherein petitioners' house is located. After petitioners presented their case at the hearing of this matter, respondent moved to dismiss the petition. The ALJ granted respondent's motion, concluding that the evidence presented compelled a determination that petitioners failed to demonstrate that their children are domiciled in respondent's District, and rejected their assertion that the equitable doctrines of estoppel and laches compel a decision in favor of petitioners. The ALJ also determined that respondent is entitled to tuition for the entire period petitioners' three children attended its school, rejecting petitioners' contentions that they did not intend to defraud respondent and that respondent had "slept on its rights" and thus, is not entitled to reimbursement of tuition. The ALJ concluded that the total amount of tuition owed is $135,662.

The Commissioner affirmed the ALJ's determination that petitioners' children are not entitled to a free public education from respondent, agreeing that the evidence demonstrates that the children are not domiciled in respondent's District. The Commissioner also affirmed the ALJ's denial of petitioners' application to add the Knowlton School District as a party. Finally, the Commissioner modified the ALJ's determination as to the amount of tuition owed respondent by petitioners. The Commissioner concluded that equitable considerations preclude respondent from obtaining reimbursement of tuition for the period prior to April 20, 1999, when respondent notified petitioners that their children were not domiciled in the District. The Commissioner thus ordered that tuition be reimbursed for the period from April 20, 1999 through the 1999-2000 school year.

July 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7367-99
AGENCY DKT. NO. 122-5/99

M.F. AND P.J.F. ON BEHALF OF MINOR CHILDREN,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY,

Respondent.

Harriet K. Gordon, Esq., for petitioners

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherred, attorneys)

Record Closed: May 3, 2000 Decided: June 14, 2000

BEFORE **RICHARD McGILL**, ALJ:

M.F. and P.J.F. (hereinafter sometimes "petitioners") filed petitions with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Hope (respondent) in regard to their children, K.F., J.F. and B.F. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance.

PROCEDURAL HISTORY

This matter began with separate petitions filed by P.J.F. and M.F. P.J.F. filed his letter petition on April 26, 1999, and M.F.'s petition was received on May 20, 1999. Both petitions invoked the authority of the Commissioner of Education to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9.

On June 9, 1999, respondent filed an answer and a counter-petition for reimbursement of tuition. After petitioners filed a reply and an answer to the counter-petition, the matter was transmitted to the Office of Administrative Law on July 8, 1999, for determination as a contested case.

On August 16, 1999, petitioner filed a motion to bring the Knowlton Board of Education into the case as a third party. On September 14, 1999, respondent filed responsive papers in opposition to the motion and a cross-motion for summary decision. After the parties submitted additional papers, both motions were denied by Order dated November 16, 1999.

The hearing commenced on April 10, 2000, at the Office of Administrative Law in Newark, New Jersey. At the end of petitioner's case, respondent moved to dismiss the petition. For the reasons set forth below, respondent's motion was granted. On April 11, 2000, respondent presented evidence in regard to its counter-petition. The record closed on May 3, 2000, upon receipt of briefs in regard to the counter-petition for reimbursement of tuition.

ISSUES

As set forth in the prehearing order, the issues in this proceeding are as follows: (1) whether K.F., J.F. and B.F. are domiciled in Hope Township and therefore eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1(a), (2) whether respondent is estopped from denying that K.F., J.F. and B.F. are domiciled in Hope Township, and (3) whether the doctrine of laches is applicable to this proceeding. Additionally, there is the

question whether petitioners will be required to pay tuition reimbursement and the amount thereof.

MOTIONS TO DISMISS

At the conclusion of petitioners' case, respondent moved to dismiss. For this type of motion, all of petitioners' evidence must be accepted as true and petitioners must be given the benefit of all legitimate inferences which may be drawn therefrom. *Bozza v. Vornado, Inc.*, 42 *N.J.* 355, 357 (1964). If under this view of the evidence the proofs would not sustain a judgment in favor of the petitioner, the motion should be granted. *Id.*, at 357-358.

In this proceeding, the parents have the burden to prove by a preponderance of the evidence that the child is eligible for a free education. *N.J.S.A.* 18A:38-1(b)(2). In this case, the criterion for eligibility is that the child is domiciled within the school district. *N.J.S.A.* 18A:38-1(a). In a situation where a residence is located on a parcel which spans a municipal boundary, the location of the land on which the house rests controls the question of the district in which the child is domiciled. *Laufer v. Scotch Plain-Fanwood Reg. Schools*, 1970 *S.L.D.* 424, 427.

At the hearing, P.J.F. testified concerning the location of the house. The deed for the property to P.J.F. and M.F. states that the total area is 9.712 acres with 9.586 acres in Knowlton Township and 0.126 acres in Hope Township. A map attached to the deed shows that the property abuts Nightingale Road. Approximately half of the frontage is in Knowlton Township and the other half is in Hope Township. The township line angles to one side of the property creating a triangular area of 0.126 acres. The greatest distance of this area from the road is approximately 200 feet. An easement for a driveway to abutting property runs roughly through the center of this area. The house is situated approximately 500 feet from the road. In response to these circumstances, which clearly suggest that the house is located in Knowlton Township, P.J.F. stated that a surveyor told him that the township line may be off by as much as 200 feet. This led P.J.F. to state that he is not really sure in which municipality the house is located, and he acknowledged that he has no evidence that actually placed the structure in Hope Township.

In regard to other factors, P.J.F. and M.F., who still lives on the property with the three children, testified that they pay property taxes to Knowlton Township and that various permits for the construction of the house were received from Knowlton Township. P.J.F.'s two oldest children, who are M.F.'s stepchildren, attended North Warren Regional High School, which serves Knowlton Township and not Hope Township. On the other hand, personnel from Hope Township once responded to a fire on the property, and P.J.F. voted in Hope Township. M.F.'s mailing address is "Blairstown," because the area is served by a post office in that municipality.

In considering the motion to dismiss, the undersigned determined that the evidence presented by petitioners would not support a finding that the residence was actually located in Hope Township. The substance of petitioners' testimony is that they are not sure in which municipality the residence is located, and indeed, the only reasonable inference that could be drawn from the evidence is that the residence is located in Knowlton Township.

Petitioners contend that respondent should be estopped from claiming that the residence is not in Hope Township. In *Carlsen v. Masters, Mates & Pilots Pension Plan Trust*, 80 *N.J.* 334 (1979), the Court set forth the following definition of equitable estoppel:

> * * * effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed * * * as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse * * *. [*Id.*, at 339.]

The Court further stated:

> Conduct amounting to a misrepresentation or concealment of material facts, known to the party allegedly estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse gives rise to an equitable estoppel. [*Ibid.*]

The burden of proving a claim of equitable estoppel rests on the proponent thereof. *Palatine I v. Planning Bd.*, 133 *N.J.* 546, 562 (1993).

M.F. testified that in or about May 1990, she attempted to enroll her daughter, K.F., in the Knowlton school system. However, a secretary told M.F. that she did not live in Knowlton and that K.F. should be enrolled in the Hope Township school system. When M.F. said that she paid taxes to Knowlton, the secretary said that part of the taxes was paid to Hope. When M.F. mentioned that her two stepchildren had gone to North Warren Regional High School, the secretary told M.F. that if she persisted in trying to enroll K.F. in the Knowlton school system, she would be charged tuition for the two older children. Having been rebuffed in her efforts to enroll K.F. in the Knowlton schools, M.F. proceeded to the Hope schools. There, she enrolled K.F. without any problem. However, M.F. acknowledged that she did not mention her effort to enroll K.F. in the Knowlton schools or that she paid taxes to Knowlton.

In regard to the statements of the secretary at the Knowlton schools, this situation cannot lead to an estoppel against respondent, because she is not a party to this proceeding or an agent of a party. With respect to the enrollment of K.F. in respondent's schools, there is no indication that respondent's representatives made any representations to M.F. In fact, it was M.F. who did not mention the fact that her stepchildren went to North Warren Regional High School, indicating that they were enrolled in school through Knowlton, that she had attempted to enroll K.F. in the Knowlton schools and that she paid property taxes to Knowlton. Thus, if anyone concealed information, it was M.F. Under the circumstances, the determination was made based upon petitioners' proofs that equitable estoppel could not be applied to respondent in this case.

"Laches" is "the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right ...." *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145, 151 (1982). In applying laches, the important factors to consider are the length of the delay, the reason for the delay and any changing conditions of either or both parties during the delay." *Id.*, at 152. It is assumed that a party to whom laches is imputed has knowledge of his rights and the

opportunity to assert them in a proper forum. *County of Morris v. Fauver*, 153 *N.J.* 80, 105 (1998).

Here, respondent's representatives were certainly aware that M.F. enrolled K.F. in 1990, J.F. in 1992 and B.F. in 1996. Moreover, it is undisputed that respondent notified M.F. of its residency determination in regard to K.F., J.F. and B.F. in or about March 1999. However, petitioners offered no evidence as to the time frame in which respondent became aware that it had a claim against them. Moreover, M.F. acknowledged that she omitted important details when she enrolled her children in the Hope schools. Petitioners also contend that their children have made friends in the Hope schools and that it would be detrimental to them to change schools. However, this circumstance certainly could not justify a determination that K.F., J.F. and B.F. can continue to attend respondent's public schools free of charge indefinitely into the future. Considering all of the circumstances, I **CONCLUDE** that the doctrine of laches should not be applied in this case.

Based on the above, I **CONCLUDE** that the petition in this matter challenging respondent's residency determination should be dismissed

COUNTER-PETITION

Respondent filed a counter-petition for tuition reimbursement for the periods of ineligible attendance. The applicable statute is *N.J.S.A.* 18A:38-1(b)(2), which provides in pertinent part as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.

Respondent contends that the assessment of tuition is mandatory and that there is no applicable statute of limitations. Petitioners maintain that any liability should begin at the time

when petitioners were given notice to remove their children from respondent's schools and that they had no intent to defraud respondent.

Respondent's argument is convincing that the use of the word "shall" in *N.J.S.A.* 18A:38-1(b)(2) makes the assessment of tuition mandatory. In addition, the statute of limitations does not run against the State or any of its agencies or subdivisions, unless the Legislature has specifically so provided. *Port Authority of N.Y. and N.J. v. Bosco*, 193 *N.J. Super.* 696, 699 (App. Div. 1984); *Hyland v. Kirkman*, 157 *N.J. Super.* 565 (Ch. Div. 1978). A review of *N.J.S.A.* 18A:38-1 reveals no statute of limitations.

Petitioners maintain that tuition should not be assessed because they did not intend to defraud respondent. The difficulty with this argument is that an intent to defraud is not required for an assessment of tuition under *N.J.S.A.* 18A:38-1(b)(2). In contrast, a person who has a fraudulent intent under *N.J.S.A* 18A:38-1(c) commits a disorderly persons offense. It follows that petitioners' argument is without merit.

Petitioners cite *Farrell v. Votator Div. of Chemetron Corp.*, 62 *N.J.* 111 (1973) for the proposition that when a plaintiff knows or has reason to know that he has a cause of action against a defendant and voluntarily sleeps on his rights to permit the customary period of limitations to expire, considerations of justice and repose indicate that the action should be barred. The implication is that respondent should have acted sooner to make a residency determination. The difficulty with this argument is that it lacks factual support as there is no indication that respondent had any reason to believe that M.F.'s children did not reside within its borders prior to the time that it gave notice to petitioners.

Petitioners cite several cases in which the equities of a particular situation led to a determination not to assess tuition for the entire period of ineligible attendance. However, this case is distinguishable in that it is not established that respondent was aware of the ineligible attendance prior to giving notice, while M.F. knew that she paid taxes to Knowlton Township and that her older children went to a regional high school consistent with a domicile in Knowlton Township. Nonetheless, M.F. entered the three children in question in respondent's public

schools rather than those of Knowlton Township. Thus, the equities of the situation do not favor M.F. Based upon the above, I **CONCLUDE** that respondent's counterclaim for assessment of tuition for the entire period of ineligible attendance should be granted.

In support of the counterclaim, respondent submitted a calculation showing an amount of tuition for each year for each child. For K.F., the period of ineligible attendance ran from kindergarten during the 1990-1991 school year to ninth grade during the 1999-2000 school year. The total for the ten-year period is $60,690. For J.F., the period of ineligible attendance ran from kindergarten during the 1992-1993 school year to seventh grade during the 1999-2000 school year. The total for J.F. is $50,161. For B.F., the period of ineligible attendance ran from kindergarten during the 1996-1997 school year to third grade during the 1999-2000 school year. The total for B.F. is $24,811. For the three children, the total is $135,662. The tuition calculation is essentially unchallenged and is **FOUND AS FACT**. Therefore, I **CONCLUDE** that petitioners should be assessed tuition in the amount of $135,662.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. Respondent's counter-petition for assessment of tuition in the amount of $135,662 is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2000
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

6-16-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 21 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 7367-99
AGENCY DKT. NO. 122-5/99

M.F. AND P.J.F., on behalf of minor children,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering his decision.[1]

In their exceptions, petitioners request that the case be "reopened," and the Board of Education of Knowlton made a party, claiming judicial error by the Administrative Law Judge (ALJ) who denied a motion to amend their pleadings to include Knowlton as a party. Knowlton's participation is germane to the case, petitioners argue, since it was a Knowlton School District secretary who informed M.F. that her children belonged in the Hope School District, and also informed M.F. that she would be subject to tuition charges for her stepchildren (who had previously attended school in Knowlton) if she persisted in trying to enroll her children in the Knowlton School District. Petitioners further argue that Knowlton's participation is necessary to obtain information regarding the change of placement of a monument that possibly redistricted the Knowlton and Hope Townships. (Petitioners' Exceptions at 1-2)

Petitioners also aver that their due process rights were violated because they were assessed tuition for the entire time all their children were enrolled in Hope Township's School,

[1] Respondent submitted a letter stating that it did not except to the Initial Decision.

despite the District's lack of notice for nine years that the children did not belong in the Hope School District. (*Id.* at 3) Alleging that there was no intent to defraud the School District, petitioners contend that in cases of disputed domicile, parents have been held liable for tuition only after they became aware that they were in the incorrect district. Petitioners cite in support thereof: *Lee v. Board of Education of the Township of Holmdel, Monmouth County,* EDU 164-97 (October 23, 1997), adopted by the Commissioner of Education December 8, 1997 (Decision No. 633-97), *aff'd* State Board June 2, 1999; *L.B. v. Board of Education of the Township of Teaneck, Bergen County,* EDU 5472-97 (August 7, 1998), adopted by the Commissioner of Education September 24, 1998 (Decision No. 416-98), *aff'd* State Board January 6, 1999; and *Board of Education of the Hunterdon Regional School District v. E. F. and G.F.*, EDU 6247-98 (December 21, 1999), adopted by the Commissioner of Education February 3, 2000 (Decision No. 49-00), *aff'd* State Board June 7, 2000. Petitioners submit that they should, at most, only be liable for tuition for the 1999-2000 school year. (Petitioners' Exceptions at 4)

Initially, the Commissioner agrees with the ALJ that inclusion of the Knowlton School District as a party is not necessary for a fair determination in this matter. Petitioners seek to include Knowlton because: 1) they allege that they relied on information provided to them by the secretary to the superintendent of the Knowlton Schools in enrolling their children in the Hope Township School;[2] and 2) petitioners allege that the townships *may* have been redistricted. The Commissioner notes that respondent does not dispute petitioners' assertion that a secretary in the Knowlton District advised M.F. that her children should be enrolled in the Hope Township school system.[3] Also, Richard J. Motyka, the tax assessor for *both* the Township of Hope and the Township of Knowlton, certified that any redistricting of the townships is reflected on the current tax maps. *See* October 4, 1999 Amended Certification of

[2] Petitioners did not seek, by subpoena or otherwise, to have the secretary testify on their behalf.
[3] Respondent, however, does challenge the secretary's authority to bind the District. (Respondent's Brief in Support of Motion for Summary Judgment at 5)

Richard Motyka at para. 1 and 12. According to the tax maps, less than two-tenths of one acre of petitioner's property is located in Hope Township, and the remaining 9.586 acres of petitioner's property and all improvements are located in Knowlton Township. (*Id.* at para. 5 and 6) Mr. Motyka also certified that, from 1992 to present, all property taxes on petitioners' property have been paid to Knowlton Township. (*Id.* at para. 8) Accordingly, as stated above, there is no dispute as to the content of the secretary's comments, and Mr. Motyka's certification answers the question of the effect of any redistricting. It is, therefore, not necessary to include Knowlton as a third party for resolution of the factual issues raised by petitioners.[4]

Upon his careful and independent review of this matter, the Commissioner concurs with the Administrative Law Judge's conclusion that petitioners have failed to prove that they are domiciled in respondent's District, so as to permit their minor children to attend school free of charge pursuant to *N.J.S.A.* 18A:38-1.

Notwithstanding the finding that petitioners were not domiciled in respondent's District during the relevant period so as to entitle their children to attend school in that District free of charge, the record does not support a finding that petitioners understood prior to notification by the Board on April 20, 1999[5] that their children were not enrolled in the appropriate school district. Respondent does not allege, nor is there anything in the record to suggest, that petitioners failed to provide the information requested when enrolling their children in respondent's school or that they provided erroneous information to the District upon enrolling their children in respondent's school. It is undisputed that M.F. attempted to enroll her oldest

[4] Petitioners sought no relief against Knowlton in their proposed Amended Petition. Rather, they sought only to establish the above factual assertions. Therefore, there is no need to determine whether Knowlton may be joined as a party for purposes of assessing liability against it.

[5] The Chief School Administrator for the Hope Township School District notified petitioners by letter of March 29, 1999 that there was a question as to whether petitioners were domiciled in Hope Township. The Board, subsequently, held a hearing on the issue of petitioners' residency at its regularly scheduled meeting on April 13, 1999. By letter of April 20, 1999, petitioners were notified of the Board's determination that petitioners and their children were residents of Knowlton, and thus not entitled to a free education in the Hope Township School. (Answer and Counter-Petition, Exhibit B)

child, K.F., in the Knowlton School District, whereupon the secretary to the superintendent informed her that K.F. must be enrolled in respondent's District or M.F. would be subject to tuition charges.[6] While it may not have been prudent for M.F. to have relied on the information provided by a secretary in the Knowlton School District, M.F. reasonably assumed that the information was accurate.[7] The ALJ concluded that M.F. deliberately concealed information from respondent by failing to mention her effort to enroll K.F. in the Knowlton Schools, by failing to mention that her step-children had attended the regional high school consistent with domicile in Knowlton, and by failing to note that she paid taxes to Knowlton. The Commissioner disagrees. The record does not reveal any intent on the part of petitioners to withhold this information or that respondent ever requested such information.

While a claimant's perception of domicile cannot override legal and geographical realities, the Commissioner finds that it would be inequitable to assess tuition against petitioners prior to April 20, 1999 under the particular facts of this matter, where petitioners domicile is situated on land which overlaps municipal boundaries, where petitioners reasonably relied on respondent's acceptance of their children as students for the previous nine years, and where there is no evidence in the record indicating that petitioners knew they were not domiciled in respondent's district prior to notice from the District. The Commissioner, therefore, concludes that fundamental fairness dictates that respondent be estopped from collecting tuition from petitioners for the period of ineligible attendance prior to April 20, 1999. *See East Orange v. Bd. of Water Com'rs., etc.*, 41 *N.J.* 6, 19 (1963) ("***equitable principles of estoppel may be applied against public bodies where the interests of 'justice, morality and common fairness' dictate that

[6] M.F. testified that when she informed the secretary that her taxes were paid to Knowlton, the secretary told M.F. that a portion of her taxes were paid to the Hope schools. (Initial Decision at 5)

[7] M.F. certified that the secretary left the room to check with a Knowlton administrator, and returned to confirm that M.F.'s children belonged in respondent's schools. (M.F.'s Certification at para. 7)

course."); *State, Dept. of Envir. Protection v. Stavola,* 103 *N.J.* 425, 436 n.2 (1986) ("Any administrative agency in determining how best to effectuate public policy is also limited by applying principles of fundamental fairness."); *H.M. and L.M. v. Board of Education of the Township of Freehold, Monmouth County,* decided by the State Board April 2, 1997; *Akbar Zadran v. Board of Education of the Township of Belleville, Essex County,* decided by the State Board of Education April 1, 1998; *Board of Education of the Borough of Fort Lee v. Kintos,* Docket #A-4944-93T5 (App. Div. October 13, 1995); and *Lee, supra.*

Accordingly, the Commissioner adopts the ALJ's conclusion that petitioners have failed to prove that they are domiciled in respondent's District, so as to permit their minor children to attend school free of charge pursuant to *N.J.S.A.* 18A:38-1 for the reasons expressed therein. As noted above, however, the Commissioner modifies the ALJ's decision with respect to reimbursement of tuition, and petitioners are hereby ordered to reimburse respondent for tuition costs for the period of their children's ineligible attendance following their notification by respondent on April 20, 1999. Therefore, for the period of ineligible attendance from April 21, 1999 until the end of the 1998-1999 school year, such tuition shall be computed on the basis of 1/180 of the tuition rate of $7,000 per child, multiplied by the number of remaining days in the school year. *See N.J.S.A.* 18A:38-1b(2). For the period of ineligible attendance for the 1999-2000 school year, petitioners shall be assessed tuition for K.F. in the amount of $5,700, J.F. in the amount of $5250 and B.F. in the amount of $5,250.[8]

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: July 31, 2000

Date of Mailing: July 31, 2000

[8] In support of its counterclaim, respondent submitted a tuition calculation for each year for each child. (Exhibit, R-3) Petitioners do not contest the tuition rates set forth therein.

[9] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

246-00

EDU #7367-99
C # 246-00
SB # 50-00

M.F. AND P.J.F., on behalf of minor children,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 31, 2000

For the Petitioners-Respondents, M.F. and P.J.F., pro se

For the Respondent-Appellant, Morris, Downing & Sherred (Craig U. Dana, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

February 7, 2001

Date of mailing FEB 09 2001

2/7/01

247-00

ROBERT J. SOPRANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

July 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NOS. EDU 4676-97, 8420-97 & 24-98

AGENCY DKT. NOS. 156-7/97, 305-8/97 & 465-12/97

(CONSOLIDATED)

ROBERT J. SOPRANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,

Respondent.

Melissa Vance Kirsch, Esq., for petitioner

David W. Carroll, Esq., for respondent (Carroll, Weiss & Josephson, attorneys)

Record Closed: June 14, 2000 Decided: June 14, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) on January 12, 1997 (EDU 4676-97), October 3, 1997 (EDU 8420-97) and January 2, 1998 (EDU 24-98) for hearing, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. EDU 4676-97 and 8420-97 were consolidated in an Order dated November 13, 1997 and EDU 24-98 was consolidated with EDU 4676-97 & 8420-97 in an Order dated December 7, 1999. Telephone conferences were scheduled for November 6, 1997, January 28, 2000, February 14, 2000 and

March 31, 2000. Prior to the March 31, 2000 telephone conference the parties advised that the matters had been tentatively settled and that an agreement would follow shortly. In a letter dated June 13, 2000 counsel for petitioner advised that the petitioner wished to withdraw his appeals with prejudice.

Accordingly, and based on the foregoing, it is **ORDERED** that the appeals of the petitioner, Robert J. Soprano, be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2000
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

6-16-00
DATE

Debbie Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

CONFIRMATION COPY -
ORIGINAL VIA FACSIMILE

MELISSA VANCE KIRSCH
Attorney at Law

920 West State Street
Trenton, New Jersey 08618
Telephone (609) 599-2900
Telefax (609) 599-1893

June 13, 2000

VIA Mail/Fax #609/588-3730

Honorable Kathryn A. Clark
Administrative Law Judge
9 Quakerbridge Plaza
Post Office Box 049
Trenton, New Jersey 08625-0049

RE: *Robert J. Soprano v. Holland Township Board of Education, Hunterdon County*
OAL Dkt. #EDUOA 04676-97S and #EDU 8420-97; Agency Ref. #305-8/97
(Consolidated Agency Ref. Nos. 156-7/97[1] & 305-8/97)

Dear Judge Clark:

Please be advised that the Petitioner, Mr. Robert J. Soprano withdraws the above-captioned matters, with prejudice.

Thank you.

Very truly yours,

Melissa Vance Kirsch

Melissa Vance Kirsch
Counsel for Robert J. Soprano

MVK:alc
C: David W. Carroll, Esq.
(via fax #609/896-9023)
Robert J. Soprano

[1] The acknowledgment documents from the Commissioner of Education list the Agency Docket No. of the petition filed in June 1997, as 156-5/97, but the OAL lists that docket number as 156-7/97.

OAL DKT. NOS. EDU 4676-97, EDU 8420-97 & EDU 24-98 (CONSOLIDATED)
AGENCY DKT. NOS. 156-7/97, 305-8/97 & 465-12/97

ROBERT J. SOPRANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision reporting that the parties had agreed to an amicable resolution of this matter have been reviewed. Noting the absence of specific terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this consolidated matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 31, 2000

Date of Mailing: August 1, 2000

248-00

248-00

A.H., on behalf of minor child, K.L.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

July 31, 2000

OAL DKT. NO. EDU 5904-99
AGENCY DKT. NO. 58-3/99

A.H., on behalf of minor child, K.L.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of notification sent to petitioner by OAL on June 21, 2000, providing ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: JUL 31 2000

Date of Mailing: AUG 01 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

249-00

C.C.B. AND M.C.B., on behalf of minor children, A.B.B. AND D.B.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

July 31, 2000

OAL DKT. NO. EDU 278-00
AGENCY DKT. NO. 330-11/99

C.C.B. AND M.C.B., on behalf of minor children, A.B.B. AND D.B.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of notification sent to petitioners by OAL on June 29, 2000, providing ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioners, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: JUL 31 2000

Date of Mailing: AUG 01 2[redacted]

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

250-00

DANELLE CONNOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

July 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6658-98

AGENCY DKT. NO. 222-7/98

DANELLE CONNOLLY,

Petitioner,

v.

WOODBINE BOARD OF EDUCATION,

Respondent.

Stephen Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Ronald Sahli, Esq., for respondent (Sahli & Padovani, attorneys)

Record Closed: June 15, 2000 Decided: June 15, 2000

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 10, 1998, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the consent order as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

15 June 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/16/00
DATE

Debbie Gutmantis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 20 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

KLAUSNER, HUNTER & ROSENBERG, ESQS.
63 East High Street
P.O. Box 1012
Somerville, N.J. 08876
(908) 685-1552
Attorneys for Petitioner

DANELLE CONNOLLY,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDUOR-06658-98S AGENCY REFERENCE NO. 222-7/98
WOODBINE BOARD OF EDUCATION,	:	
Respondent.	:	ORDER

WHEREAS, a Petition of Appeal was filed on behalf of Petitioner Danelle Connolly on or about July 1, 1998; and

WHEREAS, the Woodbine Board of Education filed an Answer on or about July 24, 1998; and

WHEREAS, an administrative hearing was scheduled before the Honorable Lillard E. Law, on March 2, 2000; and

WHEREAS, Ronald Sahli, the attorney for the Woodbine Board of Education, concluded a settlement of the above captioned litigation in negotiations with Stephen B. Hunter as the attorney for Petitioner Connolly on March 2, 2000; and

WHEREAS, the Honorable Lillard E. Law was personally advised on March 2, 2000 that the above captioned matter had been resolved subject to a ratification vote taken by Woodbine Board of Education; and

WHEREAS, the Woodbine Board of Education subsequently approved the settlement of the above captioned litigation that required the Board of Education to remit the sum of $5,000.00 in a lump sum, non-taxable distribution to reimburse Petitioner to potentially recoverable costs for claims Petitioner had waived; and

WHEREAS, the Board of Education has never implemented the agreed upon resolution of the above captioned litigation; and

WHEREAS, the attorney for the Board of Education, Ronald Sahli, has never responded to letters and telephone calls placed to him by Stephen B. Hunter, relating to the status of the Board's compliance with the Settlement Agreement; and

WHEREAS, a telephone status conference was scheduled on April 20, 2000 to discuss the reason why the Board of Education had not effectuated the settlement of the above captioned matter; and

WHEREAS, Ronald Sahli did not participate in the telephone conference call; and

WHEREAS, no reason has been proffered by any representative of the Woodbine Board of Education as to why the settlement in the above captioned matter has not yet been effectuated;

IT IS HEREBY ORDERED THAT:

The Woodbine Board of Education shall remit to Danelle Connolly, within thirty (30) days of the execution of this Order, the sum of $5,000.00 in a lump sum, non-taxable distribution to

reimburse Petitioner for potential recoverable costs for claims Petitioner has waived in this litigation.

Lillard E. Law

Honorable Lillard E. Law

OAL DKT. NO. EDU 6658-98
AGENCY DKT. NO. 222-7/98

DANELLE CONNOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the Initial Decision with attached Order by the Administrative Law Judge (ALJ) and letters from the parties indicating resolution of this matter, has been reviewed.

The Commissioner initially notes that the terms of the executed settlement reached between the parties referenced by the ALJ are not appended to the Initial Decision nor are they included in the record. The Commissioner also observes that the Order included in the Initial Decision effectuates a term of the proposed settlement agreement prior to its approval by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. Under the circumstances in this matter, the Board would have been in violation of *N.J.A.C.* 1:1-19.1 had it effectuated the terms of the settlement prior to its approval by the Commissioner. The ALJ and the parties are, therefore, cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

In the absence of the specific terms of the parties' settlement agreement so as to permit his full review under *N.J.A.C.* 1:1-19.1, the Commissioner finds it necessary to remand

this matter to the OAL. Accordingly, the matter is hereby remanded for supplementation of the record and modification of the Initial Decision to include the executed Settlement Agreement between the parties or further proceedings as necessary, such that the record has sufficient information for the Commissioner to reach a final determination.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 31 2000

Date of Mailing: AUG 02 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

251-00

J.M., on behalf of minor children, M.C.C. AND M.C.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, grandmother of students M.C.C. and M.C.C., challenged the Board's determination that they were not entitled to a free public education in the District in accordance with *N.J.S.A.* 18A:38-1.

The ALJ concluded that petitioner obtained custody of the children because she believed that it would satisfy the school residency requirements. The ALJ concluded that petitioner did not establish that she supported the children gratis. Moreover, the ALJ determined that the living arrangement and custody appeared to be temporary. The ALJ ordered that petitioner reimburse the Board tuition in the amount of $13,827.60.

The Commissioner reversed the decision of the ALJ. The Commissioner concluded that an analysis pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision, was inappropriate once it was determined that J.M. had legal custody of M.C.C. and M.C.C. Consistent with decisional law, the Commissioner further held that the motives of petitioner in obtaining an order transferring custody to J.M. are not subject to inquiry, and, absent a showing of fraud or other exceptional circumstances, M.C.C. and M.C.C are domiciled in Hamilton and entitled to a free public education from the District pursuant to *N.J.S.A.* 18A:38-1(a) until such time as legal and physical custody no longer rests with J.M. Finally, the Commissioner determined that the Board is not entitled to reimbursement of tuition.

August 4, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 118-00

AGENCY DKT. NO. 287-9/99

J.M., ON BEHALF OF MINOR CHILDREN,
M.C.C. AND M.C.C.,

Petitioner,

v.

BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY,

Respondent.

J. M., petitioner, *pro se*

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: June 16, 2000 Decided: June 16, 2000

BEFORE **M. KATHLEEN DUNCAN**:

This matter commenced on September 27, 1999, when J.M., grandmother of minor children M.C.C. and M.C.C., (hereinafter petitioner) filed a petition of appeal seeking an order from the Commissioner of Education requiring the Board of Education of Hamilton Township (hereinafter respondent) to permit M.C.C. and M.C.C. to attend the public schools in

respondent's district free of charge. An answer on behalf of respondent was filed on December 17, 1999, and on January 11, 2000, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

By letter dated March 24, 2000, the undersigned wrote to the parties as follows:

> *N.J.S.A.* 18A:38-1 provides that petitioner is entitled to an expedited hearing in the above-captioned matter. Accordingly, I have scheduled this matter for hearing at 9 a.m. on April 11, 2000 at the Trenton office of the Office of Administrative Law. At that time it will be Ms. M.'s burden to prove by a preponderance of the competent and credible evidence that M.C.C. and M.C.C. are entitled to attend the public schools of Hamilton Township free of charge in accordance with *N.J.S.A.* 18A:38-1. The school board's witnesses will testify after those for Ms. M.

Thereafter by order issued April 3, 2000, the undersigned directed petitioner to provide fully responsive certified answers to interrogatories no later than April 6, 2000 and forwarded to petitioner a copy of *N.J.S.A.* 18A:38-1, the relevant statutory provisions concerning who may attend school free of charge. The hearing was conducted as scheduled on April 11, 2000, at the Trenton office of the Office of Administrative Law. Following the close of the hearing, by memorandum dated April 25, 2000 and received on April 27, 2000, petitioner forwarded a copy of a Consent Order concerning custody of the minor children signed by Jane Grall, J.S.C., on April 18, 2000. By letter dated June 8, 2000, the undersigned requested that counsel for respondent forward an official school calendar for the 1999-2000 school year. The calendar was provided under cover-letter dated June 13, 2000, which was received on June 16, 2000, whereupon the record closed.

FINDINGS OF FACT

Some of the facts relevant to a determination of this matter are not in dispute and accordingly I **FIND** the following as uncontested facts.

In June 1999, petitioner, who is the maternal grandmother of minor children, M.C.C. and M.C.C., resided in a one-bedroom apartment at 202 E. Court, Hamilton Township. On August 13, 1999, petitioner completed a form "Affidavit-Host Family Domiciled in Hamilton Township" wherein she stated that T.C. (her daughter) and her children, M.C.C. and M.C.C., were domiciled in petitioner's home. In the blank on the form provided for indicating whether the arrangement was temporary or permanent, petitioner wrote the word "permanent." Petitioner's daughter T.C. completed an "Affidavit-Parents Residing with Host Family" on August 13, 1999, wherein T.C. reported her address as 202 E. Court. Thereafter by letter dated August 24, 1999, respondent wrote to petitioner as follows:

> After reviewing the paper work that was turned in, it is necessary to have a copy of your lease with Mrs. T. C.'s name on it.
>
> If the name is not on the lease, you will need a letter from the lease company stating that it is okay for Mrs. C. to live with you.
>
> If you have any questions, please contact me at 890-3101.

In fact T.C.'s name was not on the lease and T.C. was not residing with petitioner at 202 E. Court. Thereafter, petitioner filed an action in Superior Court to obtain custody of the two minor children M.C.C. and M.C.C. On September 24, 1999, Gerald J. Council, J.S.C., signed a Consent Order awarding temporary custody to petitioner "as agreed between the parties." T.C., petitioner's daughter, then completed a "Non-Resident Parent-Information Sheet" on a form provided by respondent. She signed the form on September 22, 1999, certifying that the information on the sheet was true. The sheet, which was provided to respondent on or about September 24, 1999, states that the court had awarded custody to petitioner. Following the printed question, "Do you contribute toward child support?" T.C. wrote "yes." Where the form continued, "If yes, how much yearly?" T.C. wrote "$4,800." The next question provides, "If not, please state the reason that you are not able to support or provide care for this student." The line for an answer following that question was left blank. A letter dated September 22, 1999, from the Rental Manager at petitioner's apartment complex, addressed "To Whom It May Concern," confirms that "Ms. M. has acquired custody of her two grandchildren M.C. Jr., age 9, and M.C., age 8," and states that the apartment complex will permit them all to reside in the one-bedroom

unit at 202 E. Court until they can be transferred to a larger unit. (On November 15, 1999, they moved to 210 E. Court, a two-bedroom unit.)

Respondent denied the application for enrollment of the students. The denial letter addressed to petitioner, dated 9/24/99, states in pertinent part, "Mother cannot support the child in any way." The denial letter also provided instructions for filing an appeal with the Commissioner. Also on September 24, 1999, petitioner prepared the following appeal of respondent's determination:

> After numerous of attempts to resolve the above matter since 8-25-99 I had no choice but to file a complaint in the courts. Each time I called your office 609 890-3101 I was told; you left for the day
>
> on vacation
> all booked up
> out sick
> we'll call you back
>
> This continued until 9/21 when I went to Mercer Court, but was referred to Hamilton Twp. Clerk's Office on Greenwood Ave. for help.
>
> Ms. Eileen Gore assisted me by contacting Mr. Offredo immediately; and I spoke to him. Only then he offered to assist me but I was on lunch, and asked him to schedule me 9/22. He gave me 9 a.m. First, I had to pick up more forms to be completed by my daughter T.C. (NON RESIDENT PARENT and GUARDIAN AFFIDAVIT for myself.
>
> Question? Do you contribute towards child support yes
> If yes how much? $4800 (yearly)
>
> Immediately, Mr. Offredo terminated the hearing and said "You are denied) but you can file an appeal. However, the children will not be able to attend school until after you have received a letter of denial or acceptance from the Commissions Office.
>
> I asked how long will that take, he got up and walked out to make copies of the completed forms. Upon returning he provided no more information.

> On the same day (9-21) I called the Hamilton Twp. Court and spoke with Ms. Lynn Hoagland and she reassured me she'll research the problem and try to find out when the children can start to school. When I spoke again with her the same day she stated didn't you know you can do an appeal and send them to school? My answer had to be no because that's not what was told to me by A. Offredo.
>
> What & why I'm appeal?
>
> Because if you look on the form the question ask how much per year? I only got them after school closed on 6/21/99. My daughter and I had made a verbal agreement, but it has not been a year, nor has any money transpired. It was a simple error that was deliberately blown up to be more. I know without a doubt that the intent was deliberate to discourage me. You discriminated towards me as a legal guardian and it shall be determined what federal laws were broken.
>
> Mr. Offredo, willfully and intentionally withheld rules, regulations, and facts on how to file for enrollment of new students. He has offended me in the worst way; and by no means is this over.

The appeal was filed in the Commissioner's office on September 27, 1999 and on September 28, 1999, the students were admitted to school in respondent's district, pending the determination of the residency dispute pursuant to *N.J.S.A.* 18A:38-1.

After the hearing took place in the within matter, Jane Grall, J.S.C., signed a Consent Order on April 18, 2000, which provided in pertinent part, as follows:

> It is hereby **ORDERED** that custody of the minor children, M.C., Jr. and M.C., shall be transferred to defendant, T.C., on June 30, 2000 at which time defendant shall have her own residence. If defendant does not have her own residence and proof thereof, the children shall remain with plaintiff, J.M., until defendant establishes her own residence.

This concludes the recitation of uncontested facts.

Petitioner testified that prior to June 21, 1999, her daughter T.C. and her daughter's children, M.C.C. and M.C.C., resided in Roselle, New Jersey and the children attended the Roselle public schools. She testified that because her daughter had decided to move to the Bronx and because petitioner did not want the children to live in the Bronx or to go to school there, there was an agreement that the children would live with petitioner in Hamilton Township. Petitioner testified that after the children came to live with her at the end of June 1999, she went to the Kuser School and spoke with the secretary there who asked her about the living arrangements. It was petitioner's testimony that at that time she was not sure what was going to happen, that she expected her daughter would be there some weekends, and the secretary had said she would send her papers in the mail. The Host Family form arrived in the mail with instructions to go to the central office to register the kids for school, petitioner testified. When she went on her lunch hour, she was told she needed an appointment, but one of the other parents gave her his slot and she was able to give her papers to Mr. Offredo, the Residency Officer. She testified that although she told Mr. Offredo at that time that T.C. was not going to be living with her, that T.C. would be taking an apartment in New York, she had nevertheless later received the August 24, 1999 letter (quoted hereinabove) requesting proof that T.C.'s name was on the lease. She said she then tried to get in touch with Mr. Offredo again by telephone, but that he did not return her phone calls. She insisted that she had told him that the plans had changed and that T.C. was going to take an apartment in the Bronx. Thereafter, she testified, at the suggestion of another residency officer, John E. Conner, she and her daughter and her former son-in-law went to the Mercer County Superior Court so that legal custody could be awarded to petitioner. After seeking the intervention of Eileen Gore, in the Hamilton Township Clerk's office, who called Mr. Offredo on petitioner's behalf, petitioner was finally able to get an appointment with Mr. Offredo, she indicated. On September 22, 1999, when she appeared for her appointment she was given more forms to fill out, she indicated, including the Non-Resident Parent Form. Later when Mr. Offredo reviewed the forms and noted that T.C. had indicated a $4800 annual contribution toward the support of the children, he had told her that enrollment would be denied. Petitioner said she explained that it was just a verbal agreement, that no money had yet transpired since the children had only been with her since the end of June. According to petitioner, Mr. Offredo then jerked the papers out of her hands and said that the children were denied and told her that a letter would be coming. She further testified that because the children were still out of school at this

point, she then called the Hamilton Township Clerk's office again and was told how she could file an appeal with the Commissioner and that the children could then go to school.

On cross-examination petitioner acknowledged that she wanted the children to live with her for two reasons; she did not want them in New York City because of the crime rate there and because of the school system. She felt that by living with her the children would have a better environment and a better school system. Petitioner testified that she had convinced her daughter and her former son-in-law that having the children live with her would be a better way. She also acknowledged on cross-examination that her former son-in-law is paying child support for M.C.C. and M.C.C. She did not know how much he was ordered to provide, and she indicated that she had not received any of it. "I have to go back to court to get the support shifted to me," she said. Although her daughter did not give her any of the money, T.C. did buy the children school clothes, petitioner testified. When asked about future intentions for returning the custody of the children to her daughter, petitioner testified that it was not her intention to take the children away from their mother permanently, but that she was only helping out. "I have my own life and my own bills," she indicated. When questioned by the undersigned about the Court-Ordered Custody Agreement, petitioner acknowledged that the Custody Order was for six months and that she had a court date for April 18, 2000, where it could be extended for another six months.

T.C., petitioner's daughter, testified that the children had gone to live with her mother because her mother did not want them to move to the Bronx. Concerning the Non-Resident Parent Form, she testified that she and her mother had anticipated a certain amount that she would give to her mother to help out with the cost of raising the children; that was why she had put "$4800" on the form, she said, not because any money had actually changed hands. She acknowledged that her former husband has been under a child support court order since 1995, although she denied that he made any regular support payments. According to T.C. he was approximately $37,000 in arrears. She acknowledged that from time to time she does receive payments through the Probation Department when he goes on unemployment or when he gets a job where they catch up with him. The most recent checks she had received from the Probation Department were in February of 2000. The first check was $108.40, she said, and the other four or five were between $51 and $54 each. She expected to receive another one, perhaps on

Thursday of the week of the hearing. Finally, she indicated that it was her intention on April 18, 2000, when they went back to the court concerning custody, to ask for custody of her children back since she was residing in Linden now and the Linden schools are okay. On cross-examination she indicated that she buys clothes for the children and that the checks she has received from her former husband have been spent entirely on the children. When she comes to visit at her mother's apartment on the weekends, she entertains them or takes them for haircuts, etc. Sometimes I might take them to Linden with me to my friend's house, she added. She testified that after she moved to New York in July 1999, she was working in Perth Amboy at a hair salon up until December 1999. She had not worked since then, except to do hair at home, but was anticipating starting a new job in May of 2000. Before she moved to the Bronx she was on disability and then unemployment, she testified.

Albert Offredo, a Residency Investigator for respondent, testified that petitioner had told him that her daughter would be moving in with her, that the forms which were provided to his office on or about August 24, 1999, confirmed that and accordingly, he had sent out the August 24 letter asking for proof that the daughter and the children were on the lease. After approximately two weeks went by he got a call from petitioner, he testified, wherein she advised that she would not be enrolling the children in school after all. On September 21, 1999, he received another call from petitioner wherein she said the circumstances had changed, and he had advised her that she would have to fill out another form or affidavit of guardianship. He indicated that although he had heard petitioner testify in the courtroom that she had had difficulty getting an appointment, he did not understand how that could be the case; "I never took a vacation day or a sick day since I started," he said. According to Mr. Offredo he had explained the law of guardianship to petitioner and her daughter and he had given them forms to fill out. When they returned the completed forms later in the day and he looked at them, he told them that the daughter could not be contributing to child support. At that point, he testified, petitioner became very upset and said she had been getting the run-around trying to get the children enrolled. Mr. Offredo said that he had tried to explain the appeal process to petitioner, but she left before he could complete the explanation because she was upset. The denial was based on parental support, he said. Finally, Mr. Offredo testified that the annual per pupil cost in Hamilton for 1999-2000 is $7,452. The per diem cost for each child is $41.40. The children started school on September 28, 1999 and currently continue in attendance. The official school

calendar, C-1 in evidence, shows 167 school days between September 28, 1999 and June 14, 2000, the last day of school for students.

With respect to the disputed facts, I **FIND** that Mr. Offredo did tell petitioner on September 22, 1999, that there was an appeal process and that after the appeal was filed in the Commissioner's office, the children could attend school. Even petitioner's own appeal letter filed with the Commissioner on September 27, acknowledges it. Most of the other facts in the individuals' testimony are not really disputed, and accordingly I hereby incorporate them to the extent that they are relevant and material.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-1, the statute relevant to a determination of this matter, provides in pertinent part, as follows:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be

> accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child.

. . .

In the present matter, it is clear from the evidence provided that, notwithstanding the sworn statements in the August 13, 1999 affidavits referenced hereinabove at page 3, petitioner's daughter, T.C., never intended to reside in her mother's apartment at 202 E. Court and, in fact, she never did. At the time the children moved into 202 E. Court, it was their mother's intention to move to the Bronx, something which she promptly did. Accordingly, at no time relevant to these proceedings has T.C. been domiciled in Hamilton Township.

Domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, s/he intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), affirmed 58 *N.J.* 112 (1971). Accordingly, T.C.'s domicile was Roselle and then the Bronx. A child's domicile is the domicile of his parents, or if the parents are divorced, the domicile of the custodial parent with whom they live. See *Roxbury Bd. of Ed. v. Milford Bd. of Ed.*, 283 *N.J. Super.* 505, 521-522 (App. Div. 1995). Accordingly, the children were not domiciled in Hamilton and were not entitled to attend respondent's schools free of charge pursuant to the provisions of *N.J.S.A.* 18A:38-1a.

Petitioner certainly meets some of the qualifications set forth in paragraph b of the statute. She herself is certainly domiciled within the school district. Since September 24, 1999, petitioner has had legal custody of the children. Legal custody alone, however, is insufficient to establish eligibility under the statute. *Bd. of Ed. of the Township of Cranford v. A. McG. and L.M.*, 95 *N.J.A.R.*2d (EDU) 74. *N.J.S.A.* 18A:38-1b provides that a child living with a person domiciled within the school district is entitled to a free education upon the filing by the child's parent that she "is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district." The paperwork filed by

petitioner and her daughter does not establish that T.C. was not capable of supporting or providing care for the children. In fact the paperwork indicates that T.C. would be contributing $4800 toward the care of the children. The fact that the parent does not provide support is not the key determinate, but whether the parent could provide support. Clearly at the relevant time periods herein T.C. did have some financial resources. After she moved to the Bronx, she worked as a hairdresser at a salon until December 1999, and before that she collected disability benefits and unemployment benefits. She also worked at home as a hairdresser and received some child support payments from the children's father. She could have provided support and care for the children. The reason the children were not with her in the Bronx was not because of her inability to support or care for them, but rather because petitioner felt that it would be better for them to live with her in Hamilton Township. While petitioner's intentions in this regard are understandable and even laudable, they do not entitle the children to attend school in the district free of charge. Furthermore, the custody order entered was clearly temporary and the subsequent order anticipates that T.C. will resume custody of her children at the conclusion of the school year. This is not the type of situation envisioned by the provisions of *N.J.S.A.* 18A:38-1b. The facts in the within matter are somewhat similar to those in *Board of Education of the Township of Cranford v. A.McG. and L.M., supra.* In that case the Commissioner adopted the decision of the administrative law judge who concluded:

> I reject respondents' claim that the custody order issued to the grandmother gives the children the right to obtain a free public education in Cranford. Custody alone is not enough to establish eligibility under the statute. *N.J.S.A.* 18A:38-1(b) states that a child living with a person domiciled within the school district is entitled to a free education upon the filing by the child's parent or guardian with the secretary of the board of education a "sworn statement that he is not supporting the child," due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement must be substantiated by documentation pertaining only to the support or nonsupport of the child. Respondents failed to provide documentation or convincing testimony regarding their inability to support the children. Moreover, the evidence shows that the grandmother misconstrued her discussion with Board personnel; she obtained custody of the children because she believed it would satisfy school residency requirements. *Id.* at 77.

In the within matter I likewise **CONCLUDE** that petitioner obtained custody of the children because she believed it would satisfy the school residency requirements. I **CONCLUDE** that she has not established that she supports the children gratis; certainly non-cash contributions were made by T.C. and cash contributions, which were made by the children's father, were spent on the children as well. The living arrangement and the custody were only temporary, and it appears that they probably will not continue past the end of June 2000. For all of the foregoing reasons, it is hereby **ORDERED** that petitioner reimburse respondent in accordance with tuition rates calculated pursuant to the formula established by the New Jersey Department of Education and as set forth in the testimony of Albert Offredo and in exhibit R-8 in evidence and in exhibit C-1, in the amount of $13,827.60 [(167 x 41.40) x 2].

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 16, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6-20-00
DATE

Debbie Abramowitz/kgp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 21 2000
DATE

Jeff S. Mazi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1	Package of petitioner's personal identification (5 pages)
P-2	Letter from New York City Housing Authority to T.C., dated July 6, 1999
P-3	Information Sheet, Hamilton Township schools, Central Registration
P-4	Non-Resident Parent Information Sheet completed by T.C., 9/22/99
P-5	Pupil Enrollment Form for M.C.C., Jr., completed by T.C. (4 pages)
P-6	Letter from Albert Offredo to petitioner, dated August 24, 1999
P-7	Letter from respondent to petitioner, dated September 24, 1999
P-8	Superior Court of New Jersey, Chancery Division, Family Part, Civil Action Complaint filed by petitioner (2 pages)
P-9	Consent Order signed by Gerald J. Council, J.S.C., 9/24/99
P-10	Letter from petitioner's rental manager To Whom It May Concern, dated February 11, 2000
P-11	Letter from petitioner's rental manager To Whom It May Concern, dated September 22, 1999
P-12	Petitioner's lease for 210 E. Court (3 pages)
P-13	Petitioner's lease for 202 E. Court
P-14	Letter from respondent to petitioner faxed on October 1, 1999 (2 pages)
P-15	Consent Order, signed by Jane Grall, J.S.C., on 4/18/00 (2 pages)

For respondent:

R-1	Pupil Enrollment Form for M.C., dated 7/12/99, completed by T.C. (2 pages)
R-2	Pupil Enrollment Form for M.C.C., Jr., dated 7/12/99, completed by T.C. (2 pages)
R-3	Affidavit-Host Family Domiciled in Hamilton Township, completed by petitioner 8/13/99, re: M.C.C.

R-4 Affidavit-Host Family Domiciled in Hamilton Township, completed by petitioner 8/13/99, re: M.C.C., Jr.

R-5 Affidavit Parents Residing with Host Family, completed by T.C. on 8/13/99, re: M.C.C., Jr.

R-6 Affidavit Parents Residing with Host Family, completed by T.C. on 8/13/99, re: M.C.

R-7 Affidavit-Guardian, completed by petitioner on 9/22/99

R-8 Letter from respondent to petitioner, dated April 11, 2000

For the judge:

C-1 Hamilton Township Public School 1999-2000 Pupil/Teacher calendar

WITNESSES

For petitioner:

J.M.

T.C.

For respondent:

Albert Offredo

OAL DKT. NO. EDU 118-00
AGENCY DKT. NO. 287-9/99

J.M., on behalf of minor children, M.C.C. AND M.C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon independent review of the record of this matter, the Commissioner determines to reverse the Initial Decision of the Administrative Law Judge (ALJ) for the reasons set forth herein. The record clearly demonstrates that on September 24, 1999, J.M. was granted legal custody of M.C.C. and M.C.C. On April 18, 2000, the Court ordered transfer of custody of these children to T.C., their natural mother, as of June 30, 2000, contingent upon T.C. having her own residence. Further, the Court ordered that if T.C. did not have her own residence on that date, custody of the children was to remain with J.M. until such time as T.C. establishes her own residence. (Exhibit P-15) Based on these facts, the Commissioner finds and determines that M.C.C. and M.C.C. were entitled, during the period in dispute herein, to attend school in the Hamilton Township School District free of charge pursuant to the requirements of *N.J.S.A.* 18A:38-1(a). As was determined by the Commissioner and affirmed by the State Board of

Education in *L.A. v. Board of Education of the Town of West Orange*, 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.*2d (EDU) 124, *aff'd* by the State Board of Education 97 *N.J.A.R.*2d 554 (1997), as of the date that a resident of a district takes *legal control* of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision.

Consequently, in the instant matter, once J.M. assumed legal and physical custody of M.C.C. and M.C.C., the only appropriate inquiry for the Board was whether J.M. and M.C.C. and M.C.C. were domiciled in the District pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as the Board does not dispute that J.M. is domiciled in Hamilton, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, *Mansfield Twp. BOE v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that M.C.C. and M.C.C. were entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a), as of the date J.M. acquired legal custody of them. *See* also *Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997. In so finding, the Commissioner notes that there is no claim of fraud on the part of petitioner. *See, L.A., supra; V.H., supra;* and *Y.L., supra.* Further, as was stated in *L.A.*, and affirmed by the State Board, "the motives pertinent to the custody order are not determinative. The order must be accepted on its face." *L.A., supra,* 97 *N.J.A.R.*2d at 269. *See* also *Y.L., supra.* Lastly, unlike the circumstances found in *Cranford, supra*, there is no claim that M.C.C. and M.C.C. were not residing with J.M.

Accordingly, having determined that M.C.C. and M.C.C were eligible, pursuant to *N.J.S.A.* 18A:38-1(a), to attend school in the Hamilton Township School District during the

1999-2000 school year, the recommendation of the ALJ ordering tuition payment by petitioner is herein reversed. Further, it is determined that their eligibility for a free education in the Hamilton Township School District will continue until such time as J.M. no longer retains custody of M.C.C. and M.C.C. or there is a change of domicile affecting entitlement to a free education in Hamilton.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 04 2000

Date of Mailing: AUG 04 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#252-00

252-00

IN THE MATTER OF ROBERT FISHER,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE,	:	DECISION
SALEM COUNTY.	:	

August 10, 2000

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
Robert Fisher, Upper Pittsgrove Board of Education Salem County	:	SEC Docket No.: T21-00

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Robert Fisher was elected to serve a three-year term on the Upper Pittsgrove Board of Education in April 1999; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on May 1, 1999; and

WHEREAS, the NJSBA conducted seven training sessions between April 1999 and April 2000 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 14, 2000, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he replied that he did not attend due to work and schedule conflicts, but that he plans to attend the October 2000 session; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its May 23, 2000 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1999 to April 2000 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, he could have attended one of the many other sessions offered; and

WHEREAS, the Commission finds that if Mr. Fisher fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Fisher violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends if he does not attend a June session, but remove him from the board if he fails to attend by the October training session.

Dated: May 23, 2000

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 23, 2000.

Lisa James-Beavers, Executive Director

[225_eaststate:docs/orders/trng/(TrngRes2000.doc)]

AGENCY DKT. NO. 229-6/00

IN THE MATTER OF ROBERT FISHER,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF UPPER PITTSGROVE,	:	DECISION
SALEM COUNTY.	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), on April 14, 2000 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member submitted a response to the Commission indicating that his demanding work schedule which requires him to work seven days a week precluded his prior attendance, but that he planned to attend the October 24, 2000 session; and

Whereas, the Commission voted on May 23, 2000 to recommend that the above-named Board member be allowed to attend a June 2000 training session, if possible, and, if he failed to do so, that he be suspended until he attends a required training program; and

Whereas, the Commission further voted on May 23, 2000, that the above-named Board member be removed from office if he fails to so attend a required training program by the end of October 2000, and memorialized such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 26, 2000, the above-named Board member was afforded an opportunity to submit to the Commissioner of Education a response to said resolution; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member did not attend a June training session; and

Whereas, the Commissioner of Education has carefully considered the record of the matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member, having failed to attend a June training session, is suspended from office as of the date of this decision, pending his attendance at the October training session, but is hereby removed from said office, without further proceedings, should he fail to attend the October training session as scheduled.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 10 2000

Date of Mailing: AUG 11 2000

*This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

254-00

#254-00

MICHELLE SIDERIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

August 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8001-99
AGENCY DKT. NO. 217-8/99

MICHELLE SIDERIO,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF MONROE, GLOUCESTER COUNTY,
Respondent.

Williams F. Ziegler, Esq., for petitioner (Holston, MacDonald & Uzdavinis, attorneys)

Louis Rosner, Esq., for respondent

Record Closed: June 15, 2000 Decided: June 22, 2000

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 2, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to a settlement and have submitted letters dated June 12, 2000 and June 14, 2000, indicating the terms thereof, which are attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 27 2000
DATE

M. Kathleenn Duncan
M. KATHLEENN DUNCAN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

LAW OFFICES

Holston, MacDonald & Uzdavinis

A PROFESSIONAL CORPORATION
66 EUCLID STREET
P. O. BOX 358
WOODBURY, NEW JERSEY 08096-7358

ROBERT G. HOLSTON
ARTHUR J. MacDONALD, JR.
RONALD J. UZDAVINIS

856-848-5858
FAX 856-848-1898

WILLIAM F. ZIEGLER*
AUGUSTA J. PISTILLI*
*ALSO ADMITTED IN PENNSYLVANIA

e-mail: holstonlaw@home.com

June 14, 2000

Honorable Kathleen M. Duncan
Office of Administrative Law
Quakerbridge Plaza, Building 9
Quakerbridge Road, PO Box 049
Mercerville, New Jersey 08625-0049

RE: Michelle Siderio v. Monroe Township Board of Education
OAL Docket No. EDUCR 08001-99S
Agency Ref. No.: 217-8/99

Dear Judge Duncan:

Please be advised that the above referenced matter has settled in accordance with the proposals by the party which has been memorialized and effectuated by the actions of the Monroe Township Board of Education at their June 6, 2000 regular meeting. Enclosed is a copy of the correspondence I received from Louis Rosner, Esquire along with a copy of the Resolution passed by the Board. Please, therefore, dismiss the above referenced matter as settled.

Thank you for Your Honor's courtesy in this regard.

Very truly yours,

HOLSTON, MacDONALD & UZDAVINIS
A Professional Corporation

By: _____
WILLIAM F. ZIEGLER

WFZ/caw
cc: Michelle Siderio
Louis Rosner, Esquire
Enclosure

LOUIS ROSNER
Attorney At Law
Suite 1700
1525 Locust Street
Philadelphia, PA 19102

215.772.2263
FAX 215.735.5170
e-mail lrosner@gorosner.com

MEMBER NEW JERSEY AND
PENNSYLVANIA BARS

NEW JERSEY OFFICE
36 EUCLID STREET
WOODBURY, NJ 08096
856.845.0055

June 12, 2000

William Ziegler, Esq.
Holston, MacDonald & Uzdavinis
66 Euclid Street
P.O. Box 358
Woodbury, NJ 08096-7358

RE: Michelle Siderio v. Board of Education of Monroe Tp.
OAL Docket No. EDU 8001-992
Agency Docket No. 217-8/99

Dear Bill:

I have enclosed for your file a copy of the resolution passed by the Board on June 6, 2000 restoring the previously withheld increments to Michelle Siderio effective July 1, 2000. Consistent with our agreement, it is my understanding that your client will now either withdraw her petition or request that it be dismissed by Judge Duncan.

Thank you for your courtesy and cooperation. Please do not hesitate to contact me should you have any questions.

Very truly yours,

LOUIS ROSNER

LR/ms
cc: Charles Ivory, Ed.D., Superintendent
Robert P. Becker, Esq.

Monroe Township Public Schools

MAPLE GROVE ADMINISTRATION BUILDING
75 E. ACADEMY STREET
WILLIAMSTOWN, NJ 08094
(856) 629-6400 • Fax (856) 875-9786

CHARLES M. IVORY, Ed.D.
Superintendent
STEPHEN E. DERKOSKI
Assistant Superintendent
VINCENT TARANTINO
Assistant Superintendent
ELIZABETH A. RENNEBAUM
Board Secretary
D. DIANE BERNSTEIN
Supervisor of Technology
WILLIAM R. GALLAGHER, JR.
Supervisor of Special Projects
NANCY L. SILVER
Supervisor of Curriculum and Instruction

Date: June 12, 2000

Re: Motion of June 6, 2000

Employment/ Adjustment Increment	A motion by Mr. DiNovi, seconded by Mrs. Bagley, for the reasons stated by the Superintendent of Schools in his letter of June 6, 2000, approval to restore prospectively both the employment increment and the adjustment increment of Michelle Siderio for the 1999-2000 school year as of July 1, 2000, but that no retroactive payment shall be made for the increments withheld in the 1999-2000 school year, was carried by a unanimous roll call vote.

#254-00

OAL DKT. NO. EDU 8001-99
AGENCY DKT. NO. 217-8/99

MICHELLE SIDERIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the Initial Decision and the parties' letters of June 12, 2000 and June 14, 2000 indicating resolution of this matter, have been reviewed.

Noting the absence of sufficient specific terms of the parties' settlement agreement so as to permit his full review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 11 2000

Date of Mailing: AUG 14 2000

256-00SEC

256-00

IN THE MATTER OF JOSEPH DE VIERNO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF LONG HILL,	:	DECISION
MORRIS COUNTY.	:	
	:	

August 14, 2000

256-00SEC

IN THE MATTER OF JOSEPH DE VIERNO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF LONG HILL,	:	DECISION
MORRIS COUNTY.	:	
	:	

August 14, 2000

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1999 to April 2000 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, he could have attended one of the many other sessions offered; and

WHEREAS, the Commission finds that if Mr. DeVierno fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. DeVierno violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends if he does not attend a June session, but remove him from the board if he fails to attend the October training session.

Dated: May 23, 2000

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 23, 2000.

Lisa James-Beavers, Executive Director

[225_eaststate:docs/orders/trng/(TrngRes2000.doc)]

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 1999 to April 2000 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, he could have attended one of the many other sessions offered; and

WHEREAS, the Commission finds that if Mr. DeVierno fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. DeVierno violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends if he does not attend a June session, but remove him from the board if he fails to attend the October training session.

Dated: May 23, 2000

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 23, 2000.

Lisa James-Beavers, Executive Director

[225_eaststate:docs/orders/trng/(TrngRes2000.doc)]

AGENCY DKT. NO. 232-6/00

IN THE MATTER OF JOSEPH DE VIERNO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF LONG HILL,	:	DECISION
MORRIS COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), on April 14, 2000 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member replied that he had not attended training due to personal obligations, but plans to attend the September 2000 session; and

Whereas, the Commission voted on May 23, 2000, to recommend that the above-named Board member be suspended until he attends training, and removed from office if he fails to attend by the end of October 2000, memorializing such decision through a resolution forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 26, 2000, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution; and

257-00

L.C., on behalf of minor child, P.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

RESPONDENT.

: COMMISSIONER OF EDUCATION

: DECISION

SYNOPSIS

Petitioning parent sought reimbursement for tuition costs, setting forth numerous complaints and grievances against respondent school district in a letter to the Commissioner of Education. The letter was considered a petition of appeal, and the case was transmitted to the OAL for a hearing.

At the OAL, respondent moved to dismiss the petition for failure to state a claim upon which relief may be granted. Respondent also asserted several procedural deficiencies in the petition. The ALJ granted the motion to dismiss, holding that the petition did not meet the minimal standards regarding parties, allegations and relief; that all allegations concerning events prior to 90 days before November 1, 1999 were out-of-time; and that no allegations against P.C.'s teacher were properly before the Commissioner of Education.

Noting that he had construed this matter as a claim for reimbursement of the costs of providing a tutor for petitioner's daughter due to alleged failures on the part of the District, the Commissioner concluded petitioner failed to articulate and prove specific bases for her claim to be cognizable before him. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1085-00

AGENCY DKT. NO. 341-11/99

L.C. ON BEHALF OF MINOR CHILD, P.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

Respondent.

L.C., *pro se*

Craig U. Dana, Esq., appearing for respondent
(Morris, Downing & Sherred, attorneys)

Record Closed: May 29, 2000 Decided: June 27, 2000

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE

On November 1, 1999, L.C. sent a seven page handwritten letter plus attachments concerning her daughter, P.C., to five entities including the Department of Education. The Commissioner of Education transmitted the letter to the Office of Administrative Law (OAL) on January 11, 2000, for a hearing as a contested case.

On January 17, 2000, counsel for P.C.'s second grade teacher filed a Motion to Intervene, which is still pending. On April 13, 2000, counsel for the respondent Board of Education of the Township of Montague (District) and petitioner had a telephone conference with the undersigned. Petitioner tried to raise other complaints she had about the District but was informed that matters not raised in the November 1, 1999, letter were not included in this proceeding. Counsel for the District stated during the telephone conference that the District intended to move to dismiss. On May 17, 2000, the District filed a Motion to Dismiss. The record was held open for 10 days to allow the petitioner to answer. Petitioner faxed a letter on May 16, 2000, disagreeing with some factual allegations in the District's brief, which she received prior to the OAL, but did not file anything further expressing disagreement with the legal argument of the District.

In the November 1, 1999 letter (the November letter) petitioner stated many complaints about P.C.'s education in the District since September 1997, including complaints concerning conduct of P.C.'s classmates, failure to have P.C.'s eyes examined, unfair tests, a stolen winter coat, marking of homework answers, lack of workbook on science test, and methods of classroom instructions. The parent also disputed the teachers' recommendations at the end of kindergarten and first grade that P.C. be retained. Petitioner did not ask for any relief from the District or the Commissioner concerning these complaints.

In Fall 1999, petitioner had many complaints concerning P.C.'s second grade teacher. In the November letter petitioner stated that she wanted to bring tenure charges against that teacher. Because at an October 29, 1999 meeting, P.C.'s teachers stated that P.C. had a lot of learning difficulties and because the District had no after school program, L.C. also stated in the November letter that she had hired a tutor to start November 14, 1999, and intended to bill the District for the tutor. The letter does not request a hearing or any intervention by the Commissioner of Education.

LEGAL DISCUSSION AND CONCLUSION

To initiate a contested case before the Department of Education concerning a controversy or dispute arising under the school laws, a petitioner must file a petition of appeal and serve it in accordance with *N.J.A.C.* 6A:3-1.1 to 1.5. The petition together with any supporting papers must be served on each respondent. The petitioner must then file proof of this service. In no case may a petitioner submit materials to the Commissioner which have not been served upon respondent. *N.J.A.C.* 6A:3-1.13(a). The petitioner must file the petition no later than "the 90th day from the receipt of the notice of final order, ruling, or any other action by the District Board of Education, individual party, or agency, which is the subject of the requested contested case hearing." *N.J.A.C.* 6A:3-1.3(d). The regulations require the format of the petition to include the name and address of each party respondent, a statement of the specific allegation and essential facts supporting them which give rise to a dispute under the school law, the relief the petitioner is seeking and a notarized statement of verification or certification in lieu of affidavit for each petitioner. *N.J.A.C.* 6A:3-1.4(a). The petition must also cite, if known to the petitioner, the section of the school laws under which the controversy has arisen. *Id.*

To make allowance for the fact that some petitioners filing appeals would not be represented by counsel, the regulations provide that the petition submitted by a *pro se* petitioner that substantially conforms with the required format would be accepted even if not in the prescribed technical form. "However, where a petition does not meet minimal standards regarding parties, allegation, or relief sought, it may be returned to the petitioner without being filed." *N.J.A.C.* 6A:3-1.4(b). Any submission returned to the petitioner for this reason must be accompanied by a letter noting the date of the submissions receipt and identifying deficiencies deemed to constitute substantial noncompliance. *N.J.A.C.* 6A:3-1.4(b)1.

Having read the November letter several times I **FIND** that it does not meet minimal standards regarding parties, allegations, and relief sought and therefore should

have been returned to the petitioner without being filed. First, it is not verified, which could be rectified. Moreover, it contained many allegations against individual teachers and students but the letter does not request any specific remedy against them. Additionally, it is very difficult to comprehend what relief, if any, is sought against the District. Moreover, the letter itself does not seemed to address the Commissioner or describe a dispute or controversy ripe for adjudication.

Importantly, the majority of incidents described in the letter took place when P.C. was in kindergarten and first grade, so even if they are deemed actions of the District they took place well outside of the 90 days for requesting relief from a final action of the District. Hence, I **FIND** that as the petitioner filed the petition on November 1, 1999, any action or event that she complained of that took place more than 90 days before, which would include everything that happened to P.C. in kindergarten and first grade, cannot be the subject of a petition because it would be out of time. *N.J.A.C.* 6A:3-1.3(d).

The only clearly enunciated request for relief in the November letter was a request to bring tenure charges of conduct unbecoming a teacher against P.C.'s second grade teacher but to bring such tenure charges a person must submit the charges in writing to the school Board, not the Commissioner of Education. "Any charge made against any employee of a Board of Education under tenure during good behavior and efficiency shall be filed with the Secretary of the Board in writing, and a written statement of evidence to support such charges shall be presented to the Board." *N.J.S.A.* 18A:6-11. In the event that the Board finds probable cause exists and that the charge is sufficient to warrant a dismissal or reduction of salary, then it shall file such written charges to the Commissioner for a hearing. *Id.* The charges against P.C.'s second grade teacher as well as any allegations against any other substitute or former teachers, if not time barred, must follow this procedure. As I **FIND** that the Board has not certified any such tenure charges, I **CONCLUDE** that none of the allegations against P.C.'s teacher are properly before the Commissioner at this point.

The only remaining allegation was that the petitioner had hired a tutor to begin in the future and planned to submit the bill to the Board. The petition does not allege any final action of the Board of Education concerning this issue. Moreover, there is no allegation of what school law was being broken. Thus, as of the date of the November letter there was not controversy or dispute arising under the school laws. The reasoning of the petitioner for liability of the District for hiring a tutor was because the District does not have an after school program. However, petitioner made no legal connection between the two and I am unable to locate any school law which requires every District to have an after school program or which permits the private hiring of tutors in Districts without one. To the extent that petitioner is alleging a general negligence theory of liability such a cause of action is covered by the Tort Claim Act and belongs in the Superior Court. *Myers v. Medford Lakes Bd. of Educ.,* 199 *N.J. Super.* 511 (1985). Thus, I **FIND** the November letter does not articulate or infer a controversy or dispute about a final action of the District arising under the school laws.

For the foregoing reason, I **CONCLUDE** that the petitioner has thus far failed to state any claim in the November letter upon which relief can be granted.

ORDER

I **ORDER** that this case shall be **DISMISSED** for failure to state a claim upon which relief can be granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

6-29-00

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 6 2000

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. 01085-00
AGENCY DKT. 341-11/99

L.C., on behalf of minor child, P.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, which the Commissioner construes as a claim by petitioner for reimbursement of costs associated with tutoring her daughter, P.C., due to alleged failures on the part of the District, the Commissioner concurs that petitioner has failed to articulate and prove specific bases for her claim cognizable before him pursuant to *N.J.S.A.* 18A:6-9.[1]

[1] The Board asserts that petitioner "has consistently declined recommendations that P.C. be referred to the Child Study Team" and, "[b]ecause P.C. has not been classified as a handicapped student, she is entitled only to those school programs that are available to non-handicapped students." (Board's Brief in Support of Motion to Dismiss at 5) The Commissioner notes, however, that a Board may take action pursuant to *N.J.A.C.* 6A:14-2.7 when there is a disagreement with a parent about whether a student should be evaluated by the Child Study Team. Further, even where a Board concurs that a student is not eligible for special education, the Board may be obliged to provide support services pursuant to Section 504 of the Rehabilitation Act of 1973, if the student is nonetheless determined to have a disability that substantially limits his/her learning.

Accordingly, for this reason, as well as those set forth by the ALJ, this matter is hereby dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: AUG 14 2000

Date of Mailing: AUG 14 2000

[2]The Commissioner notes that, although petitioner's letter dated November 9, 1999 was not verified, she *did* submit a separate, notarized verification, also dated November 9, 1999. In light of her *pro se* status, these papers were deemed to satisfy applicable filing requirements. (*See N.J.A.C.* 6:11-1.15, now *N.J.A.C.* 6A:3-1.16.)

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

258-00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

August 18, 2000

OAL DKT. NO. EDU 6127-99
AGENCY DKT. NO. 136-6/99

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

John M. Henry
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 18 2000

#261-00

261-00

P.C., on behalf of minor child, M.C., :

PETITIONER,

: COMMISSIONER OF EDUCATION

V.

: DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY, :

:

RESPONDENT.

:

August 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 2187-00

AGENCY DKT. NO. 95-3/00

P.C., ON BEHALF OF MINOR CHILD, M.C.,

Petitioners,

v.

MONROE TOWNSHIP BOARD OF EDUCATION,

Respondent.

P.C., petitioner *pro se*, on behalf of M.C.

Robert P. Becker, Jr., Esq., for respondent Monroe Township Board of Education (Becker & Duffield, attorneys)

Record Closed: June 30, 2000 Decided: July 3, 2000

BEFORE **DANIEL B. MC KEOWN**, ALJ (t/a)

INTRODUCTION

P.C., the mother of M.C., a seventeen year-old senior at the Williamstown High School under the control of the Monroe Township Board of Education, had appealed a ten day out-of-school suspension of M.C. on charges. In addition, M.C. was prohibited from attending the senior class trip, the prom, and other events. Petitioner was granted emergency relief by the Commissioner of Education against the prohibition of M.C.'s participation on the class trip (See, *P.C. v. Board of Education of the Township of Monroe*, 2000 *S.L.D.* -, Decision on Motion, March 31, 2000), after which the Board allowed him participation in other events related to high school seniors. The matter was then returned to the Office of Administrative Law for a plenary hearing as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13. In the meantime, the case was reassigned the undersigned administrative law judge.

Petitioner was advised by Board counsel on April 12, 2000 that M.C.'s disciplinary record would not be part of his permanent record and would be destroyed at the end of the 1999-2000 academic year and that he would be allowed to attend the senior prom. In return, petitioner stated she would then withdraw any remaining allegations against the Board regarding the charges initially lodged against her son. Petitioner filed her letter on June 29, 2000 withdrawing all remaining allegations against the Board of Education.

Based on petitioner's letter of withdrawal, it is hereby **ORDERED** that the matter of *P.C., on behalf of M.C. v. Monroe Township Board of Education*, OAL DKT. NO. EDU 2187-00, Agency DKT. NO. 95-3/00 be considered **WITHDRAWN WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DANIEL McKEOWN, ALJ t/a

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 6 2000

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

OAL DKT. NO. EDU 2187-00
AGENCY DKT. NO. 95-3/00

P.C., on behalf of minor child, M.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon review, and pursuant to *N.J.A.C.* 1:1-19.2, the Commissioner approves petitioner's withdrawal of this matter. Accordingly, this matter is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 21 2000

262-00

JOANNE ALESSIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff member alleged the District improperly withheld her salary increment for the 1997-98 school year based on evaluations of her teaching performance wherein she received unsatisfactory ratings.

The ALJ determined that the District had demonstrated that petitioner, among other things, utilized improper instructional techniques, did not maintain accurate and complete records and did not properly assess her students' needs or evaluate their progress. The ALJ determined that the withholding of petitioner's increment was appropriate and so concluded in her recommended decision.

The Commissioner adopted findings and determination in Initial Decision as his own. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9812-98
AGENCY DKT. NO. 399-9/98

JOANNE ALESSIO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: May 22, 2000 Decided: June 30, 2000

BEFORE **ELINOR R. REINER**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City (District) to withhold her salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

Initially this matter was one of thirty-one consolidated cases filed with the Commissioner of Education on August 31, 1998. Count one of the multi-count petition alleged the wrongful withholding of the increment of petitioner, Joanne Alessio. On September 21, 1998, the District filed its answer. On October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law (OAL) for hearing as a contested case under OAL Dkt. No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Alessio case, designated OAL Dkt. No. EDU 9812-98, on November 21 and 23, 1999. Witnesses and exhibits are listed in the attached appendix.

FINDINGS OF FACT

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the District submitted a detailed review of the testimony and proposed findings of fact, which I largely have adopted herein.

1. During the 1997-98 school year, petitioner was assigned to teach English as a Second Language to students at Dickinson High School.

2. English as a Second Language (ESL) is a course taught in English to students who come from other countries and whose primary language is something other than English.

3. Petitioner has been employed by the District for twenty-one years, starting as a math teacher and teaching ESL for fifteen years.

4. Petitioner holds master's degrees in urban education, social work and ESL.

5. Prior to her high school assignment in the 1997-98 school year, petitioner had not taught ESL on the high school level. Teaching high school ESL was different from teaching ESL on the elementary level with respect to the ages and numbers of the students, curriculum, textbooks and record keeping. However, on both the elementary level and the high school level, petitioner had roll books and grade books and had to prepare lesson plans.

6. The skills to be taught in high school ESL, although essentially the same as those taught on the elementary level, could be more advanced.

7. Petitioner claimed that she had no problems with teaching students on the high school level, and her problem in the high school was limited to record keeping.

8. Petitioner was absent from work for nineteen days from mid-September 1997, when she fell at work and hurt her ankle.

9. On October 23, 1997, petitioner's teaching performance was evaluated by Georgina Rey (Fauta) a vice principal at Dickinson High School.

10. Georgina Rey had been in the District's employ for twenty-two years. Her duties as vice principal were to supervise the faculty in the areas of mathematics and bilingual/ESL/world languages.

11. At the time of the evaluation, petitioner was teaching an ESL 3 class of sixteen students. Rey observed petitioner's second-period class, from 9:25 a.m. until 9:45 a.m. The period was normally 80 minutes, but since testing was going on that day, the class periods were shortened.

12. In her observation report (R-1), Rey gave petitioner an unsatisfactory rating for assessing the needs and evaluating the progress of pupils. Petitioner's roll book (or daily class register) was incomplete, lacking student attendance, grades, absences and seating charts. The book had only check marks with no numerical value, so it was hard to tell how petitioner would assign a grade for the first marking period.

13. Although petitioner had been absent for nineteen days from September 20, petitioner had returned to work three days prior to the observation and had adequate time to record student data received from the substitute teachers.

14. Rey rated petitioner's performance as unsatisfactory in the area of organization and planning. Although there was an up-to-date written lesson plan, the objectives were vague, there were no references to the classroom activities, and homework assignments were not included in the lesson plan. The lesson in the book was not the lesson that was presented that day. The activity ended abruptly with no homework assignment and no closure.

15. Rey also rated petitioner as unsatisfactory in the area of instructional techniques. The petitioner gave no beginning direction to the students, walked around the room for several minutes, asked questions in random fashion and ended the class abruptly without giving any closure to the lesson.

16. Rey found that petitioner needed improvement in the area of affective domain, inasmuch as the poor lesson planning and poor assessment of the students' work on petitioner's part showed a lack of interest and respect for the students.

17. When petitioner was absent from work from mid-September, she received no feedback from the school. She never called the school herself during her absence to ask about her students.

18. When petitioner returned to work, she was given all student work ungraded and attendance data from the substitute teacher. When Mrs. Rey observed her class on October 23, 1997, she had checked the students' work but had not yet graded it; she had recorded all absences by that time. Although petitioner also claimed to have recorded all the data, she conceded that she made additions to her original register after Rey's visit. When asked to look at her original roll book (P-5) and identify the specific activity for which grades had been given, petitioner was unable to do so.

19. Rey held a post-observation conference with petitioner on October 27, 1997. Petitioner did not want to sit down to discuss Rey's observation report; she simply signed the document, writing on it that she did not agree with it, and threw the report on the desk.

20. Petitioner never asked Rey for assistance, but Rey asked the master teacher to help petitioner on an ongoing basis.

21. Petitioner's teaching performance was observed and formally evaluated a second time by Rey on February 11, 1998. Petitioner was teaching an ESL 3 class for an 80-minute period from 12:30 p.m. until 1:50 p.m. to nineteen students.

22. In her written observation report (R-3), Rey rated as unsatisfactory petitioner's performance in the area of assesses needs and evaluates progress of pupils. Petitioner's record book was not legible and it did not coincide with the grades that petitioner reported on separate official term

records. Petitioner also had only folders, not portfolios, for students where all papers were placed, and not all of the work was graded.

23. Rey also rated petitioner's performance as unsatisfactory in the area of organization and planning. The objective in the written plan was to use the simple present tense, which was too elementary for the ESL 3 level.

24. Rey found that petitioner needed improvement in the area of instructional techniques. There were no meaningful or constructive educational activities, merely ten minutes of questions and answers followed by having the students write in their workbooks for the remainder of the 80-minute period. Petitioner gave no initial directions to the students about the purpose of the lesson and provided no closure to the lesson.

25. Rey further found that petitioner needed improvement in the area of affective domain because there was no mutual respect in the way that petitioner handled the class. There were student behavioral problems during the class: students were getting up, leaving the room without permission, even sleeping, but petitioner did not exercise discipline over the students.

26. A post-observation conference was held on February 20, 1998, but petitioner simply signed her name to the report, writing on it that she did not agree with it, and then threw it on the desk.

27. Petitioner was also observed formally by two other administrators, who did not testify but whose written observation reports were admitted into evidence.

28. Beth Shachat, acting supervisor of ESL/bilingual education, observed petitioner's class on November 12, 1997. In her report (P-1), she noted that petitioner needed improvement in the area of organization and

planning; specifically, she needed to plan additional activities for students and to give homework on a daily basis. The report also noted that petitioner needed improvement in the area of instructional techniques; specifically, she needed to model expected outcomes for the students before giving them assignments and to ask them thought-provoking questions.

29. Robert Donato, principal of Dickinson High School, observed and formally evaluated one of petitioner's classes on January 21, 1998. According to Donato's report (P-2), the lesson in petitioner's plan book for the day of the observation was never addressed by petitioner, who spent the class time on the previous day's lesson. He found that petitioner needed to improve organization and planning.

30. Petitioner's teaching performance was also observed and evaluated by Dr. Joseph Ramos, director of bilingual/ESL/world languages for the District.

31. Ramos had been employed by the District for twenty-four years and had previously held several supervisory positions. In his position as director, he was responsible for implementing the District's instructional programs in bilingual education, ESL and world languages. He evaluated the performance of teaching staff members upon request. Ramos had been asked by Mrs. Granick, head of the Human Services Department for the District, to conduct an evaluation of petitioner.

32. Ramos observed petitioner conducting an ESL 2 class on March 10, 1998, from 11:45 a.m. to 1:05 p.m., an 80-minute period. Ramos prepared a written report of his observation of petitioner's performance (R-4), assigning ratings on the five performance factors.

33. Ramos rated petitioner as needing improvement in demonstrating proficiency in her subject matter because she did not use any ESL techniques during the lesson and she did not appear to be adhering to the District's curriculum.

34. Petitioner employed no ESL instructional techniques during the class; she did not use visuals, real objects, choral and individual repetition (practicing language) or any other techniques to actively involve the students in listening and speaking. The students merely sat in class and wrote for over 60 minutes of the 80-minute period.

35. In terms of curriculum, Ramos observed that petitioner should have been focusing on grammatical structure around the time of his observation in March, but she was not teaching any grammar on the day of his observation nor, according to a lesson plan book, had she taught grammar on any of the preceding days.

36. Ramos gave petitioner an unsatisfactory rating for assessing the needs and evaluating the progress of pupils. Petitioner stayed in the front of the class without circulating through the classroom. Petitioner interacted with only the few students who were in the front of the classroom and for only several minutes of the class period. Many students simply sat in class doing nothing and some students spoke among themselves in Spanish, indicating that they did not understand what they were supposed to do.

37. Petitioner's roll book at the time of the observation contained grades but gave no indication of the particular matter being rated, whether homework, tests or projects. Petitioner claimed to have portfolios, but had only folders which contained worksheets, dittos and other papers. There were no portfolios that had samples of a student's work and progress.

38. Ramos also gave petitioner an unsatisfactory rating for organization and planning. Petitioner did not teach the lesson that was written in her lesson plan book. The written lesson plan was to show a movie and have the students discuss the characters. Petitioner said that neither a TV nor a VCR was available so she conducted a different lesson. Instead of the movie, petitioner had her students engage in writing and independent work for the bulk of the 80-minute class period.

39. Ramos rated petitioner's instructional techniques as unsatisfactory, as she employed no ESL techniques, having the students writing for most of the period, and put words on the blackboard that were totally meaningless. Numerous students chatted among themselves and Ramos heard some of them say in Spanish that they did not understand what they were supposed to do. Petitioner made no effort to actively engage all the students and gave them little opportunity to practice and use the English language. Instead, the students were asked to do busywork.

40. Ramos found that petitioner needed improvement in addressing the affective domain. Some students displayed behavioral problems, speaking to each other and not paying attention, but petitioner did not attempt to address those problems.

39. Dr. Ramos held a post-observation conference with petitioner. Petitioner refused to sit down, merely signed the evaluation, writing that she did not agree with it, and left.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Alessio's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Here the underlying facts were substantiated by the testimony of two qualified educational experts, as well as aspects of the reports of two other qualified educational experts. Petitioner, an experienced teacher with a master's degree in ESL, did not use ESL instructional techniques, did not maintain accurate, complete and up-to-date records for her students, did not properly assess her students' needs and evaluate their progress, and did not employ effective organizational planning for her lessons on the several occasions when her teaching was observed by Ms. Rey and Dr. Ramos. Petitioner also received less than satisfactory ratings for organization and planning and

for instructional techniques when her performance was formally evaluated on other occasions during the 1997-98 school year by Ms. Shachat and by Principal Donato. In sum, petitioner's performance was less than satisfactory when evaluated in regard to the five performance factors utilized by the District to evaluate performance. Under the circumstances, petitioner has not succeeded in showing that the Board's decision to withhold her salary increment was arbitrary, capricious or unreasonable.

It must be pointed out that petitioner asserts that there was a serious question as to the motives and credibility of at least one of the evaluators, Ms. Rey. Petitioner alleges that her veracity was questionable and her relationship with petitioner was strained. Petitioner also contends that the uncontradicted testimony was that the evaluations were not of sufficient duration, as required by the District's guidelines. Moreover, petitioner alleges that the criteria and requirements were not made clear to her or her evaluators. More particularly, petitioner argues that she was not properly trained in how to maintain her roll book and in what was required of her to teach high school level ESL classes. Any alleged deficiency in her teaching skills was the result of the District's failure to properly prepare her for her new assignment, together with the fact that she was injured and absent for nineteen days prior to the evaluations.

I have considered petitioner's arguments and conclude that the evidence simply does not substantiate her contentions. I cannot agree that the motives and credibility of Ms. Rey were insincere or that there was a personal rift casting a shadow over her credibility. Rather, I found Ms. Rey's testimony to be credible and worthy of belief. Additionally, in regard to petitioner's argument that the evaluations were not long enough, I **FIND** that there were a number of evaluations that supported the findings of fact here and were of sufficient duration for the evaluators to make an informed and reasonable decision. In addition, the evaluations were conducted over several months. Moreover, I cannot **CONCLUDE** that the teaching requirements of Ms. Alessio were not made clear to her and were not clear to her evaluators. Rather, petitioner had been advised of the necessary documentation that she had to keep and had even been assigned a master teacher to help her. She could have utilized the help of her evaluators, supervisors and a master teacher if she required training in how to maintain

her roll book or in what was required of her to teach high school level ESL classes. The alleged deficiencies in her teaching skills were not the result of the District's failure to properly train or prepare her for her assignment. Moreover, her formal training and twenty-one years of service to the District, including a master's degree in ESL and teaching ESL for fifteen years, should have allowed her to properly prepare to teach on the high school level. Clearly, she should have possessed the requisite expertise to rectify the situation. As such, I **CONCLUDE** that petitioner's arguments are unsubstantiated by the evidence and testimony on the record. Petitioner has not proven that it was unreasonable for the administrators who observed and evaluated her teaching performance during the 1997-98 school year to conclude that her performance was less than satisfactory.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner is **DENIED** and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/7/00
DATE

Debbie Gramiccioni/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 10 2000
DATE

Jeff S. Mazor
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al/pb

APPENDIX

List of Witnesses

For Petitioner:

Joanne Alessio

For Respondent:

Dr. Joseph Ramos

Georgina Rey Fauta

List of Exhibits

For Petitioner:

P-1 Jersey City Public Schools Instructional Observation Report for Joanne Alessio, dated November 12, 1997

P-2 Jersey City Public Schools Instructional Staff Observation Report for Joanne Alessio, dated January 21, 1998

P-3 Memo to Robert Donato from Joanne Alessio (three pages)

P-4 Memo to faculty from Robert Donato, dated February 9, 1998

P-5 Daily Class Register of Joanne Alessio, grades nine through twelve, school year 1997-98

P-6 Plan Book for Joanne Alessio, term ending 1998

P-7 Memo to Dr. Joseph Ramos from Joanne Alessio regarding evaluation

For Respondent:

R-1 Jersey City Public Schools Instructional Staff Observation Report for Joanne Alessio, dated October 23, 1997

R-2 Memo to R. Donato from Joanne Alessio (three pages)

R-3 Jersey City Public Schools Instructional Staff Observation Report for Joanne Alessio, dated February 11, 1998

R-4 Jersey City Public Schools Instructional Staff Observation Report for Joanne Alessio, dated March 13, 1998

R-5 Instructional Annual Written Performance Report for Joanne Alessio, dated June 1, 1998

R-6 Letter to Joanne Alessio from Judi Granick, dated June 1, 1998

OAL DKT. NO. EDU 9812-98
AGENCY DKT. NO. 399-9/98

JOANNE ALESSIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, which included transcripts of the hearing conducted at the OAL on November 22 and 23, 1999, the Commissioner determines to affirm the Initial Decision. As noted, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold her increment was arbitrary, capricious or unreasonable, based on the facts. *Kopera, supra.* Finding no cause to disturb the findings, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet her burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 16 2000

Date of Mailing: AUG 21 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#263-00 E

263-00

M.C. & P.C., on behalf of minor child, B.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 6266-00
AGENCY DKT. NO. 249-7/00

M.C. & P.C. o/b/o B.G.,

Petitioners,

v.

BUENA REGIONAL SCHOOL DISTRICT,

Respondent.

Roberta Bonnette Cooper, Esq., for petitioners

Kimberly A. Baldwin, Esq. for respondent (Capizola, Fineman & Lapham, attorneys)

BEFORE **JOSEPH LAVERY**, ALJ:

THE MOTION

Petitioners ask that the disciplinary directive that B.G. be enrolled in an alternative high school be reversed, and that B.G. be placed on home instruction and/or returned to attendance at Buena Regional High School.

Respondent Board of Education, Buena Regional School District, contests the motion.

Today's Order denies petitioners' motion for emergent relief.

ANALYSIS OF THE RECORD

Arguments of the Parties:

Petitioners maintain that the four-part test for emergent relief has been satisfied, for the following reasons:

1. B.G. would suffer irreparable harm because, while on home instruction, he has improved his grades and excelled in his subjects. In contrast, he would experience academic failure if sent to the alternative high school. Moreover, he will be deprived of playing on the freshman football team, which would disrupt any potential, long-range plans for sports participation.

2. The law is settled that B.G. has a legal right and entitlement to a public education.

3. A reasonable probability of ultimate success is bound up with preservation of the *status quo,* and for that reason, B.G. should not be permanently excluded from attendance at the regular high school from which he was expelled.

4. Finally, the relative hardship falls most heavily on B.G. He would pose no danger to students or staff if returned to the regular high school; he has demonstrated ability in home instruction; disruption of his progress would cause irreversible damage, and placement in an alternative school program would be devastating emotionally as well as scholastically.

For all these reasons, relief is sought.

The Board responds that it intends to prove that B.G. has a considerable and persistent history of misconduct involving insubordination, profanity, lateness, cutting class, absences and confrontational behavior with teaching staff. Included in this history will be proof of a statement by B.G. equating his circumstance with that of the Columbine massacre, which he accompanied with a threat of violence.

Against this background, the Board maintains, there is also a presumption of correctness to its action. Further, the standard for overturning it requires a showing of arbitrary, capricious or unreasonable action by the Board. Since there is nothing in petitioner's case which addresses the Board's conduct, petitioners should be denied relief, the Board argues.

Addressing the four-part test for emergent relief, the Board reasons:

1. No irreparable harm will follow because the alternative school does provide a public education, and there is no evidence proffered or in place which supports the probability of academic failure or emotional distress.

2. The legal right to public education is provided in the alternative school, paid for completely by the Board of Education. Petitioners offer only the argument of personal dissatisfaction, which would be insufficient cause for an injunction.

3. There is little likelihood that petitioners will prevail on the merits of this case, given the legal standard involved, and the lack of any argument by petitioner addressing the Board's action.

4. Finally, irreparable harm would obviously affect the school district, if B.G. were to be returned to class in Buena Regional High School. Petitioners' threats, his past history of intimidation of teachers, and his physical altercations with students escalate the risk of harm. In contrast, placement in

a more structured environment in the alternative school would cause no harm to petitioner. Unsupported claims to the contrary are insufficient to overcome these facts.

CONCLUSIONS OF LAW

I CONCLUDE that the four-part test of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) has not been satisfied by petitioners. The Board's argument, if proven, will be sufficient to carry its claim that petitioner was properly expelled and appropriately relocated educationally. Further, applying to the facts presently offered the test for review by the Commissioner set forth in *Kopera v. West Orange Board of Education,* 60 *N.J. Super* 288, 294 (App. Div. 1960), it is unlikely that the standard of arbitrariness, capriciousness or unreasonableness will be demonstrated by petitioners.

It should be emphasized that failure to satisfy the test for emergent relief does not prevent petitioners from offering preponderating evidence at plenary hearing, notwithstanding.

ORDER

I, **ORDER**, therefore that petitioners' Motion for Emergent Relief, be, and hereby is, **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

August 16 2000
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

OAL DKT. NO. EDU 6266-00
AGENCY DKT NO. 249-7/00

M.C. & P.C., on behalf of minor child, B.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter, the Initial Decision and the Order of the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief as he concurs with the Administrative Law Judge's (ALJ) hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter shall move to plenary hearing on its merits as contemplated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 21 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

264-00

R.C.P., on behalf of minor child, A.S.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning uncle challenged Board's residency determination.

The ALJ concluded that petitioner's nephew satisfied the statutory test for an "affidavit student" under *N.J.S.A.* 18A:38-1b(1) to be entitled to a free public education in respondent's District. The ALJ determined that petitioner is domiciled in the District, is supporting his nephew *gratis*, that A.S.K.'s parents are unable to support him in this country due to family hardship and that A.S.K. is not residing with petitioner solely for purposes of receiving a free public education in respondent's District.

The Commissioner agreed that, under the facts of this case, R.C.P. is entitled to a free education in respondent's schools and adopted the Initial Decision of the ALJ as his own.

August 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11002-99

AGENCY DKT. NO. 247-8/99

R.C.P. ON BEHALF OF MINOR CHILD A.S.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Michaelene Loughlin, Esq., appearing for petitioner (Loughlin & Latimer, attorneys)

Joseph R. Marano, Esq. and **Daniel S. Goodman**, Esq., appearing for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 28, 2000 Decided: May 18, 2000

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner R.C.P. appealed the determination of respondent Ramapo Indian Hills Regional High School District Board of Education (District) that he does not qualify as the guardian of A.S.K. and that A.S.K. does not meet the requirements for an "affidavit student."

On August 10, 1999, petitioner filed a petition pursuant to *N.J.S.A.* 18A:38-1 concerning a residency dispute between petitioner and the District. On August 31, 1999, the District filed an answer denying the charges although not making any counter claim for tuition. On September 28, 1999, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. Pending the hearing, the student was allowed to attend school. A.S.K. is currently attending school in the District free during the pendency of this matter.

On February 15, 2000, the District filed a Motion for Summary Decision and supporting papers thereto. On March 17, 2000, petitioner filed a Cross-Motion for Summary Decision. The District's response was filed on March 28, 2000. Hence, this decision addresses both motions for summary decision. It is the position of the District that for purposes of its motion is that petitioner does not meet the statutory standards set forth in *N.J.S.A.* 18A:13A-1 taking as true the petition, the answers to interrogatories, and the affidavits submitted by petitioner. It is the position of the petitioner that, based upon the same documents, that petitioner meets the statutory standard both as a guardian and as an affidavit student case.

FACTS

The following facts are essentially undisputed and I **FIND** them to be **FACTS** in this case.

Petitioner R.C.P. and his wife own property and reside within the District.

On January 14, 1984, A.S.K. was born in Woodside, New York, and thus is an American citizen. In 1985 his parents moved back to their country of origin, Korea, and A.S.K. has lived in Korea until June 1999.

At the age of fifteen A.S.K. decided he wanted to live in the United States as an American citizen and to go to college and pursue a career and life in this country. His

parents agreed with his decision that he should live here as an American citizen. The parents were unable to raise him as an American citizen in Korea because they could not provide the culturalization or English language opportunities there. Thus, to satisfy his desire his parents began looking for a suitable guardian. After numerous considerations, they requested A.S.K.'s maternal uncle, petitioner, to become A.S.K.'s guardian and provide for A.S.K. as his son. Among the reasons for this decision were that the parents knew that petitioner was a good parent to his own children, petitioner agreed to serve as guardian, petitioner has a son and daughter nearly the same age as A.S.K., which will help A.S.K. become culturalization and petitioner, and his family are Christian as are the parents of A.S.K. It was the intention of petitioner as well as the parents that A.S.K. would reside with petitioner in his home for an indefinite period of time.

The parents provided petitioner with a notarized legal guardianship authorization granting R.C.P. and his spouse the authority to assume legal guardianship of A.S.K because the parents felt incapable of providing for A.S.K.'s desire to live as an United States citizenship except by this arrangement. The parents felt it would be a great family hardship for the family to move back to the United States but it would also be a great hardship to deprive A.S.K. of the privilege of being raised in the United States as an American citizen.

On May 21, 1999, A.S.K.'s parents signed the grant of legal guardianship to R.C.P. effective June 3, 1999. On June 2, 1999, A.S.K. arrived at petitioner's home and has lived there ever since. In the first week of June, petitioner went to the guidance officer at the high school with A.S.K.'s guardianship papers and health records. On July 7, 1999, the District sent a letter informing petitioner that A.S.K. would be accepted solely as a tuition student at the cost of $8085 per year. After a call from petitioner, the District sent him a document describing the verification of eligibility for an affidavit student.

The petitioner also phoned the Bergen County Commissioner's office where someone suggested that he become a court certified legal guardian through the Bergen

County Surrogate's Office. The parents subsequently signed the notarized guardianship agreement required by the Surrogate. The Surrogate also required that the school district verify that the child met the requirements for admittance into the school. The District refused to sign the document due to its position that the child did not meet the necessary requirements. The Surrogate's office would not issue guardianship papers to petitioner without that signed documentation from the school.

ISSUES

The issues before me are: (1) Whether the uncontested facts show that A.S.K. was domicile in the District and thus entitled to a free education; or (2) Whether the uncontested facts show that A.S.K. met the requirements of an affidavit student and thus was entitled to a free public education in the District.

LEGAL DISCUSSION AND CONCLUSION

Summary Decision must be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-1-12.5; *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (1995). While viewing the evidentiary material presented in the light most favorable to the non-moving party, the court must determine whether there is sufficient evidence to permit a rational fact-finder to resolve the alleged disputed issues in favor of the moving party. *Brill v. Guardian Life Ins. Co.*, 142. N.J. 520, 523, (1995). When a motion for Summary Decision is made and supported, an adverse party in order to prevail "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determine in an evidentiary hearing." If the adverse party does not so respond, a Summary Decision, if appropriate, shall be entered. *N.J.A.C.* 1:1-12.5. Based upon my review of the record, I **FIND** that there are no material facts in dispute. Hence, I **CONCLUDE** that the matter is ripe for Summary Decision.

Public schooling must be provided to persons over the age of five and under the age of twenty who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a). "The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving . . . ." *In the Matter of Unanue,* 255 *N.J. Super.* 362, 374 (Law Div. 1991). Minors lack the capacity to chose their own domicile and thus their domicile is that of their parent or guardian. In the context of Title 18A, the Commissioner of Education has required that special factors must exist to warranty departure from the traditional rule that domicile is that of the natural father. *C.N. v. South Orange Bd. of Educ.*, 96 *N.J.A.R.* 2d 913, 916. (Domicile did not lie with the father because he lived in another state, had relinquished all control over the child, and was unable to provide for her). See also *L.A. v. Bd. of Educ. of the Town of West Orange,* 97 *N.J.A.R.* 2d (EDU) 266 (1997) (Power of attorney sufficient to establish child domiciled with relative).

Here the record showed that the parents of A.S.K. granted legal guardianship to petitioner and his spouse effective June 3, 1999, and that this guardianship still exist. The record also showed that the Surrogate was willing to accept these papers signed by the parents as official guardianship papers but would not issue guardianship papers because of the District's refusal to agree that petitioner and his wife qualified as the guardians under Title 18A. There is no dispute that petitioner has physical control of A.S.K. as his parents are in Korea and he is living with petitioner. The parent and petitioner have also stated under oath that in addition to assuming physical control he has assume financial responsibility for A.S.K.

The District refused to accept the guardianship claim of petitioner because it presumed that A.S.K. was residing with petitioner with the sole purpose of attending school within the District. However, under *N.J.S.A.* 18A:38-1(a) motivation for the guardianship is not an issue. The prohibition against a student coming into the District for the sole purpose of attending school within the District is relevant under *N.J.S.A.* 18A:38-1(b). The District does not attack the validity of the documents notarized in Korea whereby A.S.K.'s parents grant legal guardianship of A.S.K. to petitioner and his

wife. Nor can the District legitimately point to petitioner not having been issued guardianship papers by the Surrogate when the District's failure to sign the required document, however well-intentioned, prevented the issuance.

Based on the foregoing, I **FIND** that the uncontested facts show that petitioner is the legal guardian of A.S.K. As petitioner is domiciled in the District, A.S.K. has right to a free public education in the District pursuant to *N.J.S.A.* 18A:38-1(a).

Under *N.J.S.A.* 18A:38-1(b) petitioner must satisfy the following conditions in order to entitled A.S.K. a free education in the District:

> (1) Petitioner is domiciled in the District; (2) Petitioner is supporting A.S.K. *gratis*; (3) Petitioner will assume all personal responsibilities for A.S.K. relative to school requirements; (4) Petitioner intends to keep in support A.S.K. gratuitously for longer than the school year; (5) A.S.K.'s parents are incapable of supporting or providing care for A.S.K. due to a family or economic hardship; and (6) A.S.K.'s parents did not send him to reside with petitioner solely for receiving free education in the District. The parents of A.S.K. must also submit a sworn affidavit asserting the last two criteria have been satisfied.

The District's primary challenge under *N.J.S.A.* 18A:38-1(b) is that A.S.K.'s parents have not shown that they were incapable of supporting or providing care for A.S.K. due to a family or economic hardship. The District pointed out that the hardship must be of such a nature that the parent or guardian are not capable of supporting the child or providing care as a result of the hardship, citing *J.B. v. Bd. of Educ. of Tp. of Ocean*, 96 *N.J.A.R.* 2d (EDU), *rev'd Comm'r of Educ.* (March 25, 1996), *rev'd St. Bd. of Educ.* (Oct. 2, 1996), *on remand, Comm'r of Educ.* (Feb. 11, 1997). In that case the Commissioner found that family strife had a detrimental affect on the student suggesting that the "parents, sadly, are incapable of meeting his emotional, social, and developmental needs." Having determined by prior decision that these unique and compelling circumstances constitute family hardship, the Commissioner clarified on remand that for the above reasons J.B.'s parents were not presently capable of

providing care for him due to such family hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). *Id.*

In the case at bar A.S.K.'s parents claimed that they were unable to raise A.S.K. in Korea and give him the privileges of an American citizenship because they could not provide an American culturalization or English language opportunities for him there. They felt they could not meet his desire to live as an American citizen, to obtain his college education in United States, and to pursue a career and life in this country. Petitioner stated in interrogatories that A.S.K. decided that he wanted to live in the United States to pursue his high school education here in order to learn English, learn the culture, and prepare for his college education and a career in this country.

The District argued that no family hardship was shown and that the family was capable of providing care and support for him. I **FIND** this situation to be otherwise. The family hardship here is that the parents are unable to provide A.S.K. the privileges of an American citizen including the intimate knowledge of American culture and heritage while they are in Korea. Moreover, the family is unable to move to this country to give him what they feel he needs to succeed here in the United States.

Petitioner stated that he never filed any affidavit until filing the petition under *N.J.S.A.* 18A:38-1(b) because the District's fax stated that this information must be provided if the person is "kept in the home of a person other than parent/guardian." (Petitioner's Exhibit E). However, he has since provided documentation and affidavits from both the mother and the petitioner as to the reasons, which were available to the school board since August 1999.

I **FIND** that the unique and compelling circumstances in this case rise to a level of family hardship that meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize . . . and overlooks the substantial state interest in ensuring the education of all its children . . . ." *Gundersen v. Bd. of Educ. of the City of Brigantine,* 95 *N.J.A.R.* 2d (EDU) 39, 42. In finding family hardship in a

child's reaction to marital conflict, the Commissioner quoted his previous decision with approval.

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter . . . . Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy . . . .
>
> The amendments to *N.J.S.A.* 18A:38-1 . . . were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile . . . .
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme . . . .

R.H. v. Ocean Co. Bd. of Educ., 96 *N.J.A.R.* 2d *(EDU)* 628, citing *Gundersen, supra*.

I **FIND** that the uncontradicted evidence demonstrates that petitioner has taken his nephew into his home to provide him an opportunity to live as an American citizen and to better understand the culture and the language as early as possible due to the fact that A.S.K.'s parents are unable to provide him with same. I also **FIND** that there is no evidence that this arrangement was entered into fraudulent solely for the purpose of obtaining a free public education in the District. Based on the above, I **CONCLUDE** that the petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner is domiciled within the District, petitioner is supporting A.S.K. *gratis,* the parents are incapable of supporting him in this country due to family hardship, and A.S.K. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Hence, I **CONCLUDE** that A.S.K. meets the requirement of an

affidavit student under *N.J.S.A.* 18A:38-1(b) and thus is entitled to a free public education in the District.

In his petition dated August 9, 1999, R.C.P. asked that his federal constitutional and statutory claims including damages and attorneys fees be preserved. In his brief petitioner requested a finding that certain District actions violated petitioner's constitutional procedural due process rights. The OAL may only consider constitutional issues when the expertise of the agency is necessary to decide the issue before it. *Desilets v. Clearview Regional Board of Education*, 137 *N.J.* 585 (1994). The OAL cannot award damages or attorneys fees for federal constitutional or statutory claims. *J.A. v. Bd. of Educ. of South Orange*, 381 *N.J. Super.* 512, 526 (App. Div. 1999). In *Maisonet v. New Jersey Dep't of Human Servs.*, 140 *N.J.* 214, 226-27 (1995) the Supreme Court set up a procedure for determining constitutional issues that arise out of administrative agencies. Thus, I **CONCLUDE** that I must not determine the federal constitutional and statutory issues here.

ORDER

I **ORDER** that petitioner's petition to allow A.S.K. to attend school in the District is hereby **GRANTED.** I **ORDER** that petitioner's claim for damages and attorneys fees for procedural violations of the federal constitution is **DISMISSED WITHOUT PREJUDICE** for any proceedings under *Maisonet, supra* or in any other appropriate jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 18, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 11002-99
AGENCY DKT. NO. 247-8/99

R.C.P., on behalf of minor child, A.S.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions were untimely filed. The Initial Decision was mailed to the parties on May 25, 2000, and exceptions were due on or before June 7, 2000, but were filed by the Board on June 13, 2000. *See N.J.A.C.* 1:1-18.4(a). Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner concurs that, under the particular circumstances of this case, R.C.P. is entitled to a free education in the Board's District and accordingly, adopts the Initial Decision of the ALJ as

his own.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 22 2000

[1] With respect to the discussion at page five of the Initial Decision regarding the issuance of guardianship papers, the Commissioner notes that the guardianship of a minor is governed by *N.J.S.A.* 3B:12-12 to 23, which gives the surrogate of the county in which the minor resides the powers of the Superior Court in the appointment of guardians for minors, *N.J.S.A.* 3B:12-12, and allows for appointment of a guardian for a minor where a parent absents himself from the state, leaving a minor child under the age of 18 without sufficient provision for his maintenance and education. *N.J.S.A.* 3B:12-23.

The requirements for an application for guardianship of a minor are set forth in R. 4:81. The requirements include the minor's age and residence, the names and addresses of the minor's nearest of kin and of all persons who stand *in loco parentis*, as well as all persons with whom the minor resides. R. 4:81-1.1(a). An affidavit made by a person with personal knowledge stating the value of the minor's real and personal estate, and the amount of income from any real or personal estate belonging to the minor, must be provided. R. 4:81-1(b). In addition, a renunciation from any living parent of the minor, along with a request for issuance of letters of guardianship consistent with the application, must be provided. R. 4:81-2. There is no requirement in the New Jersey Court Rules or statutes for a verification from the school district in which the proposed guardian is domiciled in order to grant guardianship papers. Therefore, the Commissioner agrees with the ALJ that the fact that petitioner was not provided guardianship papers for A.S.K. is not determinative of whether A.S.K. is entitled to a free education from respondent.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

264-00

EDU #11002-99
C # 264-00
SB # 52-00

R.C.P., on behalf of minor child, A.S.K.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 18, 2000

For the Petitioner-Respondent, Loughlin and Latimer
(Michaelene Loughlin, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler
(Allan P. Dzwilewski, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 3, 2001

Date of mailing JAN 04 2001

265-00

T.M., on behalf of minor child, M.E.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning relative challenged the Board's determination that M.E. may not attend its schools. The Board counter-petitioned for tuition for the period of time M.E. attended its schools.

Petitioner failed to appear at the hearing of the matter. The ALJ determined that petitioner had, accordingly, failed to carry the burden of proof, that the petition should be dismissed pursuant to N.J.S.A. 18A:38-1b(1), and that the Board should be awarded $7,094.64 in tuition.

The Commissioner affirmed the determination of the ALJ, noting, however, that such dismissal was without prejudice to any entitlement M.E. may have to attend school pursuant to N.J.S.A. 18A:38-1a, if M.E. is adopted by petitioner.

August 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11827-99
AGENCY DKT. NO. 307-10/99

T.M., ON BEHALF OF
MINOR CHILD, M.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,

Respondent.

No appearance by or for T.M.

Stephen J. Christiano, Esq., for respondent

Record Closed: July 7, 2000 Decided: July 7, 2000

BEFORE **RICHARD McGILL**, ALJ:

T.M. (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of West Orange (hereinafter "respondent") in regard to minor child, M.E. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance.

PROCEDURAL HISTORY

The petition in this matter in the form of a letter dated October 1, 1999, was filed with the Commissioner of Education on October 5, 1999, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. On November 3, 1999, respondent filed an answer which included a counterclaim for tuition reimbursement. The matter was transmitted to the Office of Administrative Law on November 18, 1999, for determination as a contested case.

The matter was scheduled for a hearing on July 5, 2000, at the Office of Administrative Law in Newark, New Jersey. T.M. did not appear for the hearing, and no message was received in regard to the nonappearance. Respondent submitted proofs in regard to its counterclaim, and the record closed on July 7, 2000, after giving T.M. an additional day to submit an explanation in regard to the nonappearance.

ISSUES

The issues in this proceeding are whether M.E. is eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 and, if not, whether respondent's counterclaim should be granted.

FACTS

The only witness in the proceeding was Josefa Lopez, who is employed by respondent as its registrar. Her testimony was fully credible and is accepted as true. Based upon the evidence presented at the hearing, I **FIND** as follows. As the registrar, Ms. Lopez denied T.M.'s application to enroll M.E. in respondent's public schools, because T.M. failed to submit a sworn statement from M.E.'s parent or guardian establishing economic hardship. Thereafter, T.M. filed the petition with the Commissioner of Education, and as a result, M.E. was allowed to attend kindergarten in respondent's public schools during the pendency of this proceeding. M.E. attended respondent's public schools for a total of 164 days. At a rate of $43.26 per diem, the

total tuition for this period of time is $7,094.64.

LAW AND ANALYSIS

Attendance at public schools shall be free to any person who meets the requirements set forth in *N.J.S.A.* 18A:38-1. Under certain circumstances, a child who is kept in the home of a person who is domiciled in a school district may attend the public schools free of charge. *N.J.S.A.* 18A:38-1(b)1. If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. *Ibid.* In the proceeding before the Commissioner of Education, the resident has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. *Ibid.* If the evidence does not support the claim, the resident shall be assessed tuition for the student prorated to the time of the student's ineligible attendance in the school district. *Ibid.*

Here, T.M. did not appear for the hearing and did not provide any explanation for the nonappearance. Under the circumstances, T.M. failed to carry the burden of proof that M.E. met the requirements for a free education. Therefore, I **CONCLUDE** that the petition should be dismissed.

It follows from the dismissal of the petition that M.E. was ineligible for attendance at respondent's public schools during the period in question. Therefore, T.M. must be assessed tuition for the period of ineligible attendance. Based upon the findings above, I **CONCLUDE** that T.M. should be assessed tuition in the amount of $7,094.64 for the period of M.E.'s ineligible attendance.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. The counterclaim for assessment of tuition in the amount of $7,094.64 is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 2000
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7/11/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESS LIST

For petitioner:

None

For respondent:

Josefa Lopez

EXHIBIT LIST

R-1	Tuition calculation	Evidence

OAL DKT. NO. 11827-99
AGENCY DKT. NO. 307-10/99

T.M., on behalf of minor child, M.E.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions, nor did petitioner file any explanation of her failure to appear at hearing.

Upon careful and independent review of the record, the Commissioner concurs with the ALJ, for the reasons expressed in the initial decision, that petitioner has failed to meet the burden of proof in demonstrating M.E.'s entitlement to attend school in respondent's district pursuant to *N.J.S.A.* 18A:38-1(b).

However, the Commissioner also notes that, in her Petition of Appeal, petitioner claims that her adoption of M.E. was imminent as of October 1, 1999, and that, with the consent of M.E.'s parents, she had "***launched the administrative and judicial process" in Ethiopia necessary to adopt M.E., and that the adoption was "awaiting final signature ***." (Petition of Appeal at 2) The Commissioner, therefore, dismisses this matter without prejudice to any claim of entitlement by M.E. to attend the schools of the district pursuant to *N.J.S.A.* 18A:38-1(a). *See L.A. v. Board of Education of the Town of West Orange*, 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd*

by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.*2d (EDU) 124, *aff'd* by the State Board of Education 97 *N.J.A.R.*2d (EDU) 554 (1997) (establishing that, as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b).)

Accordingly, the decision of the ALJ finding M.E. not entitled to attend school pursuant to *N.J.S.A.* 18A:38-1(b) and directing payment of tuition for the period of ineligible attendance, is affirmed, subject to the clarification set forth herein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 22 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

268-00

DAVID MICHAEL BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination to deny him a high school diploma because he was deemed academically ineligible to complete a required physics course due to excessive unexcused absences.

The ALJ found the Board's determination to be appropriate and in conformance with its policy regarding chronic illness that may cause chronic absences and/or lateness to school. The ALJ rejected petitioner's assertion that he had demonstrated a medical basis for his persistent and chronic absences.

The Commissioner adopted the Initial Decision as the final decision in this matter. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8412-99

AGENCY DKT. NO. 196-7/99

DAVID MICHAEL BUCKLEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

David Michael Buckley, petitioner, *pro se*

Jeffrey Belz, Esq., for respondent

Record Closed: May 16, 2000 Decided: July 6, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

The petitioner, David Buckley, was denied a high school diploma because he was deemed academically ineligible to complete a required Physics course, due to excessive unexcused absences.

PROCEDURAL HISTORY

The petitioner appealed to the Department of Education and on October 4, 1999, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was heard on May 16, 2000, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

The following is a factual summary of the testimony as presented. No analysis or conclusions are made at this point. Findings of fact and conclusions will be presented under the appropriate headings below.

The first witness to testify was David Buckley, the petitioner, who said that he was often late to his 1st period classes because of his asthma. He produced doctor's notes, which he said dealt with his absences from his 1st period class.

Buckley said that he seeks a high school diploma. He was offered the opportunity to obtain a GED, but declined. Although he said the possibility of his attending summer school was discussed, this is not an option because Physics is not offered as a summer course locally.

On cross, Buckley said he had taken Physics before as a Junior, but had not passed the course then, either.

The next witness to testify was Robert Carvale, Vice Principal of Ewing High School. Carvale said that, in May, suspicion began to arise that Buckley was abusing his medical note. He said that the amount of Buckley's absences would affect his ability to learn the course material.

In closing, respondent said that Buckley's attendance record represented an egregious example of absenteeism. Buckley said that he had earned 120 credits without Physics, and that by his calculation (confirmed by Carvale) his grade for Physics was a passing grade. It was stipulated that 67.6 was Buckley's grade for Physics, and that, without the absences, this would be a passing grade.

This concluded the presentation of testimony and evidence.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences there from, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. Ewing High School's Attendance Policy states that students are required to be in class 180 days during the school year. If the student has a chronic illness that may cause chronic absenteeism and/or lateness to school, it is mandatory that the student obtain a doctor's note annually stating what the chronic illness is and that chronic absenteeism or tardiness may occur this year due to the described chronic illness. Each student is permitted 10 absences per course without penalty. Over 10 absences will mean no credit for the course. Doctor visits count toward the 10 absences allowed in a class. Unusual circumstances may be appealed. Tardiness over 15 minutes late is considered an absence. Tardiness of less than 15 minutes is considered to be 1/3 of an absence.

2. In his Senior year, David Buckley's 1st period class was Physics, commencing at 7:15 a.m. and concluding at 8:35 a.m. The Physics class, which lasts 80 minutes, meets 90 times during the semester in question.

3. In his Senior year, David Buckley arrived for his Physics class between 7:15 and 7:30 and was thus tardy 7 times on February 11, February 26, March 2, March 17, March 23, April 7, and April 19. He arrived after 7:30 and thus was considered absent 23 times on February

2, February 3, February 5, February 9, February 17, February 22, February 23, February 24, February 25, March 1, March 3, March 4, March 5, March 8, March 10, March 16, March 18, March 26, April 16, April 21, April 23, April 29 and May 25. On 24 occasions (on February 1, February 8, February 12, March 9, March 24, April 5, April 6, April 9, April 12, April 13, April 14, April 15, April 20, April 22, April 26, April 27, April 28, April 30, May 3, May 6, May 7, May 10, May 12, and May 13), he arrived after the Physics class ended, i.e., on or after 8:35.

4. Buckley's grade for Physics for the year was 67.6. It was stipulated that, without the absences, this would be a passing grade.

DISCUSSION

The school's attendance policy provides that, if the student has a chronic illness that may cause chronic absenteeism and/or lateness to school, it is mandatory that the student obtain a doctor's note annually stating what the chronic illness is and that chronic absenteeism or tardiness may occur this year due to the described chronic illness.

The doctor's notes that petitioner produced do not explain or excuse Buckley's absences. The first doctor's note, P-2 at page 2, of May 13, 1999, states that his medical problems "may" account for his tardiness, and that his medical regimen was changed, ostensibly to correct the problem with his attendance record[1].

The second doctor's note (R-4) of June 14, 1999 states, in its entirety, "David Buckley was in to see me 9/18/98; 9/28/98; 10/19/98; 11/9/98; 1/13/99 and 1/26/99. Although his respiratory problems may cause occasional tardiness and absence, I was unaware of chronic persistent medical problems necessitating daily or weekly missed school hours. This does not preclude him from having them; I simply was not informed of them."

[1] The note of 5/13/99 states, in its entirety "David Buckley's attendance record was reviewed today by me. He has medical problems which may account for his tardiness; we have changed his medical regimen."

The petitioner emphasized the first part of the last sentence, that "this does not preclude him from having them (chronic persistent medical problems)." However, the doctor's statement is clear that he was not aware of any chronic or persistent medical problems that would necessitate missed school hours, on any more than an occasional basis.

These notes do not state that Buckley has a chronic illness, or that chronic absenteeism or tardiness may occur due to the described chronic illness.

Individually or together, these statements do not provide a medical basis to excuse such persistent and chronic tardiness or absence. (There were evidently other doctor's notes, dating back at least as far as 2/1/99 (see R-1), but no other doctor's notes were produced in evidence.)

Buckley far exceeded the 10 allowed absences per course per year. His absences are not the result of any "unusual circumstance," but instead were routine and habitual. He was barely present for Physics class, which no doubt accounts for his low grade. He was warned in writing at least twice that he was failing the course. (R-5 and R-6).

Buckley stated that he should be awarded his diploma because of minor technicalities not related to education. To do so would debase the value of a diploma.

ORDER

It is therefore **ORDERED** that respondent's actions in withholding petitioner's diploma be **AFFIRMED** and that the appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 6, 2000
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

David Buckley, Petitioner

For Respondent:

Robert Carvale, Vice Principal, Ewing High School

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Fax, Buckley to the Court, November 19, 1999

P-2 Documents, 14 pages

For Respondent:

R-1 Student Cumulative Attendance Roster, 2/1/99-5/23/99, 2 pages

R-2 Report Card

R-3 Student Attendance, 2 pages

R-4 Note, To Whom It may Concern, from Pakish, June 14, 1999

R-5 Class Absence Letters – Parent Notification

R-6 Class Absence Letter – Parent Notification

OAL DKT. NO. EDU 8412-99
AGENCY DKT. NO. 196-7/99

DAVID MICHAEL BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ. Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 25 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

269-00

J.D.K. AMD G.E.K., on behalf of minor child, J.D.K., JR., AND M.S.D. AND R.D.M.D., on behalf of minor children, G.D. AND B.D.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents challenged the determination of the Board to cease providing their children transportation to the private schools they attend because the schools are located more than 20 miles from petitioners' residences. Petitioners agreed that the schools were more than 20 miles from their residences.

The ALJ concluded that, because the law is clear that transportation is to be provided only if a private school is located within 20 miles of a student's residence, the Board's determination to cease providing transportation was correct. The ALJ rejected petitioners' equitable arguments, which were based on the fact that transportation was provided in the past and that reasonable notice was not provided, because of the unambiguous statutory basis for the Board's determination.

The Commissioner adopted the decision of the ALJ for the reasons expressed therein and dismissed the Petitions of Appeal.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00673-00

AND EDU 00674-00

AGENCY REF. NOS. 4-1/00 and 5-1/00

J.D.K. AND G.E.K., ON BEHALF OF THEIR MINOR CHILD, J.D.K., JR. AND M.S.D. AND R.D. AND M.D., ON BEHALF OF THEIR MINOR CHILD, B.D.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ESTELLE MANOR, ATLANTIC COUNTY,

Respondent.

J.D.K., parent, on behalf of **J.D.K.,** petitioner

M.S.D., parent, on behalf of **G.A. and B.D.,** petitioner

Beverly Sharps Muller, Esq., for respondent

Record Closed: May 23, 2000 Decided: July 5, 2000

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Estelle Manor Board of Education terminated bus service to the petitioners upon discovering that they resided more than 20 miles from the private schools in which their children were enrolled. *N.J.S.A.* 18A:39-1. The petitioners requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13.

FACTS

The petitioners do not dispute that they reside more than 20 miles from the private schools they attend. They rely upon equitable doctrines to assist them in regaining bus transportation. For instance, the school has provided transportation for them in the past; the school abruptly terminated service without reasonable notice.

Neither of these arguments avail the petitioners. The statute is clear. It provides, among other things, that pupils may be transported by bus to private schools "located within the State not more than 20 miles from the residence of the pupil . . . ." *N.J.S.A.* 18A:39-1. The statute has been litigated extensively and does not violate equal protection. *Reed By and Through Reed v. Attorney General,* 195 *N.J. Super.* 172 (*App. Div.* 1984). *West Morris Regional BOE v. Sills,* 58 *N.J.* 464 (1971) cert. denied. 92 *S. Ct.* 450, 404 *U.S.* 986.

The School Business Administrator and Board Secretary correctly advised the petitioners that their only remedy lay with the Legislature.

I **AFFIRM** the action of the Estelle Manor Board of Education which terminated the bus transportation of G.D., B.D. and J.D.K., Jr.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

7/11/00

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 2000

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

M.S.D.

R.D. and M.D.

J.D.K.

G.E.K.

For Respondent:

Maryann Clark, Bus. Admin/Bd. Sec.

DOCUMENTS IN EVIDENCE

None

OAL DKT. NOS. EDU 00673-00 AND EDU 00674-00 (CONSOLIDATED)
AGENCY DOCKET NOS. 4-1/00 AND 5-1/00

J.D.K. AMD G.E.K., on behalf of minor child, J.D.K., JR., AND M.S.D. AND R.D.M.D., on behalf of minor children, G.D. AND B.D.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, the Commissioner determines to adopt the Initial Decision for the reasons expressed therein. Accordingly, the within Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 25 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#270-00

270-00

BERTHA SMALLWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff member alleged the District improperly withheld her salary increment for the 1998-99 school year based on evaluations of her teaching performance wherein she received unsatisfactory ratings.

The ALJ determined that the District had demonstrated that petitioner, among other things, utilized improper instructional techniques, did not properly assess her students' needs or evaluate their progress and failed to implement any of the suggestions given to her by her supervisors. The ALJ determined that the withholding of petitioner's increment was appropriate and so concluded in her recommended decision.

The Commissioner adopted findings and determination in Initial Decision as his own. Petition was dismissed.

August 18, 2000

#270-00

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3810-99
AGENCY DKT. NO. 399-9/98

BERTHA SMALLWOOD,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Ken Iwama, Assistant General Counsel, for respondent

Record Closed: May 24, 2000 Decided: July 6, 2000

BEFORE **ELINOR R. REINER**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold her salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education on August 31, 1998. Count 20 of the multi-count petition alleged the wrongful withholding of the increment of petitioner, Bertha Smallwood. On September 21, 1998, the District filed its answer. On October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Docket No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Smallwood case, designated EDU 3810-99, on January 24, 2000. Witnesses and exhibits are listed in the attached appendix.

FINDINGS OF FACT

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the District submitted a detailed review of the testimony and proposed findings of fact, which I largely have adopted herein.

1. During the 1997-98 school year, petitioner was assigned to teach fifth grade at P.S. 14.

2. Petitioner has been employed by the Jersey City school system since February 1985. She started out as a pool sub and eventually became a permanent teacher in 1986. In 1990, she moved to School No. 14. She has a bachelor of science degree, a bachelor of arts degree, a Typing Certificate and an Early Child/Elementary Education Certificate. She is certified to teach preschool through eighth grade.

3. In the fall of 1997, petitioner was observed and evaluated by District math supervisor Naser Nesheiwat.

4. Nesheiwat has been employed by the District for approximately twenty-one years. He currently serves as the math supervisor, a position he has held for approximately eleven years. Prior to serving as the math supervisor, Nesheiwat served in the position of math teacher. As math supervisor, Nesheiwat is responsible for, among other duties, observing and evaluating teaching staff members.

5. On October 27, 1997, Nesheiwat observed Smallwood teach a 45-minute math lesson.

6. During his observation, petitioner's teaching performance was less than satisfactory in every performance category set forth in the evaluation form. Specifically, Nesheiwat gave petitioner performance ratings of "improvement needed" in demonstrates proficiency in subject matter, assesses needs and evaluates progress of pupils, employs effective organization and planning, utilizes effective instructional techniques, and addresses affective domain.

7. Smallwood started the lesson approximately seventeen minutes late, wasting more than one-third of the entire lesson. During that time, students learned nothing, as petitioner failed to provide them with any instruction. The students were just walking around the classroom doing their own thing.

8. Once the lesson started, petitioner was unable to engage the students, as the classroom was in chaos. Sixteen of the twenty-two students present were not paying any attention to the lesson.

9. Petitioner could neither assess nor evaluate her students because of the complete lack of control and discipline in her class.

10. Petitioner failed to employ effective organization and planning. Instead of properly using models, manipulatives and word problems to help students understand the object of the lesson, she taught skills in isolation. Moreover, the objectives she planned were neither detailed nor student centered.

11. As for petitioner's instructional technique, petitioner failed to utilize any logical sequence in presenting her lesson.

12. Concerning the affective domain, petitioner completely failed to control her class. The students demonstrated no respect for petitioner, and her method of classroom control consisted of yelling and screaming at the students.

13. Petitioner's performance during the observation was unacceptable.

14. Nesheiwat reviewed the evaluation with petitioner and provided her with a comprehensive list of "suggestions for improvement."

15. Nesheiwat also made follow-up visits, approximately two weeks after the evaluation, to petitioner's classroom to assist her and observed that she was still not involving her students in the lessons.

16. Approximately two weeks after the evaluation, Nesheiwat provided petitioner with a stack of additional materials (manipulatives) to assist her in remedying her performance problems.

17. On January 7, 1998, petitioner was observed and evaluated a second time by Nesheiwat. Nesheiwat observed petitioner teach a 45-minute math lesson.

18. Petitioner's teaching performance deteriorated to unsatisfactory in every performance category. She failed to implement any of the suggestions given to her by Nesheiwat following the first evaluation and exhibited the same performance problems.

19. Petitioner started the lesson approximately fifteen minutes late, wasting one-third of the lesson time.

20. Petitioner failed to adequately assess the needs and evaluate the progress of her students since her classroom was in a state of total chaos. Some students were doing somersaults in the class while others were jumping on top of desks.

21. As for organization and planning, petitioner failed to plan her lesson according to the needs of the students, which resulted in the lack of student participation. She failed to properly maintain her students' portfolios, which contained uncorrected and unchecked papers.

22. Petitioner's instructional technique was also unsatisfactory, as she failed to engage the students in any activities to stimulate their interest. She taught skills in isolation. Fifteen of the twenty students present were not paying any attention to the lesson.

23. Concerning affective domain, petitioner again completely failed to control her class.

24. Petitioner's performance was unacceptable.

25. Following the second evaluation, Nesheiwat gave petitioner the same "suggestions for improvement" that he previously gave her, since she had failed to implement any of them.

26. When Nesheiwat attempted to review the suggestions with petitioner, she called him a liar and refused to sign them.

27. Petitioner was also observed and evaluated by Sandra Harrison, principal of P.S. 14, in the fall of 1997.

28. Harrison had been employed by the District for approximately twenty-seven years. She served as principal of P.S. 14 for eight years until July 1998. Prior to serving as principal, Harrison served as a guidance coordinator, guidance counselor, crisis intervention teacher and classroom teacher. As principal of P.S. 14, Harrison was responsible for, among other duties, observing and evaluating teachers.

29. On September 17, 1997, Harrison observed Smallwood teach a 45-minute language arts lesson.

30. Harrison gave petitioner a less than satisfactory performance rating in the category of organization and planning. Petitioner demonstrated poor classroom management, since students were allowed to behave poorly and were unable to focus on the lesson. She also failed to follow the standard lesson plan structure in planning her lesson.

31. On January 21, 1998, Harrison and Nesheiwat met with petitioner and gave her an improvement recommendation plan to assist her in remedying her performance deficiencies. Harrison also scheduled petitioner to observe a successful teacher in another school district in order to learn some strategies to promote effective classroom management.

32. Petitioner was observed and evaluated a second time by Harrison on February 12, 1998. Harrison observed petitioner teach a 45-minute math lesson.

33. Harrison found that petitioner's teaching performance had deteriorated to less than satisfactory in every performance category. Specifically, Harrison gave petitioner the following performance ratings: unsatisfactory in demonstrates proficiency in subject matter, unsatisfactory in assesses needs and evaluates progress of pupils, unsatisfactory in employs effective organization and planning,

unsatisfactory in utilizes effective instructional techniques, and improvement needed in addresses affective domain.

34. Concerning proficiency in subject matter, petitioner was unprepared to teach the lesson, skills were taught in isolation, students were not given enough time to respond to petitioner's questions and petitioner failed to respond to students' questions. Petitioner did not use proper English in presenting her lesson. She pronounced the word "quotient" as "quotent," asked the students "where should your 7 be at?" and stated "if we was going to take a divisor" (R-5).

35. Concerning the area of assesses needs and evaluates progress of pupils, petitioner failed to take the time to make the proper assessment of pupil progress. She planned only a limited number of activities, which were insufficient to support the various learning styles of students. Students were not given clear instructions on how to use manipulatives.

36. Petitioner also failed to employ effective organization and planning, in that there was no logical sequence in the presentation of the lesson, which confused the students. Petitioner also failed to maintain proper control of the classroom. As a result, disruptions in the class, caused by poor student behavior, detracted from the instructional process.

37. Concerning her instructional technique, petitioner failed to communicate the objective of the lesson to the students, foster a discussion among the students and properly summarize the lesson to check for student comprehension.

38. Concerning affective domain, petitioner did not make behavior expectations clear to her students. The students basically did whatever they wanted to do, including walking around the classroom and talking without restriction.

39. Following the second evaluation, Harrison gave petitioner more "recommendations for improvement," due to the continuing performance problems she was experiencing.

40. In addition to the evaluations, Harrison and assistant principal John Smiga also sent petitioner numerous memos throughout the school year, concerning her chronic problem of lack of control of student behavior, as well as the deplorable physical condition of her classroom.

41. Petitioner did not take advantage of the assistance offered to her by Harrison. Harrison directed petitioner to visit and observe teachers. Petitioner failed to comply with this directive, claiming that she had no time to do it.

42. The students in petitioner's class had low test scores, which were directly related to the poor instruction she was providing. Her students were at least a grade behind.

43. Harrison gave petitioner an Instructional Annual Written Performance Report, which summarized petitioner's teaching performance for the entire school year. Ms. Harrison gave petitioner less than satisfactory ratings in each performance category set forth in the annual written performance report. Specifically, petitioner received unsatisfactory ratings in demonstrates proficiency in subject matter, assesses needs and evaluates progress of pupils, employs effective organization and planning, utilizes effective instructional techniques and addresses affective domain; petitioner received improvement needed ratings in exhibits professional attitudes and manners, establishes rapport with pupils, staff and/or parents, and implements and enforces school rules, regulations and Board policy.

44. Due to petitioner's poor performance throughout the 1997-98 school year, Harrison recommended that petitioner's salary increment be withheld.

45. Based upon Harrison's recommendation, the District withheld petitioner's salary increment for the 1998-99 school year.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Smallwood's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Petitioner admitted that she did have some performance problems during Nesheiwat's first evaluation. She admitted that there were student disruptions in her classroom during the school year and that no teaching could occur in the classroom with student disruptions. She agreed that there were times when her classroom was out of order and that there were papers on the floor and shelves and desks in disarray.

However, the sum and substance of petitioner's testimony was to the effect that her poor performance record was not her responsibility. Essentially, petitioner blamed others for her situation. She contended that Nesheiwat was a "liar" and that his second evaluation of her was a "bunch of lies." She claimed that Harrison retaliated against her due to a grievance that she filed and that Harrison and her colleagues were on a "witch-hunt" to get her. Pointing to the lack of discipline in the building, she blamed Harrison for the discipline problems with her students. She also blamed her own students, claiming that they were low achievers and belonged in special education classes. She blamed the scheduling of her classes as the reason for her lack of classroom control and the deplorable physical condition of her classroom on electricians. Petitioner also contended that the administration failed to properly advise her on how to prepare lesson plans or on the criteria and requirements she should utilize.

However, petitioner failed to provide any evidence to support these allegations. Specifically, she failed to present any evidence to support her conspiracy claim or that a grievance existed. And, in fact, Harrison testified that she had no knowledge of the existence of any such grievance. In sum, her arguments amounted to excuses, which were unsupported by any independent evidence and did not seem reasonable or credible. Petitioner's effort to blame her poor teaching performance either on those who conducted the evaluations or other factors was unsuccessful. Petitioner failed to prove that it was unreasonable for the administrators who observed and evaluated her teaching performance during the 1997-98 school year to conclude that her performance was less than satisfactory.

Of import, her assertions were contrary to the testimony and evidence adduced by respondent's witnesses. It is clear that petitioner was evaluated by two independent and experienced evaluators, who observed and evaluated petitioner's teaching performance on at least two occasions each. Their testimony, as substantiated by their reports and other evidence in the record, was clear, specific, credible and worthy of belief. It demonstrated that petitioner properly received unsatisfactory ratings in demonstrates proficiency in subject matter, assesses needs and evaluates progress of pupils, employs effective organization and planning, utilizes effective instructional techniques and addresses affective domain. Clearly, the evidence supported the fact that petitioner's teaching performance was actually less than satisfactory in each performance category set forth in the evaluation form. In fact, it is observed that the testimony and evidence supports the fact that the administration attempted to advise petitioner of what was expected of her and make suggestions for improvement of her performance. Petitioner was unresponsive to Nesheiwat's attempts to help her. Further attempts to help her also proved to no avail. Despite the fact that Ms. Harrison scheduled petitioner to observe a successful teacher in another school district in order to learn some strategies for effective classroom management, petitioner failed to take advantage of this help. In sum, not only was petitioner properly evaluated, but the school clearly attempted to properly train, prepare and advise petitioner as to what was expected of her and help her accomplish these goals. Under the circumstances, I **CONCLUDE** that petitioner has not proven that the Board's decision to withhold her salary increment was arbitrary, capricious or unreasonable.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner is **DENIED** and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 6, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/11/00
DATE

Debbie Antanaitis/pb
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

List of Witnesses

For Petitioner:

Bertha Smallwood

For Respondent:

Naser Nesheiwat

Sandra D. Harrison

List of Exhibits

For Petitioner:

P-1 Identification

P-2 Memo to Sandra Harrison from Bertha Smallwood dated June 15, 1998

P-3 Memo to Sandra Harrison from Bertha Smallwood dated March 3, 1998

For Respondent:

R-1 Instructional Observation Report for Bertha Smallwood dated October 27, 1997

R-2 Instructional Observation Report for Bertha Smallwood dated January 7, 1998

R-3 Instructional Staff Observation Report for Bertha Smallwood dated September 17, 1997

R-4 Memo to Bertha Smallwood from Sandra Harrison dated January 21, 1998

R-5 Instructional Staff Observation Report for Bertha Smallwood dated February 12, 1998

R-6 Instructional Annual Written Performance Report for Bertha Smallwood dated May 14, 1998

R-7 Memo to Bertha Smallwood from John Smiga dated October 10, 1997

R-8 Memo to Bertha Smallwood from Sandra Harrison dated November 17, 1997

R-9 Memo to Bertha Smallwood from Sandra Harrison dated January 20, 1998

R-10 Memo to Bertha Smallwood from Sandra Harrison dated February 25, 1998

R-11 Letter to Bertha Smallwood from Judi Granick dated June 1, 1998

OAL DKT. NO. EDU 3810-99-98
AGENCY DKT. NO. 399-9/98

BERTHA SMALLWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, which included a transcript of the hearing conducted at the OAL on January 24, 2000, the Commissioner determines to affirm the Initial Decision. As noted, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold her increment was arbitrary, capricious or unreasonable, based on the facts. *Kopera, supra.* Finding no cause to disturb the findings, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet her burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 [redacted]

Date of Mailing: AUG 25 [redacted]

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#271-00

271-00

IN THE MATTER OF THE TENURE HEARING OF ROGER WOOD, SCHOOL DISTRICT OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent teacher for alleged improper touching of female students. Respondent's misconduct was also the subject of criminal complaints and an indictment. Respondent pled guilty to three counts of third-degree endangering the welfare of children, violations of *N.J.S.A.* 2C:24-4(a). In his judgment of conviction, the Superior Court Judge ordered respondent to resign from his teaching position, to surrender any teaching certificate, never again to assume a teaching position, to serve four years of probation on each count concurrent, to undergo therapy, to be subject to community supervision for life, to have no contact with the victims and no unsupervised contact with females under 18 years of age. Moreover, respondent cannot seek employment where a female under the age of eighteen is employed.

Consistent with the Superior Court judgment, the Board's claims were granted by the ALJ and respondent was dismissed from his teaching position. The ALJ further determined that, given the stay and delay in disposition of this case at respondent's request, the Board was not responsible for payment of back pay and/or benefits to respondent.

The Commissioner adopted the findings and determination in the Initial Decision as his own with modification. The Commissioner concurred with the ALJ that the Board's tenure charges of unbecoming conduct were sustained, justifying respondent's dismissal and that respondent had no entitlement to back pay or benefits. The Commissioner, however, declined to reach the ALJ's Initial Decision discussion with respect to whether a stay of tenure proceedings as a consequence of an ongoing related criminal "investigation" was possible, determining that resolution of that issue was not necessary to the adjudication of this matter.

August 18, 2000

#271-00

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8447-98

AGENCY DKT. NO. 409-9/98

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD,

Petitioner,

v.

ROGER WOOD,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

Nicholas Celso, Esq., & **Joseph Morano**, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 7, 2000 Decided: July 11, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Borough of South Plainfield (BOE) charges that Roger Wood, a tenured teacher in the BOE's school system, engaged in unbecoming conduct and that there is just cause for his dismissal. N.J.S.A. 18A:6-10.

More particularly, the BOE alleges that respondent wrongfully and repeatedly touched his female students. Respondent's misconduct is also the subject of criminal complaints and an indictment. Respondent pled guilty to three counts of third-degree endangering the welfare of children, violations of N.J.S.A. 2C:24-4(a), and the judgment of conviction shows the following: The Superior Court judge found that respondent was a sex offender and that his misconduct was characterized by a pattern of repetitive and compulsive behavior. Respondent must resign from his teaching position, surrender any teaching certificate and never again assume a teaching position. Respondent must undergo sex offender's specific therapy, submit to community supervision for life, avoid contact with the victims and avoid unsupervised contact with females under eighteen years of age.

Consistent with the Superior Court judgment, the BOE's claims are granted and the respondent is dismissed from his teaching position. Given the procedural history, etc., detailed below, the BOE is not responsible for payment of back pay, etc.

PROCEDURAL HISTORY
AND
FINDINGS OF FACT

On September 10, 1998, in the Department of Education, the following papers were filed: the BOE's sworn tenure charges, superintendent's sworn statement of evidence in support of tenure charges, certification of determination for filing of tenure charges, BOE's resolution of determination of probable cause to credit evidence, etc., and certification of service. N.J.S.A. 18A:6-9, -11; N.J.A.C. 6:24-5.2. On September 21, 1998, the respondent's answer and separate defenses were filed with the Department.

The Department transmitted the matter to the Office of Administrative Law, where on September 24, 1998, it was filed as a contested case. N.J.S.A. 18A:6-11; N.J.S.A. 52:14B-2(b). On September 25, 1998, the case was assigned to me and I faxed to the attorneys a scheduling letter, citing the expedited schedule required by N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-1 et seq. as recently amended. The attorneys forwarded letters relative to the possibility of a criminal

charge against respondent, and on October 7, 1998, I faxed a letter to them wherein I wrote that unless I received notice that a criminal charge had been filed, this litigation would go forward according to the expedited schedule. On October 13, 1998, the attorneys and I engaged in a telephone conference and respondent's attorney represented that the Middlesex County prosecutor had undertaken a criminal investigation and that he (respondent's attorney) might move for a stay of this case. I advised the attorneys to notify me if a criminal charge was filed, but, in the meanwhile, unless I received notice that a criminal charge had been filed, this litigation would go forward according to the expedited schedule.

In an October 14, 1998, letter to the attorneys, I wrote the following:

> N.J.S.A. 18A:6-16 [and N.J.S.A. 52: 14B-1 et seq.] address the situation where a related criminal charge has been filed against the teacher, but we do not have evidence of a filed criminal charge and we talked about the possibility of a stay in the absence of a criminal charge. I have done some preliminary research and I offer it to you, so that Mr. Klausner may make a practical decision relative to a motion for a stay.
>
> A stay is an extraordinary preliminary and provisional remedy which enjoins and delays award of the permanent remedy and it is granted only where the moving party demonstrates a clear right and demonstrates that, in its absence, grave injustice would occur. Housing Authority of Town of Morristown v. Little, 135 N.J. 274, 289 (1994); Chalom v. Benesh, 234 N.J. Super. 248, 254 (Law Div. 1989).
>
> In determining whether to grant a stay, a judge should consider the equities and necessity of the particular case and whether granting a stay would frustrate New Jersey public policy. American Home Products v. Adriatic Ins., 286 N.J. Super. 24, 38 (App. Div. 1995); National Freight, Inc. v. Ostroff, 133 N.J. Super. 554, 558 (Law Div. 1975). It has been held that a stay should not be granted "unless no hardship, prejudice or inconvenience would result to the one against whom the stay is sought." Insurance Co. of North America v. Allied Crude Vegetable Oil, 89 N.J. Super. 518, 541 (Ch. Div. 1965), citing Gosschalk v. Gosschalk, 28 N.J. 73 (1958).
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> In a civil proceeding, a witness may assert the Fifth Amendment right against self-incrimination and a witness who asserts a valid claim under that right may not be compelled to

testify absent at least the protection of use immunity (which I have no authority to grant). Whippany Paper Board Co. v. Alfano, 176 N.J. Super. 363, 369 (App. Div. 1980), citing Maness v. Meyers, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975), and Mahne v. Mahne, 66 N.J. 53 (1974).

However, while a civil defendant has the absolute right against self-incrimination, he has no absolute right to a stay of the civil case to await indictment on the same subject matter or to await disposition of an indictment, because such a stay would delay justice that might be due to the civil claimant. National Freight, supra, 133 N.J. Super. at 558. Further, in the absence of a stay, in discovery and in a hearing, the civil defendant may assert his Fifth Amendment right or tell the truth and "the truth is always the truth, and telling the truth will not hurt anyone except insofar as he ought to be hurt." Shaw v. Riverdell Hospital, 150 N.J. Super. 585, 591 (Law Div. 1977), citing National Freight, supra, 133 N.J. Super. at 559, and In re Vince, 2 N.J. 443, 448 (1949), and citing DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970). In DeVita, there was a motion to stay a state judicial inquiry looking toward disbarment and removal from judicial office pending completion of a related criminal proceeding on the ground that the Fifth Amendment should be construed so that one is not faced with the difficult decision of either asserting the privilege against self-incrimination or testifying with limited immunity and it was held that there was no authority for so broad a reading of the Fifth Amendment and no constitutional right to stay the civil action to await the outcome of a related criminal case.

N.J.S.A. 18A:6-16 [and N.J.S.A. 52:14B-1 et seq.] may be said to set forth the public policy that teacher tenure charges should be expeditiously decided and only when there is a related criminal charge filed is a tenure case excepted from the statute's expeditious schedule. I understand that Mr. Celso has notified the prosecutor of this case and that he (Mr. Celso) has no knowledge of criminal charges that have been filed.

Given the above and, especially, in the absence of evidence of a filed criminal charge, it appears that a motion for a stay may be unsuccessful and that the schedule previously set forth should continue. However, I leave it to Mr. Klausner to notify me of authority that would support a stay and to take such action as he sees fit. Finally, please notify me immediately if you learn of a criminal charge filed.

The attorneys exchanged several letters relative to respondent's raising the Fifth Amendment in objection to the BOE's discovery requests. In a November 30, 1998, letter to the attorneys, I wrote the following:

> In response to the BOE's discovery requests, if appropriate, Mr. Wood may assert his Fifth Amendment right against self-incrimination. However, I **ORDER** that, by December 3, 1998, in writing served on the BOE's attorney, Mr. Wood identify the BOE's discovery requests to which he raises his Fifth Amendment right and that he serve answers to other discovery requests. If the BOE believes that the Fifth Amendment right is inappropriately raised, it may move for appropriate relief and, if the BOE sees fit, relative to those discovery requests to which Mr. Wood raises his Fifth Amendment right privilege, it may request inferences for findings of fact.

No record had been made here of a criminal charge filed against respondent and respondent made no motion here for a stay. However, in the Superior Court, Chancery Division, Middlesex County, respondent's attorney filed a Superior Court complaint, Wood v. South Plainfield BOE and Tassini, A.L.J., C-314-98, demanding restraint of the hearing of this case, etc. The BOE's attorney and a deputy attorney general representing me appeared in defense of the complaint, and on December 15, 1998, the Honorable Joseph C. Messina, J.S.C., entered an order denying the relief sought and dismissing the case. Respondent took no appeal from the order.

The BOE filed papers in support of a motion to compel respondent to answer discovery and for inferences adverse to respondent based on his refusal to answer discovery based upon his Fifth Amendment rights. In a December 28, 1998, letter, respondent's attorney wrote that, in view of the anticipated action by the prosecutor, respondent requested a stay and represented that the respondent was aware that (because a stay would delay disposition of this case), consistent with Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333, 342 (App. Div.), certif. denied, 78 N.J. 336 (1978), the BOE would not be required to pay respondent's salary (otherwise required pursuant to N.J.S.A. 18A:6-8.3) or benefits, subject to the Consolidated Omnibus Budget Reconciliation Act (COBRA) rights, during the period resulting from the stay.

In a December 28, 1998 letter to the attorneys, I wrote the following:

> (1) I take Mr. Klausner's letters as representations that Mr. Wood asserts his Fifth Amendment rights, in objection to discovery, and that, if he were called as a witness, he would assert his Fifth Amendment rights, in declining to testify. The prosecuting party must present a prima facie case to support its charges and the party in defense must assert his Fifth Amendment rights in declining to testify before an inference adverse to him may be taken. This has not yet occurred in this case. In any event, consistent with the Fifth Amendment and N.J.S.A. 2A:84A-31/N.J.R.E. 532, even in the absence of a filed criminal charge, given the severe penalty demanded by the BOE, I believe that Mr. Wood's assertion of his Fifth Amendment rights should not be taken as a basis for an inference adverse to him. State Dep't of Law & Public Safety v. Merlino, 216 N.J. Super. 579, 587 (App. Div. 1987), aff'd, 109 N.J. 134 (1988). Consequently, I **DENY** the BOE's motion.
>
> (2) In Mr. Klausner's December 24, 1998 letter, he writes that his associate has spoken to an assistant prosecutor who represented that an investigator is "out for surgery until the end of February" and that, "two or three weeks after the investigator's return," she expects to finish the investigation. On this basis, Mr. Klausner again requests that this administrative case be stayed. As I have previously written to you, as I read N.J.S.A. 18A:6-16 [and N.J.S.A. 52:14B-1 et seq.], the filing of a related criminal charge would except this case from the expedited schedule, however, a mere investigation is not sufficient to except. As I have also previously written to you, if a criminal charge is filed, you should immediately notify me; however, having no notice of a filed charge, I have not stayed this case. As you know, in Wood v. South Plainfield BOE & Tassini, ALJ, Ch. Div. C:314-98, Mr. Wood demanded an order staying this administrative case and, on December 15, 1998, the Honorable Joseph C. Messina, J.S.C., agreeing with my reading of N.J.S.A. 18A:6-16 [and N.J.S.A. 52:14B-1 et seq.], dismissed the complaint. (Mr. Klausner has represented that there will be no appeal from the dismissal.) The BOE's attorney has previously represented that he has notified the prosecutor's office of this administrative case and, in Mr. Klausner's December 24, 1998 letter, he does not represent that a criminal charge has been filed against respondent. Consequently, I see no basis to except this case from the expedited schedule and I **DENY** the respondent's motion for a stay.

> Given the above, on the above date, you should be ready to begin the hearing and the BOE, as the prosecuting party, bears the burden of proof and will present its case first.

Relative to the BOE's outstanding discovery demands, on January 4, 1999, the attorneys and I engaged in a telephone conference. Respondent's attorney agreed to provide names of persons with knowledge of facts purportedly exculpating respondent and agreed to provide copies of letters and other writings in that regard. I determined that, since there was no related criminal charge filed against respondent, the hearing would begin as scheduled, i.e., on January 12, 1999. On January 11, 1999, I issued written orders denying the BOE's motion for an order requiring respondent to answer discovery as unnecessary, denying the BOE's motion for adverse inferences (for the reasons set forth in my December 28, 1998, letter described above) and denying the respondent's motion for a stay (for the reasons set forth in my December 28, 1998, letter described above).

On January 11, 1999, I received a copy of respondent's letter transmitting papers to the Commissioner of Education in support of a motion to stay the hearing and I adjourned the hearing to January 13, 1999, to allow the Commissioner an opportunity to act on the motion.

On January 12, 1999, the attorneys represented that criminal charges related to the tenure charges had been filed against respondent and respondent's attorney faxed to me copies of the following: State of New Jersey v. Wood (i.e., the respondent), County of Middlesex, South Plainfield Municipal Court, W-1999-000063-1E, Police Case No. 198-62, a complaint, wherein it was charged that between September and November 1996, respondent committed crimes relating to one child, and State of New Jersey v. Wood (i.e., the respondent), County of Middlesex, South Plainfield Municipal Court, W-1999-000063-122, Police Case No. 198-62, a complaint wherein it was charged that between September and November 1996, respondent committed crimes relating to another child. More particularly, in each complaint it was alleged that respondent did:

> within the jurisdiction of this court, commit the act of aggravated criminal sexual contact upon [the victim], age 13, by touching victim's intimate part, i.e., buttocks, and the defendant having

> supervisory power over the victim which is in violation of N.J.S. 2C:14-3a. Acts occurred between 09011996 and 11051996.
>
> within the jurisdiction of this court, commit the act of endangering the welfare of a child to wit: a child less than 16 by engaging said child in sexual conduct which would debauch and impair the morals of the child in violation of N.J.S. 2C:24-4a. Acts occurred between 09011996 and 11051996.

In view of the related criminal charges filed against respondent, on January 12, 1999, I entered an order granting the respondent's motion for a stay of this administrative litigation and ordering that, given respondent's request for adjournment and motion for a stay, the BOE was not obligated to make payment of his salary and benefits, subject to his rights under the COBRA.

The above-described complaints were transmitted to the Middlesex County Prosecutor and, in State v. Roger Wood, indictment 99-06-00698, in the Superior Court, Law Division, Middlesex County, respondent was charged in several counts. Respondent pled guilty to three counts of violation of N.J.S.A. 2C:24-4(a). The May 22, 2000, judgment of conviction entered by Honorable Barnett E. Hoffman, P.J.C.D., shows that respondent's conduct was characterized by a pattern of repetitive and compulsive behavior, and Judge Hoffman sentenced respondent to the following: Respondent is to serve four years of probation on each count, concurrent. Respondent is to undergo sex offender's specific therapy until medically discharged. Respondent is subject to community supervision for life. Respondent is to have no contact with the victims and no unsupervised contact with females under eighteen years of age. Respondent is to surrender all teaching certificates and never serve in a teaching position again. Respondent cannot seek employment where a female under the age of eighteen is employed.

On June 7, 2000, the attorneys and I conferred and I advised them that, in view of the judgment of conviction, etc., I would enter this order.

CONCLUSIONS OF LAW

The Legislature established tenure for teaching staff members to aid in establishment of a "thorough and efficient free public school system." N.J. Const. art. VIII, § IV, ¶ 1; N.J.S.A.

18A:10-1; N.J.S.A. 18A:28-5. However, a tenured teacher may be dismissed for unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10.

Given the judgment of conviction of N.J.S.A. 2C:24-4(a), respondent engaged in conduct unbecoming a public school teacher and there is just cause for his dismissal. N.J.S.A. 18A:6-10.

Because the stay and delay in disposition of this case was at respondent's request, for the reason described above, he waived his claim under N.J.S.A. 18A:6-8.3 to receipt of his salary, etc., pending a decision on this case (subject to his rights under the COBRA). This is consistent with legislative intent in the recent amendments of N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-1 et seq., which restrict a board of education's obligation to continue to pay the salary of a teacher who has been suspended.

ORDERS

Respondent is dismissed as a public school teacher.

The BOE is not liable for backpay and/or benefits.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 11, 2000
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7/12/00
DATE

Deborah Gottschalk
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 8447-98
AGENCY DKT. NO. 409-9/98

IN THE MATTER OF THE TENURE HEARING OF ROGER WOOD, SCHOOL DISTRICT OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that, in light of respondent's guilty plea to three counts of violations of *N.J.S.A.* 2C:24-4(a) and the resultant Judgment of Conviction entered by the Honorable Barnett E. Hoffman, PJCD, on May 22, 2000, the Board's tenure charges of unbecoming conduct against him have been sustained, justifying his dismissal. The Commissioner further agrees that because the delay in the disposition of this matter was at respondent's request, he has no entitlement, pursuant to *N.J.S.A.* 18A:6-14, to back pay or benefits from the Board. In so determining, however, the Commissioner declines to reach the ALJ's extensive Initial Decision discussion with respect to whether respondent could be granted a stay of tenure proceedings as a consequence of an ongoing related criminal "investigation," since he finds that resolution of this particular issue, under the circumstances existing here, is not necessary to the adjudication of the within matter.

Accordingly, the Initial Decision of the OAL is affirmed with the exception noted above.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 25 2000

[1] It is noted that, pursuant to the May 22, 2000 Judgment of Conviction, respondent was required to surrender all of his teaching certificates.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

272-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGARET SIDBERRY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WILLINGBORO,	:	DECISION
BURLINGTON COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges against respondent school psychologist, alleging inefficiency and unbecoming conduct. The charges were based on respondent's repeated failure to complete and file psychological assessments in a timely manner.

After 15 days of hearing, the ALJ, based on the testimony and documentary evidence presented, concluded that the Board had sustained the charge of inefficiency and that dismissal was the appropriate penalty. The ALJ concluded that respondent repeatedly failed to conduct evaluations and submit psychological assessments in a timely manner, despite the extensive assistance provided by the Board to enable her to complete her work. The ALJ rejected respondent's proffered reasons for her untimely completion of her work, including various reductions in staff, serving on two Child Study teams and time spent training new staff. Finally, the ALJ did not address the charges of unbecoming conduct because of her conclusion that the sustained charge of inefficiency warranted dismissal of respondent from her position.

The Commissioner concurred with the ALJ's determination that the Board had proven the charge of inefficiency. In considering the appropriate penalty, the Commissioner weighed respondent's years of service and the fact that her performance was adequate in certain areas. The Commissioner, however, concluded that respondent continued to perform in an inefficient manner despite extensive efforts on the part of the Board to assist her in improving her performance and completing her work. Thus, the Commissioner determined that there could be no reasonable expectation that respondent would be able to conform her performance to the level reasonably expected of child study team members and that termination was the appropriate penalty. The Commissioner transmitted the matter to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

Agust 18, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0952-97S

AGENCY DKT. NO. 30-1/97

IN THE MATTER OF THE TENURE HEARING OF MARGARET SIDBERRY, BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

Joan Kane Josephson, Esq., for Petitioner (Carroll, Weiss & Josephson, L.L.P., attorneys)

Michael C. Damm, Esq., for Respondent (Selikoff & Cohen, P. A., attorneys)

Record Closed: March 19, 1999 Decided: May 19, 2000

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner, the Board of Education of the Township of Willingboro, Burlington County (Board), filed tenure charges against respondent Margaret Sidberry. The charges are based upon inefficiency, pattern of conduct and unbecoming conduct. The Board seeks removal of Ms. Sidberry from her tenured position as a school psychologist. Respondent Sidberry denies the allegations of inefficiency, pattern of conduct and unbecoming conduct and seeks to have the tenure charges dismissed.

The Board filed Amended Tenure Charges against Ms. Sidberry with the Commissioner of Education on January 23, 1997. On February 18, 1997, Ms. Sidberry filed her Answer to the charges with the Commissioner. On February 25, 1997, the matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education for hearing as a contested case pursuant to *N. J. S. A.* 52:14B-1 to -15 and *N. J. S. A.*52:14F-1 to -13. A prehearing conference was held on May 7, 1997, and a Prehearing Order was entered on May 21, 1997. Following a dispute between the parties, an Order was entered on October 6, 1997, compelling the Board to provide certain discovery. The hearing in this matter commenced on October 14, 1997, and continued on October 15, 16, 17 and 20, 1997[1]; January 12, 13, 14, 15, 21, 1998; March 23, 24, 1998, June 4, 5, and June 10, 1998. Post hearing briefs were filed by the parties on March 19, 1999, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS

Unless otherwise noted, the following facts are undisputed and are adopted as **FINDINGS OF FACT.** Margaret Sidberry is a tenured employee of the Board and has been so employed since December 1983. She holds a Bachelor of Science Degree in Education, 1972, from Duquesne University; a Masters Degree in Education from the University of Pittsburgh in Special Education and Rehabilitation Counseling and a Certificate of Advanced Graduate Study, School Psychology Certificate from Duquesne University. Ms. Sidberry is a certified school psychologist in the State of New Jersey and since the inception of her employment with the Board has functioned as a psychologist on various Child Study Teams (J-3).

The terms and conditions of employment for a Child Study Team (CST) member, such as Ms. Sidberry, for the years 1993-1996 were the same as those of a teacher and are governed under the negotiated agreement between the Board and the Willingboro Education Association (Article I, Part A.1 and 3B) (J-3). Pertinent portions of the agreement are annexed as J-1, Articles I through XXVIII. For the purposes of this proceeding only, similar terms are contained in the 1996-1999 agreement which, at the time of hearing, had not yet been fully negotiated. Ms. Sidberry had been a

[1] The transcripts of the October, 1997 hearing dates were not filed with the OAL. The transcripts of the remaining hearing dates were filed with the OAL.

ten-month employee prior to 1994. However, commencing in the summer of 1994, she became a twelve-month employee of the Board.

While the Amended Tenure Charges alleged unbecoming conduct and inefficiency starting as early as the 1992/1993 school year, on the first day of hearing, October 14, 1997, I limited the charges to the time period between the 1993/1994 school year and January of 1997, due to the Board's failure to respond to discovery requests seeking evidence to support the charges prior to that time.

A Child Study Team (CST) consists of three members: a psychologist, a learning disabilities teacher-consultant (LDTC) and a social worker. There are five CSTs in the Willingboro school district. Three CSTs are assigned to the elementary schools and out of district placements; one team is assigned to the junior high school and one team is assigned to the high school. The duties of a CST include the evaluation of students for possible classification as learning disabled; the development of Individual Education Programs (IEPs) for classified students; and the case management of students and their IEPs as they progress through school. Each CST member is responsible for conducting evaluations (either psychological, LDTC or social) in accordance with federal and state law for students who have been assigned to them. The psychological and LDTC evaluations consist of testing the student; observing the student in the classroom and writing a report. The social evaluation consists of interviewing the student's teacher, at least one of the parents; observing the student and writing a report. Once the three evaluations for a student are completed, the CST meets, reviews the reports and develops an IEP for the student if classification as learning disabled is deemed appropriate. The team then meets with the student's parents to discuss the IEP.

Once a student is classified and an IEP is developed, a CST member is assigned to "case manage" the student. Case management involves addressing the individualized problems of the student and making recommendations with regard to re-evaluation and changes in the IEP if necessary. CST members are also assigned special tasks from time to time by their supervisors and in addition provide input with respect to disciplinary hearings involving students whom they case manage. The typical weekly schedule for a CST member is testing one student per day for three days of the week; one day for case management duties and one day to meet with other CST members to

review CST reports and develop IEPs (called pre-staffing or team days). While there were some slight differences in their testimony, CST members who testified, such as Marvin Schuck (LDTC), Jay Albert (psychologist), Noreen Donnelly (LDTC) and Tom Mole (social worker) agreed that the testing, evaluation and writing of a report for a student can almost always be accomplished in one day and I so **FIND**[2]. As discussed below, Ms. Sidberry contends that many factors arose over which she had no control which prevented her from accomplishing the testing, evaluation and report writing in one day for some students.

The Willingboro CSTs are assigned to the district's Department of Pupil-Personnel Services. Willingboro Pupil Personnel Services Procedures for Professional Staff are promulgated in a written document which became effective in September 1995 (P-1). In pertinent part, the Procedures provide that:

> Reports are to be submitted within seven (7) days of the scheduled evaluation date. If the student and/or parent does not keep the appointment, it is the team member's responsibility to reschedule. Child Study Team member should follow-up with phone calls 15 - 30 minutes after the scheduled arrival time. If no answer, an appointment date should be rescheduled within two days of the missed appointment. After the 2nd missed appointment, creative measures should be used to encourage participation; e. g., telephone interviews, home visits, interviewing selected staff, written contacts by the social workers, etc. (P-1, page 2).

Pursuant to the above procedure, if a student is absent on their appointed test day, the evaluator must find time within their existing schedule to test the student; if the evaluator is absent another day in the evaluator's schedule is arranged. Again, while there was some slight differences in their testimony, Ms. Sidberry's supervisor, Margaret Wolford, and CST members other than Ms. Sidberry, agreed and I **FIND** that the seven days ran from the date a student was actually evaluated; that is, if the student missed a scheduled evaluation date, the time did not start running until the CST member was able to reschedule and actually complete the evaluation. Based on the testimony of Doris Salagi, former IEP Facilitator, Kurt Jarvis, social worker and Ms. Wolford, I further **FIND** that the time period ended when the CST member handed in his or her report to either the IEP Facilitator or the Team Leader and that the report could be submitted in handwritten form. Time spent thereafter in

[2] CST members called by the Board were Jay Albert, Marvin Schuck, Thomas Mole and Dorothy Landis. CST members called by Ms. Sidberry were Noreen Donnelly, Nancy Bullett and Kurt Jarvis.

typing up the report by the clerical staff did not count against the seven day time period. There was also some confusion among CST members as to whether the seven days referred to calendar days or work days. Based on the testimony of Ms. Wolford and that of Dorothy Landis, social worker, I **FIND** that the seven days refers to seven working days.

During the 1993/1994 school year, Ms. Sidberry was on the high school CST and was supervised until March 1994 by Penny Webb, then Acting Supervisor of Pupil Personnel Services (J-3, paragraph 6). In her staff evaluation of Ms. Sidberry dated March 10, 1994, Ms. Webb was generally complimentary of Ms. Sidberry's performance (P-2). However, Ms. Webb noted that "[a]s the testing gets completed, you are requested to submit your reports in a timely manner. Please adhere to these timelines" (P-2). In the Recommended Areas of Improvement section of the evaluation, Ms. Webb noted that Ms. Sidberry should "[d]evelop time management skills to in[s]ure timely completion of reports while meeting the time demands of case management and student discipline issues" (P-2).

Commencing on March 28, 1994, Margaret Wolford, Director of Pupil Personnel Services, became Ms. Sidberry's supervisor. Based on her demeanor and the consistency of her testimony, I found Ms. Wolford to be a credible witness. I also found her testimony credible and convincing because she gave credit to Ms. Sidberry when credit was called for; going so far as to correct the Board's attorney a few times when her questions erroneously suggested that Sidberry had failed to do something. Accordingly, I adopt Ms. Wolford's following testimony as **FINDINGS OF FACT.**

Shortly after becoming Ms. Sidberry's supervisor, Ms. Wolford discovered that Sidberry had several overdue reports. By memo dated April 25, 1994, Ms. Wolford notified Ms. Sidberry that only two of five expected psychological reports had been received by the IEP Facilitator and that four cases, T. M., J. C., R. A. and J. S., "continue[d] to be in noncompliance as a result of the missing psychological component" (P-5). Wolford directed Sidberry that "[p]riority in testing and/or writing the reports for these cases is necessary" (P-5). On May 17 and May 26, 1994, Ms. Wolford asked Ms. Sidberry to see her to discuss why Sidberry submitted only one report during the week of May 9 to May 13 when two should have been submitted to the IEP Facilitator and none during the week of May 16 to May 20 when three should have been submitted to the IEP Facilitator (P-6, P-7).

Similarly, on June 3 and June 14, 1994, Ms. Wolford asked Ms. Sidberry to see her to discuss why Sidberry submitted no reports during the week of May 23 to May 27 when three should have been submitted and no reports during the week of June 6 to June 10 when one should have been submitted (P-9, P-10). In her June 3, 1994, memo, Ms. Wolford thanked Ms. Sidberry for the three reports she submitted as a result of an writing day given her on May 31, 1994 (P-9). Ms. Sidberry was not the only staff member who received memos such as P-6 through P-10).

A June 24, 1994, memo to Ms. Wolford from Doris Salagi, IEP Facilitator, advised Ms. Wolford of the status of scheduled evaluations for five CST team members (P-11). Dorothy Landis, social worker on the high school CST, had one outstanding evaluation; Noreen Donnelly, LDTC on the high school CST, had no outstanding evaluations; Michael Giacchino, LDTC on the junior high school CST had two outstanding evaluations; Henry Rowlette, social worker on the junior high school CST, had four outstanding evaluations and Margaret Sidberry had fifteen outstanding evaluations (P-11). During the 1993/1994 school year Ms. Sidberry served on two CST teams, due to a vacancy in the district's school psychologist positions. At the request of Ms. Wolford, Ms. Sidberry agreed to serve on the high school CST and on the junior high CST. Some of Sidberry's outstanding evaluations listed in Ms. Salagi's memo were from the junior high school (P-11). Ms. Wolford agreed that being on two teams is a reason to "cut some slack" for a team member and she did this by sending some cases to outside agencies for evaluation and by giving Ms. Sidberry extra writing days.

By memo dated June 27, 1994, Ms. Wolford advised Ms. Sidberry to submit her outstanding reports to the IEP Facilitator by June 29, 1994 (P-12). By the time Ms. Wolford gave this memo to Ms. Sidberry, Sidberry had submitted three reports on June 29, 1994, leaving twelve outstanding reports as of that date (P-11, P-12, P-13). Not all these reports were overdue under the seven day rule because some of the students had not yet been tested but the ninety day federal requirement for completing the evaluations was running. On July 21, 1994, Ms. Sidberry had eight uncompleted reports and Ms. Wolford advised her that "[a] concrete plan to complete your cases is essential. Please submit such a plan by Tuesday, July 26, 1994" and offered Sidberry her assistance in developing this plan (P-13). Ms. Wolford placed a copy of her July 21, 1994, memo (P-13) to Ms. Sidberry in Sidberry's personnel file and viewed the memo as a disciplinary action. This was the

only such disciplinary memo that Ms. Wolford sent to any of the thirteen CST members on staff at the time.

Wolford and Sidberry met on July 28, 1994, at which time Sidberry still had five outstanding reports. Of these five, two students had been tested by Ms. Sidberry but reports had not been submitted as of July 28, 1994, and three students had not been tested as of that date (P-14). Ms. Sidberry did not submit a plan to complete her cases as requested by Ms. Wolford on July 21, 1994 (P-14). Prior to the start of the 1994-1995 school year, Ms. Sidberry completed two of the outstanding reports on the students she had tested. The three students who had not been tested were sent to an outside agency for evaluation.

CST members are not scheduled to start testing students until two weeks after school starts in September. After approximately three weeks of testing at the start of the 1994/1995 school year, Ms. Wolford wrote a memo on October 11, 1994, to Ms. Sidberry in which Wolford advised Sidberry that since testing started on September 14, 1994, Sidberry had only submitted one report and that four September reports were overdue (P-15). These four students had been tested between September 21 and September 28, 1994, and reports had not yet been submitted by October 11, 1994 (P-15). Ms. Sidberry's incomplete reports caused delays in processing for three of the four students (P-15). Wolford advised Sidberry that she was "concerned that you are falling into the same pattern demonstrated last year with reference to delays in report writing. Your cooperation is needed to expedite team processes" (P-15).

By memo dated October 31, 1994, IEP Facilitator Doris Salagi provided Ms. Wolford with an update of scheduled evaluations for the high school CST through October 28, 1994 (P-16). Dorothy Landis, social worker, had no overdue reports (P-16). Noreen Donnelly, LDTC, may have had one overdue report (P-16). Ms. Sidberry had five overdue reports (V. F., F. G., E. R., M. S. and A. H.) (P-16).[3] Two of the overdue reports (V. F. and F. G.) were also listed as overdue on Ms. Wolford's October 11, 1994, memo (P-15). Two of the students Ms. Sidberry was scheduled to evaluate were sent to an outside agency because Ms. Sidberry was absent on the days she was scheduled to test

[3] There are nine students listed for Ms. Sidberry on P-16. Five were tested between September 27 and October 17, 1994 (V. F., F. G. ,E. R., M. S. and A. H.). Based on the 1994/1995 school calendar (R-27), these reports had not been submitted to Ms. Salagi within seven working days of testing.

them (R. E. and T. R.) (P-16). Wolford and Sidberry met on November 4, 1994, and Wolford agreed to give Sidberry two writing days on November 7 and 8, 1994, to complete her reports and directed her to submit all reports for logging no later than the morning of November 9, 1994 (P-17). Ms. Wolford could not recall whether Ms. Sidberry completed all the reports by November 9, 1994, but it is undisputed that these students were not subsequently included in any listing of Sidberry's overdue reports.

By memo dated January 20, 1995, Ms. Wolford asked to meet with Ms. Sidberry to discuss overdue reports (P-18). Seven overdue reports were listed in the memo for students who had been tested by Ms. Sidberry between December 5, 1994 and January 10, 1995 (R. R., C. H., K. H., T. S., D. J., M. T., and K. S.) (P-18). Five of the cases were in a noncompliant status with federal requirements (R. R., C. H., K. H., D. J., and K. S.). Ms. Wolford acknowledged that it was not necessarily Ms. Sidberry's delay which caused the case to become noncompliant. In some cases students may have transferred into the school district in a noncompliant status. In other cases, factors other than the lateness of Ms. Sidberry's reports may have already made the case noncompliant. However, the fact that the cases were in a noncompliant status made timely submission of Ms. Sidberry's reports very important. As of January 20, 1995, Ms. Sidberry had submitted only one report since January 3, 1995 (P-18). On January 20, 1995, Wolford and Sidberry met and Ms. Sidberry told Ms. Wolford that she had a lot of interruptions when she was trying to write reports. Wolford advised Sidberry to leave her office and go to another location in the building where she could work (P-18). Sidberry declined to do so because she stated she needed the materials in her office in order to write her reports. No other CST member complained to Ms. Wolford that interruptions were preventing them from completing their reports.

Ms. Sidberry submitted the report for C. H. on January 26, 1995 (P-18). However, by January 31, 1995, she had not submitted the other six reports listed in Wolford's January 20, 1995 memo (P-19). Again, the testing dates for these six reports occurred between December 5, 1994 and January 10, 1995 (P-19). Four of the cases were in noncompliant status and the psychological report was the only assessment outstanding (P-19). Ms. Wolford directed Ms. Sidberry to devote two days during the coming week to completion of the four reports in the noncompliant cases and to submit those reports by February 3, 1995 (P-19). She further directed Ms. Sidberry that "[i]f you are having

difficulty completing your work, please see me to discuss time management techniques. More effort needs to be spent on meeting report writing deadlines" (P-19). By February 22, 1995, Ms. Sidberry had not completed the reports for K. S. (noncompliant case) and M. T., whom had been tested on January 10 and 9, 1995 respectively (P-20, P-18). Accordingly, Ms. Wolford directed Ms. Salagi to put K. S. and M. T. on for staffing during the team meeting on February 23, 1995 and advised Ms. Sidberry that if her reports were not written, she would have to use "protocol" since the completion of these reports could not be delayed (P-20). Using "protocol" in general means using the raw data developed in testing the student. It is very rare to ask a CST member to use raw data during a team meeting.

On February 28, 1995, Ms. Wolford met with Ms. Sidberry to discuss her Tenure Evaluation that Ms. Wolford had prepared (P-21). Ms. Sidberry asked for additional time to review the evaluation and Ms. Wolford gave her a copy (P-21). The following day the two met again to discuss the contents of Ms. Sidberry's Individual Profession Improvement Plan (IPIP) (P-21). They discussed, *inter alia,* "the need to establish an open line of communication that could facilitate [Sidberry's] completion of written reports" and that Ms. Wolford wanted that comment to be included in Sidberry's IPIP(P-21). An IPIP is developed between a supervisor and an employee. During the meeting Ms. Sidberry asked for additional time to complete the IPIP. On March 2 and 3, 1995, Ms. Wolford spoke with Ms. Sidberry about her evaluation and IPIP and Ms. Sidberry indicted that she had not decided whether to sign the documents (P-21). Wolford tried to speak again with Sidberry on March 6 but Sidberry was on the phone (P-21). She left a message for Sidberry to call her but did not receive a call (P-21). Accordingly, on March 7, 1995, Ms. Wolford gave Sidberry her evaluation and IPIP, as prepared by Wolford, and advised her that unless Wolford heard from her that day, the documents would be submitted to Personnel without her signature (P-21). Ms. Sidberry told Wolford that she was writing a rebuttal which would be ready on March 8, 1995 (P-21). On March 8, Sidberry told Wolford that the rebuttal was not completed (P-21). Accordingly, on March 8, Wolford submitted the evaluation and IPIP to Personnel without Sidberry's signature (P-21).

In the evaluation Ms. Wolford prepared on Ms. Sidberry, she noted her appreciation of Sidberry's serving on the junior high CST which "has helped this team complete studies contained in their case log" (P-3). Wolford also indicated that she had recently discussed with Sidberry

continuing to serve on the junior high team "in the absence of a full time psychologist" and that Sidberry "expressed [her] willingness to continue in this capacity" (P-3). Wolford evaluated Sidberry's written reports as containing all the components mandated by the Code and praised her writing as "demonstrat[ing] the same sensitivity and understanding of the student's difficulties as portrayed in [Sidberry's] routine interactions with them" (P-3). Ms. Wolford also praised other aspects of Ms. Sidberry's performance including her input during parent conferences, the close contact she maintained with special education teachers, students and case workers and the "important demands" placed on Sidberry by her serving as the case manager for most seniors in the high school (P-3). Ms. Wolford agreed that she had no problem with the quality of Ms. Sidberry's work. However, she included the following in Sidberry's evaluation:

> It is important that your reports be submitted in a timely fashion to insure compliance with state regulations. Your performance in this area is rated as unsatisfactory. Despite several conferences to remediate this area, the situation continues to persist. Additional writing days have been built into your schedule, time management skills have been discussed and support from the Behavior Management Assistant has been offered. You have not placed a priority on this aspect of your functioning; consequently, many cases have become noncompliant as a result. You must readjust your priorities to complete reports more quickly (P-3).

In Sidberry's IPIP, Wolford included as a recommended area of improvement Sidberry's establishing an open line of communication with her and suggested as a way of doing this that the two have "[c]onferences to discuss strategies for case completion" (P-3). The main time management tool that Wolford discussed with Sidberry was for Sidberry to block out a period of time to do reports and then not do anything but reports during that time.

By memo dated April 27, 1995, Ms. Wolford advised Ms. Sidberry of three overdue reports for students L. S., J. J. and R. F. (P-22). These students had been tested between April 4 and April 11, 1995 (P-22). Wolford asked Sidberry to meet with her to discuss the reports but if a meeting could not be arranged due to Sidberry's schedule, she asked Sidberry to complete the "Anticipated Report" column on the memo for each student and return the memo to Wolford by April 28, 1995 (P-22). Sidberry neither scheduled a meeting nor returned the memo to Wolford. After receiving no response from Sidberry by May 2, 1995, Wolford wrote another memo to Sidberry, telling her that '[t]he matter of your overdue reports must be addressed" and asking her to meet with Wolford at

2:30 p. m. that day (P-23). At that meeting, Ms. Sidberry told Ms. Wolford that, on average, she spent two hours evaluating (i.e. testing) a student; forty-five minutes scoring the tests, fifteen minutes conferring with a parent and thirty minutes observing the student (P-24). In a memo dated May 3, 1995, Ms. Wolford advised Ms. Sidberry that

> [d]uring an average day, this would leave approximately two and one-quarter hours for writing the report. Some of this time may be consumed locating students; however, it would appear that time is available during the day to write reports. It is important that reports be completed in order that cases can be brought to conclusion. Your cooperation with the department's efforts to maintain compliance with state mandates is essential (P-24).

Ms. Wolford explained that a psychologist does not have any more difficulty locating students than does a social worker or an LDTC. In her May 3rd memo, Ms. Wolford further advised Ms. Sidberry that her schedule for the week of May 3, 1995 and the following week had been rearranged to provide her with an extra case management day during each week which "should provide you with the time requested to complete some outstanding items needing your attention" (P-24).

By memo dated May 30, 1995, Ms. Wolford advised Ms. Sidberry that the absence of her reports in four cases (R. B., W. F., D. L., and R. T.) was holding up the staffing of the cases and that the cases needed to be staffed with her handwritten protocols (P-25). Two of the students had not yet been tested by Ms. Sidberry (R. B. and D. L.) and she submitted her report on R. T. by the time Sidberry and Wolford discussed the May 30, 1995 memo (P-25).

The last scheduled date for evaluations during the 1994/1995 school year was June 2, 1995 (P-26). No new students were assigned for evaluations between June 5 and 20, 1995, and that time period was designated for team members to complete any outstanding items prior to the end of school (P-26). By memo dated June 19, 1995, Ms. Wolford advised Ms. Sidberry that she had six reports outstanding (D. L., I. B., R. B., W. Y. J. T. S. A., and R. B.) (P-26). Two of the outstanding reports, D. L. and R. B., had also been listed on Wolford's May 30, 1995 memo (compare P-25 and P-26). The students listed on P-26 had been scheduled for testing between May 10 and June 2, 1995 (P-26). One report, D. L., was submitted by the time Wolford gave the memo to Sidberry (P-26). Ms. Wolford directed Ms. Sidberry to complete the remaining five reports by the end of the work day

on June 20, 1995 and advised her that her "cooperation in completing your normal workload cannot be overemphasized" (P-26). The list did not include one case that had originally been assigned to Sidberry and then reassigned to a colleague for completion (P-26).

As noted above, Ms. Sidberry was a twelve-month employee and thus she was scheduled to do evaluations during the summer of 1995. On July 19, 1995, Wolford and Sidberry met to discuss overdue reports (P-28). At that time, Ms. Sidberry had evaluated seven students between May 12 and June 29, 1995, for which she had not yet submitted reports (R. B., R. B., W. Y., J. T., S. A., K. E., and A. T.) (R-28). Five of these seven reports had also been listed on Wolford's May 20, 1995 memo (R. B., R. B., W. Y., J. T. and S. A.) (compare P-26 and P-28). Ms. Sidberry had also evaluated three students between July 11 and July 17, 1995 (B. S., B. C. and A.B.) (P-28). As Ms. Sidberry was scheduled to go on vacation starting July 26, Ms. Wolford directed her at a minimum to submit the reports on W. Y., K. E., B. S. and B. C. before that date since her reports were needed in order to reevaluate these students (P-28). Ms. Sidberry submitted one report on July 19 (R.B.); one report on July 21 (W. Y.) and one report on July 25 (K. E.). She also evaluated another student, A. H., on July 25, 1995 and submitted her report on that student that same day (P-28). On July 21, 1995, Ms. Wolford discovered another overdue report for C. F. who was scheduled for testing on May 24, 1995 (P-29). The psychological report was the only missing report for C. F. and Wolford directed Sidberry to also complete C. F.'s report before she went on vacation (P-29). Sidberry did not submit the C. F. report until August 22, 1995 (P-29).

By memo dated August 21, 1995, Ms. Wolford advised Ms. Sidberry that several cases were noncompliant and their psychological reports had not yet been submitted (S. A., B. C., C. F., H. H., M. R. and A. T.) (P-30). Two of these cases (S. A. and B. C.) had also been listed on Wolford's July 20 memo (compare P-28 and P-30). Ms. Wolford advised Ms. Sidberry that the cases would be scheduled for staffing using her protocols and that she should submit her reports ASAP (P-30). Wolford further advised Sidberry that she had not received any reports from Sidberry during the preceding week, although Sidberry had told her on Thursday that two reports were almost finished (P-30). Sidberry was directed to give those two reports to Wolford when she arrived for work (P-30). On August 22, 1995, Ms. Sidberry submitted the report on C. F. (P-30). Wolford acknowledged that there may have been other staff members who had overdue reports at the time but

that when she spoke with them they either had an explanation, such as the student was on vacation, or they submitted the report. While some of Sidberry's late reports had similar explanations, she was also late on reports where testing had already been done and she did not give the reports to Wolford when they met to discuss them as other staff members had done.

By August 25, 1995, Ms. Sidberry had not submitted reports on seven students who had been listed on previous overdue report memos to her (R. B., S. A. A. T., B. S., B. C., M. R. and H. H.) (P-31). In addition, Ms. Sidberry evaluated two other students on July 19 and August 17, 1995 (K. G. and A. H.) and had not submitted reports on them by August 25, 1995 (P-31). Ms. Wolford wrote a memo to Ms. Sidberry on August 25, which she copied to Sidberry's Personnel file, in which she advised Sidberry that "[c]ases are non-compliant due to your failure to submit reports in a timely manner. Other cases are delayed due to the excessive time required by you to complete reports" (P-31). Ms. Wolford concluded that:

> Your delay in submitting reports within 7 days of the evaluation date can no longer be tolerated. Reports for all cases listed in this memo are due no later than 3:30 p.m. on September 1, 1995. If you fail to complete and submit these reports, I will have no alternative but to recommend that disciplinary action be taken against you which could result in the withholding of your increment or a more severe consequence (P-31).

Ms. Sidberry did not submit five of the reports listed in Wolford's August 25 memo until September 18 and 21, 1995 (R. B., B. S., B. C., M. R. and H. H.) (P-31). During the 1995/1996 school year, the district had five staff psychologists and Ms. Sidberry no longer served on two CST teams. On September 11, 1995, Ms. Wolford wrote to Assistant Superintendent Joan McAndrew and advised her that Sidberry was given a September 1 deadline for submitting nine overdue reports and that by that date she had submitted only two reports (S. A. and A. T.) (P-32, P-31). Wolford further advised McAndrew that she had "had [Sidberry] prestaff cases with her protocols and even attend a parent conference to discuss her evaluation since the report was not completed" (P-32). Ms. Wolford asked McAndrew for guidance in handling the situation and on what action should be taken (P-32). As to the parent conference referred to in her memo, Ms. Wolford explained that the conference was not actually held because the parent did not appear.

Following her memo to Assistant Superintendent McAndrew, Wolford and McAndrew met. McAndrew directed Wolford to write to the Superintendent, Dr. Geraldyn Foster. On September 20, 1995, Ms. Wolford sent a memo to Dr. Foster regarding the failure of Ms. Sidberry to perform her duties as a school psychologist (P-33). Wolford advised Foster of the September 1, 1995, deadline she had given Sidberry to submit overdue reports and reported that as of September 20, the directive had not been fully met (P-33). She further advised Foster that despite "numerous memos, conferences and attempts to assist" Sidberry, her reports "continue to be submitted weeks after the student has been evaluated" (P-33). According to Wolford, Sidberry's overdue reports caused students to be denied their right to a free and appropriate education because the excessive time required to complete her reports "delays the placement of the students in an appropriate educational program" (P-33). Additionally, Wolford reported to Foster that "[c]ases have exceeded the ninety day time limit, thus placing the district in noncompliance;" that Sidberry "has been required to staff cases with her protocols when the report has not been written" and "to attend parent conferences to discuss her results since her written report was not available for the classification team" and that psychological evaluations were contracted out to an independent agency to expedite cases (P-33). Ms. Wolford acknowledged in her testimony that there was only one parent conference where Sidberry was directed to attend and that the conference was not actually held because the parent did not appear. Wolford concluded by asking Dr. Foster for direction "as to what actions can be taken to correct this untenable situation" (P-33).

On September 21, 1995, Ms. Sidberry finally responded in writing to Ms. Wolford's August 25, 1995 memo (P-34). Sidberry denied that she willfully neglected or was unwilling to complete her work and addressed the "obstacles" which impeded her performance which she indicated she had previously discussed with Wolford (P-34). These obstacles included: difficulty locating students; difficulty locating an adequate testing location; extended time needed to complete evaluations for some students with particular difficulties for which the one day to write and test theory did not allow sufficient time to complete an assessment that satisfied code requirements or professional standards; the scheduling policy which required staff to find the time to reschedule a missed appointment, which Sidberry described as "unreasonable" and additional unscheduled activities such as parent conferences, meeting with outside agencies and "other collaborative matters which occur on a scheduled test day" (P-34). Sidberry concluded that Wolford's demand that she complete

outstanding reports by September 1, 1995 was unreasonable since Wolford "was well aware that [Sidberry was] scheduled to test another student or participate in parent conferences" on all five working days between August 25 and September 1, 1995 (P-34). Regarding the "obstacles" described by Sidberry, Wolford testified that all staff members worked under the same conditions and were held to the same standards as Sidberry and I credit her testimony in this regard.

On September 22, 1995, Assistant Superintendent McAndrew had a letter from her hand delivered to Ms. Sidberry (P-35). In her letter, McAndrew advised Sidberry that

> A serious situation regarding your level of performance has come to the attention of the Superintendent, Dr. Foster, and to me, the Assistant Superintendent. This matter is cause for grave concern. Therefore, I am directing you to report to my office for a discussion on this matter on Wednesday, September 27th at 2:00 p. m.
>
> Since this conference may have a negative impact on your employment, I recommend that you have representation, if that is your choice. Ms. Wolford, your supervisor will also be in attendance (P-35).

On September 26, 1995, Ms. Sidberry responded in writing to Ms. Wolford's September 20, 1995 memo to Dr. Foster (P-36, P-33). Ms. Sidberry advised Dr. Foster that Wolford's comments did not reflect a full and accurate status of her job performance and that she had "attempted to complete all of [her] professional responsibilities within a structure that allows for no flexibility and makes unreasonable demands" (P-36). Sidberry further advised Dr. Foster that some reports "have been delayed due to factors which have been discussed with Ms. Wolford" and that "[t]hese conditions continue to exist and are outside of my control" (P-36). Ms. Sidberry noted that during the greater part of 1994-1995, there were only three school psychologists rather than the five needed to fully staff the five CSTs and that, therefore, an "outside agency was used to complete cases that the available staff could not complete" (P-36). She concluded that as of September 26, 1995, she had not completed only one of the evaluations listed on Ms. Wolford's memos and that was "due to the unavailability of the student" (P-36).

The meeting between Assistant Superintendent McAndrew, Wolford and Sidberry was held on September 27, 1995. Noreen Donnelly, an LDTC who had worked with Sidberry and was a union representative, also attended the meeting. Discussed during the meeting was a list of six of

Sidberry's cases requiring reports as of September 27, 1995 (A. H., J. L., G. W., D. S., S. R. and R. C.) (P-37). Four of the students were listed as having been evaluated between August 17 and September 12, 1995 (A. H., J. L, G. W. and D. S.) (P-37) and therefore their reports were overdue. Two of the students were listed as having been evaluated on September 26 and 27, 1995, (S. R. and R. C.) (P-37) and therefore their reports were not overdue. Ms. Wolford assumed the students had been tested on the scheduled dates because she had not been told differently.

During the meeting Ms. Sidberry stated that the report for A. H. had been submitted and must have been lost. She explained that J. L. withdrew from school and her name should be removed from the list. As for G. W., another student had been substituted for him on August 29, 1995, and Sidberry had submitted that report prior to September 27, 1995. Sidberry reported that she had completed the reports for D. S. and S. R. and was proofreading them. R. C. had not been tested on September 27 which Sidberry blamed on his poor attendance. Wolford subsequently confirmed that G. W. should be removed from the list because another student had been substituted for him and a report submitted on the substituted student; that J. L. did withdraw from the district on September 13, 1995, and that R. C. had not been evaluated due to his absences from school (P-38, P-41). Accordingly, only three reports were needed from Ms. Sidberry as of September 2, 1995; two of which were overdue (A. H. and D. S.) and one of which was not overdue as of that date (S. R.). Ms. Sidberry reported to Ms. McAndrew on October 5, 1995, that the only incomplete report was for R. C. due to his absences (P-39). However, as of October 17, 1996, reports for A. H., D. S. and S. R. had not yet been submitted, although Ms. Sidberry indicated to Wolford they had been written and typed but required proofreading (P-41).

During the September 27, 1995, meeting, McAndrew and Wolford presented Sidberry with a Professional Improvement Plan (PIP), effective September 28, 1995 and with a review date of November 22, 1995 (P-40, P-41). The expectation set forth in the plan was "[s]atisfactory level of performance in completing student evaluations and submitting written reports within seven (7) calendar days of the testing" (P-41). The plan for improvement was as follows:

1. An average of three evaluations per week will be scheduled.
2. Pupil observation should occur between 8:30 - 9:00 a. m.
3. Students will be evaluated in the 2nd floor office at Willingboro High School.

4. Testing should commence no later than 9:00 a.m. each day (approximate testing time two (2) hours).
5. The remainder of the day should be devoted to scoring and writing the report.
6. A calendar of time management shall be maintained on each testing day.
7. Continual communication shall be maintained with the Director of Pupil Personnel Services regarding difficulties encountered in completing evaluations/reports within the prescribed timelines.
8. A conference will be scheduled at 8:15 a. m. on case management days to remedy situations causing delays in the completion of scheduled deadlines.
9. All currently overdue reports are to be in the office of the Director of Pupil Personnel Services no later than 9:00 a. m. October 10, 1995 (P-42).

As noted above, Ms. Sidberry did not submit the reports for A. H., D. S. and S. R. by October 10, 1995, as required by the PIP. The PIP also set forth assistance which the administration would provide Ms. Sidberry (P-41). The assistance to be offered included: (1) provision of student schedules by the Director of Guidance at the beginning of each week; (2) a software program for WISC-R test would be purchased to assist Sidberry in analyzing test results; (3) attendance at a Time Management Workshop on September 28, 1995 was recommended or at another similar workshop to be held in the future (P-41). The PIP further stated that in the past Ms. Sidberry had been offered the assistance of the Behavior Management Aide to bring students to her testing site but that Ms. Sidberry had rejected this assistance (P-42). During the September 27, 1995, meeting the attendees went over the PIP item by item. They agreed that attendance at the Time Management Workshop on September 28 did not give Ms. Sidberry adequate notice and that it was too late for her to attend that Workshop but that Ms. Wolford would look for another workshop for her to attend. Ms. Sidberry objected to the PIP, stating that she had had no input on its development.

On October 23, 1995, Ms. Sidberry notified Ms. Wolford that the second floor office at the high school she was supposed to use for testing remained cluttered with items and it continued to be used as a work area by other staff members (P-43, R-29A, R-30B). Wolford relayed this information to McAndrew who wrote to the principal of the high school to "re-emphasize the urgency of cleaning out the office that has been assigned to Ms. Sidberry" and "[t]his office must be designated for the exclusive use of Ms. Sidberry" (P-44).

On October 25, 1995, the Willingboro Education Association (Association) filed a grievance with Ms. Wolford on behalf of Ms. Sidberry, alleging that Wolford had victimized Sidberry on

numerous occasions by totally unnecessary job pressure and stress and had presented a one-sided, misleading, grossly inaccurate and damaging PIP for Sidberry (P-46). The grievance further complained that Sidberry had no input in the PIP and that the plan was unreasonable, unworkable and unrealistic (P-46). By memo dated November 8, 1995, Wolford denied the grievance, concluding that the actions taken by the administration did not violate either the collective bargaining agreement or *N. J. A.C.* 6:3-4.3(c), as alleged by the Association (P-48). By letter dated November 17, 1995, the Association filed the grievance with Dr. Foster for consideration at the Superintendent level (P-49). There is no written record of Dr. Foster's decision on the grievance. Ms. Wolford testified that at some point she was told the grievance would not be pursued and it never was taken to arbitration.

On November 3, 1995, Wolford provided McAndrew with an update on Sidberry, reporting that as of that date, Ms. Sidberry was "up-to-date and current with her reports" (P-47). Ms. Wolford also reported she had been unsuccessful in locating a time management workshop for Sidberry; that Sidberry felt the software program offered by the administration had no value because it did not take into account the unique strengths and weaknesses of students and that the office assigned to Sidberry was still piled with boxes and had not been cleared as requested by McAndrew (P-47). While Ms. Sidberry was current with her reports as of November 3, 1995, by November 21, 1995, Wolford reported that Sidberry had seven outstanding reports for students she had evaluated between October 16 and November 11, 1995 (S. H., H. G., M. J., S. J., M. W., T. M. and E. G.) (P-50). Ms. Sidberry submitted the report for S. H. on November 22, 1995 and stated that she was writing the report on H. G. and expected to submit it shortly (P-50).

On November 22, 1995, Assistant Superintendent McAndrew had a letter from her hand delivered to Ms. Sidberry (P-51). The letter advised Sidberry that a meeting would be held on November 30, 1995, to discuss with her the review of her performance called for in the September 28, 1995 PIP (P-51). Prior to the meeting, Ms. Wolford advised Ms. Sidberry on November 27, 1995, that according to the CST log, Sidberry had nine overdue reports for students tested between October 17 and November 20 (H. G., M. J., S. J., M. W., T. M., E. G., M. H., C. J., L. M.) (P-52). Six of these reports had also been listed as overdue on Ms. Wolford's November 21 memo (H. G., M. J., S. J., M. W., T. M. and E. G.) (compare P-50 and P-52). Ms. Sidberry submitted the report for

H. G. on November 28 (P-52). One of the students, L. M., was listed as tested on November 20 and therefore her report was not actually due until November 28, 1995 (P-52, R-36). At this point, Ms. Wolford was having Sidberry submit her hand-written reports to her and Wolford then forwarded them to typing. Wolford had never done this before with a CST member.

By another memo also dated November 27, Ms. Wolford asked Ms. Sidberry to keep a record of her time schedule for the three testing days during the week of November 27, starting at 8:15 a. m. and concluding at 3:30 p. m., and to provide this information to Wolford by the end of the work day on November 29, 1995 (P-54). Ms. Wolford asked Ms. Sidberry to keep this record because Wolford was having difficulty understanding why Sidberry was not getting her reports in on time. Sidberry did attempt to record her time but the information she provided to Wolford was sketchy. It appeared to Wolford that Sidberry as doing case management activities on testing days. Wolford acknowledged that other team members may have done the same but that they were able to get their reports submitted on time. When Wolford discussed this issue with Ms. Sidberry, Sidberry replied that "if a parent calls, you have to talk with them."

On November 27, 1995, Ms. Wolford advised all the high school CST members that she had arranged with the Director of Guidance to provide the team members with the schedules of students to be tested during the week on Monday morning (P-53). To accomplish this, the team members had to provide their weekly testing schedule to Wolford's office by the end of the workday on Thursday. Wolford's office would then fax the schedule to the Guidance Director on Friday so that his office could compile the schedules (P-53). Ms. Wolford asked the team members to advise her immediately if the new procedure did not prove effective (P-53).

The meeting to discuss the September 28, 1995, PIP was held on November 30, 1995 (P-45). Present were McAndrew, Wolford, Sidberry and Noreen Donnelly. Wolford and McAndrew provided Sidberry with a written critique of her performance (P-45). Regarding the nine items contained in the plan for improvement, the critique for items 2, 4, 5, and 7 was that "[t]his item was a time management suggestion" (P-45). As to item 1, the critique indicated that "evaluations have been scheduled as required" (P-45). Regarding item 3, the critique recognized that the office for testing had not been provided to Ms. Sidberry "as expeditious[ly] . . . as first anticipated" and that

the situation had recently been rectified (P-45). As to item 7, the critique indicated that the "level of communication between you and [Wolford] still has not reached a satisfactory level" and that there "has been minimal communication regarding difficulties that you may have had in completing reports according to the timelines" (P-45). Regarding item 8, the critique stated that "Ms. Wolford will be in communication with you regarding conferences to be held at 8:15 a. m. on case management days" (P-45). Finally, as to item 9, the critique indicated that "[t]his deadline was not kept. Reports were not completed until November 3, 1995 and this is not satisfactory" (P-45).

Regarding the three items contained in the PIP as assistance to be offered Sidberry, the critique recognized that student schedules had not been provided during the review period and would not start being provided until November 27, 1995 (P-45). The critique further indicated that administration had offered to purchase software but that Ms. Sidberry felt it would not be beneficial in resolving her difficulties (P-45). Finally, the critique recognized that the administration did not located a Time Management Program for Sidberry to attend and instead ordered an audio program titled "How to Manage Multi Projects, Meet Deadlines and Achieve Objectives" which it was substituting as assistance in lieu of a workshop (P-45). An addendum to the PIP states that Ms. Sidberry was directed to listen to the audio tapes; that a tape recorder would be provided to her and that she could listen to the tapes during her work day (P-45). The critique concluded that "[a]s a result of the delay in providing the administrative assistance as previously outlined, [administration] will extend the sixty (60) day period of improvement to January 25, 1996 (P-45).

On December 7, 1995, Wolford and Sidberry met (P-55). As of that date, Wolford's records indicated that Sidberry had eight overdue reports for students who had been tested between October 31 and November 27, 1995 (S. J., M. W., T. M., M. H., K. J., L. M., M. H. and T. O) (P-55). Six of these students had also been listed on Wolford's November 27 memo (S. J., M. W., T. M., M. H., K. J., and L. M.) (compare P-52 with P-55). For five of the students, Sidberry's report was the only report missing and needed to complete the assessment of the student (M. W., T. M., K. J., L. M. and T. O.) (P-55). Two of these reports had been finished but Sidberry did not want to turn them in until she developed a "Log Form," which she did and turned the reports in by the end of December 7, 1995 (P-55).

During the December 7 meeting, Sidberry and Wolford also discussed the "time management" calendars Sidberry kept pursuant to Wolford's November 27 memo (P-55). Ms. Wolford emphasized the need for Sidberry "to stay focused on testing, scoring and writing reports on days designated for testing" and that "to minimize disruptions," Wolford asked "Mrs. Singleton [the Supervisor of Personnel Services] not to interrupt [Sidberry] on testing days for conferences unless it was absolutely necessary" (P-55). Wolford also agreed not to meet with Sidberry at 8:15 a. m. on case management days because Sidberry told her she needed that time to meet with teachers (P-55). Instead their meetings would be scheduled later in the afternoon. Wolford asked Sidberry to continue keeping a record of her time on testing days (P-55).

December meetings subsequent to December 7, 1995, between Sidberry and Wolford were canceled or not scheduled due to snow days and the holidays (P-56, P-57). A meeting was scheduled for January 4, 1996, but Wolford had to cancel that meeting due to an unexpected event and the meeting was rescheduled for January 11, 1996 (P-58). As of January 3, 1996, Wolford's records indicated that Sidberry had nine overdue reports for students tested between October 31 and December 13, 1995 (S. J., M. W., T. M., M. H., K. J., M. H., T. O., R. H. and A. S.) (P-57). Seven of these students had been listed on either the November 27 or December 11, 1995 memos as overdue cases (S. J., M. W. T. M., M. H., K. J., M. H. and T. O.) (compare P-57 with P-52 and P-55).

Although the reason is unclear from the record, the meeting scheduled for January 11, 1996 between Wolford and Sidberry was also canceled and rescheduled for January 18, 1996 at 2 p.m. (P-59). Wolford asked Sidberry to bring her time management calendars for testing days and any reports she was in the process of writing to the meeting (P-59). After meeting with Ms. Sidberry on January 18, Wolford provided a written analysis of the matters discussed at the meeting to Sidberry (P-60). Wolford indicated that Sidberry continued to stress the difficulties she had in locating students but noted that Sidberry rejected the offer of an aide to locate the students and then mentioned that it was not a problem all the time (P-60). Wolford concluded that "the difficulty in finding a student is an exceptional, rather than a routine occurrence" (P-60). During her testimony, Ms. Wolford noted that the offer of an aide to locate students was not made to Ms. Donnelly who also had to test students at the high school because Donnelly was able to locate the students. As of

the January 18, 1996, meeting, Sidberry had eight overdue reports for students who were tested between October 31, 1995 and December 13, 1995 (P-60). All had been previously listed as overdue on prior memos to Ms. Sidberry (P-60, P-57, P-52).

Sidberry and Wolford met again on January 25, 1996 to review the three testing days for the week of January 22, 1996 (P-61). Ms. Wolford noted that one scheduled student left the district and another was absent which should have given Ms. Sidberry two days of writing time (P-61). She also noted that Sidberry did waste time trying to locate the students on those two days and yet Sidberry continued to deny the value of using the offered aide to locate students for her (P-61). Ms. Wolford stated that she had instituted a new procedure for teachers to notify the team when students move from or withdraw from the district to eliminate one of the difficulties Sidberry faced that week (P-61). Sidberry submitted two reports and an update that week leaving six overdue reports for students who had been tested between November 6, 1995 and December 13, 1995 (P-61). All six had previously been listed as overdue in prior memos (P-61, P-57, P-52). Wolford directed Sidberry to "concentrate your activities on testing and writing reports on scheduled testing days" and if "I can assist you in any way, do not hesitate to contact me" (P-61).

On February 6, 1996, Ms. McAndrew wrote Ms. Sidberry that she and Ms. Wolford had been "engaged in a comprehensive review of [Sidberry's] performance" pursuant to the PIP whose review period had been extended until January 25, 1996, and that they "anticipate meeting with [Sidberry] in the near future to discuss our findings" (P-62). A meeting was held on February 15, 1996, at which were present Ms. Wolford and Ms. Sidberry and Jim McAndrew, President of the Association; Bunny Hewko, the Association's grievance officer; Norine Donnelly, LDTC and Association representative and Alma Singleton, Supervisor of Pupil Personnel Services (P-63). Ms. Sidberry had previously submitted her goals as part of that year's evaluation process. Ms. Wolford expressed concern with the first goal - to continue to provide professional and ethical assessment of students - because there was no mention of completing the assessment within a reasonable time (P-63).

A review of outstanding reports was also conducted at the February 15 meeting and it was verified that as of February 15, 1996, Ms. Sidberry had ten outstanding reports for students who had been tested between November 15, 1995 and February 7, 1996 (P-63). Four of these reports had

previously been listed as overdue while six reports appeared as overdue for the first time (P-63, P-61, P-57, P-52). Ms. Wolford agreed to give Ms. Sidberry an additional writing day during the week of February 25, 1996, to assist her in completing the reports (P-63). The expectations for an average work day were also discussed at the meeting and Ms. Wolford reported that it was agreed that on an average day, the expectation of completing a report within seven days of testing was realistic (P-63). On an "erratic" day, a term used by Ms. Hewko, it was agreed that the due date for a report would be extended for three days and that Ms. Sidberry would notify Wolford on any day that was considered to be "erratic" (P-63). By memo dated February 20, 1996, Ms. Wolford advised Ms. Sidberry that she had four overdue reports in cases that were noncompliant and that her report was the only one not completed in these four cases (P-64). All four cases had been previously listed in prior overdue report memos. In her February 20th memo, Wolford also noted that she had not received any reports from Sidberry during the prior week, despite the fact that there were three days in her schedule which should have given her time to write (P-64).

On February 23, 1996, Ms. Wolford completed Ms. Sidberry's Annual Performance Report and Evaluation for 1995/1996 (P-4). In the Ratings Section, Ms. Sidberry received a rating of 3 (at expected level) in nine of sixteen categories (P-4). She received a rating of 4 (superior) in one category (knowledgeable about appropriate outside referral services/sources) (P-4). However, Wolford gave Sidberry a rating of 2 (efforts need to be expanded) in four categories (administers individual tests and/or conducts effective interviews and interprets results for students, staff and parents; maintains a professional attitude in all professional relationships concerning district affairs, district regulations, district administration, as well as students and parents of the school community; schedules and conducts conferences and consults with students, guidance, teachers, administrators, nurses, parents and other appropriate personnel in a timely manner and maintains continual communication with the Supervisor of Pupil Personnel Services and the Director of Pupil Personnel Services) (P-4). Two of these four ratings were based on comments having to do with Ms. Sidberry's failure to submit her reports in a timely manner (P-4, #2 and #9). One of the four ratings indicated that communications were improving with Ms. Wolford as a result of their regularly scheduled meetings (P-4, #14). The last rating in the "2" category had nothing to do with the timely submission of reports but rather on a comment indicating that Sidberry provided students and parents with "incorrect information regarding attendance requirements in June 1995 [which] caused the

administration to become involved in due process proceedings on graduation day" (P-4, #6). [4] Finally, Ms. Sidberry received a rating of 1 (unsatisfactory) in one category (completes evaluations and reports as outlined in the Pupil Personnel Procedures and Federal/State Statutes, local policy and code (P-4, #3).[5]

In the Summary Comment portion of the evaluation, Ms. Wolford praised *inter alia* Ms. Sidberry's communication with students, parents and staff; her knowledge of the curriculum and graduation requirements and her development of realistic goals and objectives for students (P-4). However, Ms. Wolford stated that, despite her efforts to assist Sidberry, her

> [f]ailure to submit reports in a timely manner has resulted in the delayed implementation of programs. Students have been denied access to appropriate educational programs and you have contributed to placing the district in jeopardy of noncompliant status. Efforts need to be concentrated on the completion of reports as prescribed in the Pupil Personnel Services Procedures. This lack of attention to your professional duties has led me to recommend that disciplinary action be taken against you which may result in the removal of your tenure rights (P-4).

While Ms. Sidberry signed the Summary Comment page, the PIP included as part of the evaluation and the Annual Performance Report, she indicated that she did not agree with any of these documents because they inaccurately reflected her performance and were misleading; they constituted unreasonable demands on her which violated the contractual terms of the work day; they did not reflect factors beyond her control which caused the delay of some reports and she had no input in the development of the PIP (P-4).

By memo dated February 26, 1996, Ms. Wolford advised Ms. Sidberry that her number of outstanding reports had increased to thirteen for students tested between November 15, 1995 and February 14, 1996 (P-66). Ten of these reports had previously been listed as overdue on prior memos and five of the cases were in noncompliant status (P-66). Ms. Wolford further advised Ms. Sidberry that she had not submitted her time management calendars for her testing days since February 7, 1996, and asked Sidberry to submit them to Wolford as soon as possible (P-66). As

[4] This incident will be discussed in more detail *infra*.

[5] This evaluation form was apparently new for the 1995/1996 year and other staff members objected to signing the form since it was the subject of a grievance filed by the Association.

February 26, 1996, had been provided as a writing day for Ms. Sidberry pursuant to the February 15th meeting, Wolford advised Sidberry that she would like to meet with her at 3:00 p. m. that day to review Sidberry's 1995-1996 evaluation (P-66). On March 1, 1996, Ms. Wolford updated Ms. McAndrew on the status of Ms. Sidberry's outstanding reports (P-67). At the end of the day on February 26, 1996, Sidberry submitted four reports (P-67). As of March 1, 1996, she had ten overdue reports for students who had been tested between November 27, 1995 and February 14, 1996 (P-67).

On or about March 1, 1996, a meeting was held with Assistant Superintendent McAndrew, Wolford, Sidberry and Donnelly present. McAndrew gave Sidberry a ninety-day PIP to be implemented on March 1, 1996 and to conclude on May 29, 1996 (P-68, P-95). Sidberry refused to sign an acknowledgment of receipt of the PIP upon the advice of her Association representative (P-68). The March 1, 1996, PIP was very similar to the previous PIP with some clarifications such as Sidberry should submit her weekly Time Management Calendar to Wolford by the end of each week; she should initiate contact with Wolford when she experienced difficulties; conferences would be scheduled between Wolford and Sidberry on a bi-monthly basis during the afternoon hours and McAndrew would review status reports on all scheduled cases (P-95). In addition, the PIP contained a form captioned "Time Management Calendar," developed by Ms. McAndrew, for Ms. Sidberry to complete every week (P-95). The assistance to be offered by the administration during the ninety-day period between March 1 and May 29, 1996, was also slightly altered in that Wolford or McAndrew were to share with Sidberry a critique of her Time Management Calendars; Wolford would schedule bi-monthly meetings with Sidberry to assist her in meeting her responsibilities and Wolford would attempt to locate a Time Management Workshop for Sidberry to attend (P-95).

At the meeting, McAndrew also gave Sidberry a letter dated March 1, 1996, from the secretary to the Board serving Ms. Sidberry with certified tenure charges alleging inefficiency, pattern of conduct and unbecoming conduct, which charges were filed with the Board by the administration on February 28, 1996, along with a statement of evidence supporting the tenure charges (P-69). Ms. Wolford recommended to McAndrew that tenure charges be filed and McAndrew agreed. Ms. Wolford had never recommended tenure charges against any other CST member.

On March 18, 1996, Ms. Wolford approved the attendance of Ms. Sidberry, Norine Donnelly and Dorothy Landis at a Time Management Workshop to be held on May 8, 1996 (P-70). Sidberry, Donnelly and Landis comprised the high school CST at the time. Even though neither Donnelly nor Landis had time management problems, Wolford approved all three attending the Workshop since all they all made the request to attend. The three CST members attended the workshop on May 8, 1996.

In a memo dated March 19, 1996, Wolford acknowledged the receipt of four reports from Sidberry on March 14, 1996, and indicated that six reports were then overdue for students scheduled to be tested between November 27, 1995 and February 14, 1996 (P-71). By April 2, 1996, Ms. Sidberry had at least five overdue reports for students scheduled to be tested between February 2 and March 18, 1996 (P-72). It was unclear whether one student, A. H., had been tested yet (P-72). On April 2, Ms. Wolford also advised Ms. Sidberry that she had not submitted her Time Management Calendar for the week of March 25 by the end of the week as required by her PIP and that Ms. Wolford hoped that Ms. Sidberry had had sufficient time to review her Annual Performance Report with Ms. Hewko so that it could be submitted to the Personnel Office by the due date of April 4, 1996 (P-72). By memo dated April 4, 1996, Wolford advised Sidberry that she had not received her Time Management Calendars for the weeks of March 25 and April 1, 1996 and that reports for this two-week period were also due (P-73). Wolford acknowledged the receipt of three reports during the week of March 18, 1996, but noted that Sidberry had an additional day built into her schedule for report writing that week (P-73). Finally, Ms. Wolford noted that Ms. Sidberry had not yet responded to her Annual Performance Report and that, as previously indicated, if she did not hear from Sidberry by the end of the day on April 4, her APR would be submitted to Personnel without her signature (P-73).

In memos dated April 25, May 25 and May 28, 1996, Ms. Wolford advised Ms. Sidberry of her overdue Time Management Calendars for several weeks and overdue psychological reports (P-74 through P-76). Although some reports were submitted by Sidberry during this period, as of May 28, 1996, she had eight overdue reports for students scheduled to be tested between February 7 and May 15, 1996 (P-76). Ms. Wolford granted Ms. Sidberry an additional writing day on May 28, 1996 and agreed to a an interim procedure whereby, for the next three weeks, Ms. Sidberry would report

directly to the high school on testing days rather than having to sign in first at the administration building where the CST offices were located (P-76). No other team member asked for or received permission for this change in the sign in policy. On June 13, 1996, Wolford wrote to Sidberry regarding her failure to submit Time Management Calendars since May 28, 1996 (P-77). While on June 20, 1996, Ms. Sidberry had four overdue reports for students tested between February 13 and June 11, 1996 (P-78), by June 27, 1996 all of Sidberry's reports for the 1995-1996 school year had been completed (P-79).

Meanwhile, counsel for the Board and Ms. Sidberry had conducted settlement negotiations regarding the tenure charges which the Board had received on or about March 1, 1996 (P-80). By letter dated July 17, 1996, counsel for the Board wrote to Sidberry's counsel, indicating that the Board had agreed to defer review of the tenure charges upon the following conditions: (1) Sidberry accepted the withholding of her salary increment for the 1996-97 school year; to be reviewed at the end of the 1997-98 school year to determine if her performance warranted restoration of the increment; (2) Sidberry agreed to accept supplementation of the March 1, 1996, tenure charges to reflect documents relating to the matter from March 1 to September 1, 1996; (3) a ninety day period for review of Sidberry's performance from September 1 to November 30, 1996, after which the administration reserved the right to bring tenure charges before the Board if Sidberry's performance was less than satisfactory; (4) a revised PIP for Sidberry beginning September 1, 1996, which would include the following elements: (A) two-week advance scheduling of six students with all reports to be completed within twelve days; (B) advance notice of altered "bell schedules," i.e., changes in the regular school schedule, and permission for the CST to alter case management time and/or team days to compensate for an altered bell schedule; (C) preparation by the guidance clerk of student passes the night before for students to be tested the following day and placement of those passes in the teacher's mail box for distribution the following morning; (D) testing space to be arranged by September 1, 1996; (5) Sidberry waived all procedural claims against the Board from March 1, 1996 to present and (6) Sidberry would be given the opportunity to reply to the amended tenure charges and statement of evidence (P-80).

Counsel for Sidberry did not reply to Board Counsel's letter of July 17, 1996, until August 28, 1996, due to summer vacations and "etc." (P-82). In his reply, counsel indicated that (1) while

Sidberry agreed to the withholding of her increment, this was not to be construed as an admission of any wrong doing; (2) Sidberry had no objection to supplementation of the record up to September 1, 1996, provided she was given copies of all documents; (3) the ninety-day PIP period from September 1 to November 30, 1996 was satisfactory; (4) Ms. Sidberry's input must be considered in the revised PIP plan as follows: (A) the twelve day period refers to twelve "school days;" (B) the "bell schedule" provisions were satisfactory although Ms. Sidberry was requesting an advance bell schedule for the entire 1996-1997 school year as soon as it became available; (C) the student passes provision was satisfactory; (D) the testing location provision was satisfactory although Ms. Sidberry was requesting notification as soon as possible of the location; (5) Ms. Sidberry agreed to waive procedural claims only between March 1 and July 15, 1996 and (6) the provision as to Ms. Sidberry's right to reply to amended tenure charges was satisfactory (P-82).

By memo dated August 21, 1996, Ms. Wolford advised Ms. Sidberry that two reports for students she tested on August 8 and 9, 1996, had not yet been submitted (P-81). On August 26, 1996, Wolford advised McAndrew that Sidberry had submitted reports for all evaluated students and that she "has shown improvement in her submission of reports in July and August" (P-83). By letter dated August 29, 1996, Amended Tenure Charges were filed with the Board against Ms. Sidberry and her counsel provided a response thereto on November 1, 1996.

The PIP referred to in counsels' letters above for the period September 3 to December 2, 1996, was given to Sidberry on September 5, 1996 (P-96). While similar in some respects to the earlier PIPs, this PIP had new provisions such as: (1) each group of six students will be assigned two weeks in advance; (2) a meeting would be held with the Vice Principal of the high school to ascertain in advance days when the bell schedule would be changed; (3) case management and/or team days would be changed to compensate for changes in the bell schedule; (4) a guidance clerk would place student passes in teachers' mailboxes the night before indicating where and when a student would be tested; (8) the weekly Time Management Calendar shall be completed by Sidberry and submitted the last day of each week to Wolford and (10) conferences between Sidberry and Wolford would be scheduled every three weeks, with Wolford communicating in writing the scheduled conferences and following-up with a synopsis of all conferences (P-96). The assistance to be provided to Sidberry was identical to the previous PIP (P-96).

The members of the high school CST on which Ms. Sidberry served changed at the start of the 1996/1997 school year. Ms. Donnelly asked for and was transferred to one of the elementary schools. Marvin Schuck replaced Ms. Donnelly as the LDTC on the high school team and served as Team Leader until October 1996. As a result of a reduction in force, Ms. Landis' position was eliminated and she was transferred to a counseling position at the high school. Due to the RIF, which reduced the social worker positions, two social workers each served on two CST teams during the 1996/1997 school year. The schedule for the social workers was modified such that they had three testing days and two team days with no days allocated to case management. The high school CST team initially shared social worker Nancy Bullett with one of the elementary schools until Thomas Mole, social worker, started with the district in October 1996. Mr. Mole was assigned to the high and junior high schools and had no case management duties, although he replaced Mr. Schuck as Team Leader. Ms. Wolford acknowledged that the reduction in social worker positions resulted in increased case management duties for Ms. Sidberry and Mr. Schuck. During this school year, their case management case load averaged 62 to 65 students. Over the years, the average case management load has varied from 55 to 79.

On September 30, 1996, Wolford provided a synopsis of a meeting she had with Sidberry on September 26, 1996 (P-84). Wolford indicated that Sidberry "appear[ed] to be on target with [her] testing of students on the two week schedule from September 16 to September 27" (P-84). As of September 30, Sidberry had submitted two of the five written reports for the two-week period and initially indicated to Wolford that the remaining three reports would be submitted by the end of the day on September 27, 1996 (P-84). The three reports were not submitted by September 27 and Sidberry informed Wolford this was because she had forgotten her folder which contained the reports (P-84). Wolford directed Sidberry to submit the three reports by the end of the day on September 30 (P-84). Finally, Wolford informed Sidberry that for the next two-week period only three testing days would be scheduled "due to the continued need for the team to review Director's Assignments and vacation days that you have scheduled" (P-84). Director's assignments generally consist of students who have recently transferred into the district.

On October 3, 1996, Wolford advised Sidberry that as of September 30, 1996, all reports required for the weeks of September 16 and 23, 1996 had been submitted but that Sidberry had not submitted her Time Management Calendar for the week of September 23 (P-85). Ms. Wolford further advised Ms. Sidberry that she, as well as other members of the CST, had the latitude within the two-week schedule to test students on whichever day was most convenient provided that she submitted all reports within the twelve-day time limit set forth in her PIP, which so far Sidberry had done (P-85). The twelve-day period for submitting all six reports for the students tested within a two-week period was specially designed for Ms. Sidberry; all other CST members had to conform to the seven day time limit from the day of testing of each student. Thus, while Ms. Sidberry may have had only a few days to complete a report on a student tested at the end of the two-week period, she would have had from seven to twelve days to submit the report on students tested at the beginning of the two-week period. This schedule had been suggested by Sidberry and her counsel at the settlement meeting in July 1996 and Wolford agreed to the revised schedule.

On October 18, 1996, Sidberry advised Wolford that she was overwhelmed by case management duties and asked for a day during the week of November 4, 1996 to "bring to closure some of these tasks" (P-86). Sidberry told Wolford that she had used her case management days to complete Director's assignments. While Ms. Sidberry had no greater case management responsibilities than Mr. Schuck who did not ask for any additional time, Ms. Wolford agreed to Sidberry's request.

By memo dated November 1, 1996, Ms. Wolford advised Ms. Sidberry that "[w]e both need to get back on track with the monitoring of your work schedule" (P-87). Wolford acknowledged that the high school team needed additional time for completing manifestation determinations for Board review of disciplinary proceedings and for completing IEPs for Director's Assignments and that therefore the number of students to be tested in the following two weeks would be reduced from six to four (P-87).

In her November 1, 1996 memo, Wolford listed four students who had been scheduled for testing by Sidberry between October 23 and October 30, 1996. Wolford acknowledged that the testing dates of these students were tentative because of the flexibility given to Sidberry to rearrange

testing dates but testified that the students should nevertheless have been tested sometime during the two-week period ending October 30, 1996. One of the four students listed on the November 1 memo (K. P.) either moved out of district or was expelled and therefore no report was ever submitted or required on him. Reports on the remaining three students (D. D., O. D. and J. L.) were not submitted by Ms. Sidberry until December 5 and 12, 1996, even though Ms. Sidberry indicated on her Time Management Calendars that D. D. was tested on October 23, 1996 and J. L. was tested on October 29, 1996 (P-88). Testing of O. D. by Ms. Sidberry was not included on any of her Time Management Calendars for the period September 28 through November 29, 1996 (P-88).

The Time Management Calendars submitted by Ms. Sidberry for the period September 30 through November 29, 1996, simply listed students as scheduled for testing (P-88). She did not list the students she actually tested nor any reports she had written, although on a few occasions she indicated when a student was absent and when she could not complete testing due to scheduled in-service training (P-88). In a meeting with Ms. Wolford, Ms. Sidberry expressed familiar complaints of not being able to find students and not having enough writing time. During this time period, both Mr. Schuck and Mr. Mole submitted their written reports and neither indicated to Wolford that they had problems locating students. Between October 29 and December 4, 1996, Ms. Sidberry submitted no reports to the clerk for typing (P-91).

By memo dated December 6, 1996, Wolford advised Sidberry that she had five reports outstanding for students tested between October 24 and November 25, 1996 (P-91). In addition, Wolford noted that, while Sidberry submitted Time Management Calendars on December 4, 1996, she indicated that they were incorrect (P-91). Wolford reminded Sidberry that submission of the Time Management Calendars on a weekly basis was included in her September 3, 1996, PIP (P-91, P-96). Ms. Sidberry did not submit her weekly Time Management Calendar for the week of December 2, 1996, by December 6, 1996 as required by her PIP (P-92).

The review period for Ms. Sidberry's PIP having expired on December 2, 1996, the Board notified Sidberry on December 13, 1996, that it would be considering the Amended Tenure Charges dated August 29, 1996, and advised her that she had 15 days to respond to the Amended Charges. The Board further notified Sidberry that review of her performance by Wolford from August 30,

1996 to December 13, 1996 indicated that she had failed to correct the charge of inefficiency contained in the August 29, 1996 Amended Tenure Charges. On December 26, 1996, Sidberry filed a response with the Board to the Amended Tenure Charges. On January 22, 1997, the Board met and, by resolution, determined that there was probable cause to credit the evidence in support of the charges and that such charges, if credited, were sufficient to warrant dismissal or reduction in salary. Accordingly, the Board certified the tenure charges to the Commissioner of Education (J-3) and suspended Ms. Sidberry without pay pursuant to *N. J. S.A.* 18A:6-14.

While the Board was considering the tenure charges, on December 16, 1996, Wolford sent Sidberry a memo listing cases which had been assigned to Sidberry for evaluation and for which reports were outstanding (P-93). Wolford noted that the status of the evaluations was uncertain since Sidberry had failed to submit her Time Management Calendars (P-93). Included in this memo were four students who had been tested between November 18 and December 10, 1996, and for whom no reports had been submitted by Sidberry (P-93). Wolford again reminded Sidberry that her Time Management Calendars were to be submitted by the end of each week and that she had not submitted same for the weeks of December 2 and 9, 1996 (P-93).

On January 10, 1997, Wolford provided Sidberry with an update on cases assigned to Sidberry for evaluation (P-94). The list included eight students who had been scheduled for testing between November 26, 1996 and January 8, 1997 and two students whose testing needed to be rescheduled (P-94). Since Ms. Sidberry had not submitted her Time Management Calendars and did not contact Wolford regarding her December 16, 1996, memo, Wolford indicated she was uncertain regarding the status of evaluations in these cases (P-94). Wolford reiterated that Time Management Calendars were due by the end of each week and that Sidberry had not submitted any since December 2, 1996 (P-94). Because of the importance of reviewing the evaluation data, Wolford scheduled a meeting with Sidberry for the afternoon of January 10, 1997 (P-94).

During the January 10, 1997, meeting, Sidberry submitted eight reports to Wolford (P-97). Two reports on students assigned to Sidberry were then outstanding (P-97). However, one student was reported by Sidberry as being absent on both days scheduled for his testing and the other student was reported to have refused evaluation when he was brought to the testing site by his parent (P-97).

Ms. Wolford subsequently confirmed that one student had refused to be evaluated and that this was out of Ms. Sidberry's control (P-99). However, the other student was late, but not absent, on the second day scheduled for his testing and Wolford concluded that Sidberry should have been able to test him on the second day (P-99).

As a result of the Board certifying the tenure charges on January 22, 1997, and its suspension determination, Ms. Sidberry's last day at work was on January 23, 1997. Prior to leaving on January 23, Ms. Sidberry submitted four reports which brought her up to date on all evaluations (P-98).

LEGAL DISCUSSION

It is undisputed that the Board has the burden of proving the tenure charges against Sidberry by a preponderance of the credible evidence. *See, In re Polk License Revocation,* 90 *N. J.* 550, 560 (1982). Moreover, *N. J. S.A* 18A:6-10 provides that no tenured employee of a public school district shall be dismissed "except for inefficiency, incapacity, unbecoming conduct or other just cause." In proving charges of inefficiency, the Board has a "heavy responsibility" to demonstrate that it has "render[ed] positive assistance to the [tenured employee] in an effort to overcome h[er] inefficiencies." *Rowley v. Bd. of Ed. of Manalapan-Englishtown,* 205 *N. J. Super.* 65, 72 (App. Div. 1985). Education law requires that before charges of inefficiency may be certified against a tenured staff member, a period of at least ninety days must be provided to allow the staff member to correct the inefficiency. *N. J. S.A.* 18A:6-11.

Based on the foregoing **FINDINGS OF FACT, I CONCLUDE** that the Board has proven the charges of inefficiency against Ms. Sidberry by a preponderance of the credible evidence. Her repeated failure to submit evaluation reports in a timely manner clearly constitutes inefficiency sufficient to support her removal from her tenured position. *Township of Teaneck, Bergen County v. Wilburn,* 91 *N.J.A.R. 2d* (EDU) 48, 58, aff'd 92 *N. J. A.. R. 2d* (EDU) 328 (State Board), aff'd App. Div. Docket No. A-4663-91 (April 12, 1993) (failure to submit lesson plans sufficient to prove charges of inefficiency). Moreover, this was not an isolated event of failure to submit reports, but rather an on-going failure beginning in May, 1994 and continuing through December 1996. During this period, Ms. Sidberry was given numerous memos documenting her late reports and was

provided three PIP periods in order to correct her deficiencies. In addition, Ms. Wolford and Ms. McAndrew provided Sidberry with assistance in the form of allowing her additional writing days; providing her with time management audio tapes and attendance at a workshop; offering her the assistance of an aide in locating students; altering the schedule for submission of her written reports; providing student schedules and providing a dedicated office for her to do student testing.

In reaching this conclusion, I have considered and rejected the testimony and arguments of Ms. Sidberry justifying her late reports. While I do not suggest that Ms. Sidberry lacked credibility as a witness, her explanations for her repeated failures to submit timely reports were simply not convincing to the undersigned. Ms. Sidberry clearly believed her explanations justified her untimely filing of reports; however, those explanations are lacking support in the record. For example, her contention that serving on two CST teams caused delays in report writing does not explain the delays in 1995/1996 and in 1996/1997 when Ms. Sidberry served on only the high school CST. The decrease in the number of social workers in 1996/1997 no doubt resulted in additional case management responsibilities for Ms. Sidberry but the same increase was felt by Mr. Schuck who did not have problems in submitting timely reports to the extent that Ms. Sidberry exhibited. Other vacancies cited by Ms. Sidberry occurred between September 1993 and May 1995 and also did not explain her failure to submit timely reports from May 1995 through December 1996.

Nor did I find Sidberry's testimony that she had to spend considerable time training new staff members convincing. While Donnelly testified that Sidberry spent considerable time training new staff, both Landis and Schuck denied this occurred and there is no documentation that Sidberry raised this training as a defense to her untimely submission of reports prior to the filing of tenure charges against her. Moreover, Ms. Sidberry did not present evidence that the conditions she worked under regarding the difficulty in locating students, the failure to provide student schedules or the bell schedule changes and the lack of assigned office space were any different than those faced by her colleagues who managed to submit timely reports in most instances and clearly in many more instances than Sidberry was able to accomplish.

While there is no doubt that other CST members on occasion submitted late reports, Sidberry failed to present any evidence to support a finding that any other staff member had even close to the

number of late reports that were attributable to her. Analysis of report submissions by all three team members prepared by Ms. Sidberry shows that some of her reports were submitted before or not long after submission of the LDTC and social worker reports (R-23, R-26, R-30, R-42). However, those analyses do not include when the LDTC or social worker was assigned the cases and/or tested the students and therefore any conclusion on whether their reports were timely under the seven-day rule is impossible to reach. The absence of trained and capable clerical staff is simply irrelevant since Sidberry's compliance with deadlines was judged not by when her reports were typed but rather by when she submitted them to typing. Additional assignments cited by Sidberry, such as Director's Assignments and disciplinary remands from the Board, impacted not only Sidberry but other CST members as well.

Finally, I reject Ms. Sidberry's contention that the administration' s actions against her were motivated by anger resulting from an incident occurring in June 1995 during which Ms. Sidberry reportedly advised a parent or parents to file an appeal from the administration's decision that their children would not graduate due to noncompliance with the attendance policy. I do not doubt that Ms. McAndrew was angry about being late for graduation as a result of having to appear at the OAL for due process hearings nor that she mentioned the incident during a meeting at which Donnelly and Bullett were present and that Dr. Foster was also unhappy about being late for graduation and referred to the incident during a meeting attended by Joyce Payne, then Director of Education for the Board. However, I credit Ms. McAndrew's testimony that the June 1995 incident had no relation to her actions regarding Ms. Sidberry's late filing of reports. Moreover, the circumstances support the conclusion that there was no relationship between Ms. Sidberry's advice to the parents and the criticism of her late filing of reports. Firstly, criticism of Sidberry's untimely submission of reports began before June 1995. Secondly, the Board did not certify tenure charges against Sidberry until January 1997, eighteen months after the incident. Most importantly, Donnelly provided the advice to the parents along with Sidberry and, as with Sidberry, she was criticized in her annual evaluation for doing so. Yet is uncontroverted that no disciplinary action was taken against Donnelly and that she is still employed by the Board.

Based on the foregoing, **I CONCLUDE** that the Board has proven by a preponderance of the evidence the charges of inefficiency against Ms. Sidberry and that said charges justify her removal from her tenured position as a school psychologist. Because of this conclusion, I do not address the Board's additional charges of a pattern of conduct and conduct unbecoming.

ORDER

Based on the foregoing, it is **ORDERED** that the tenure charges against Margaret Sidberry are sustained and she is hereby removed from her tenured position with respondent Board.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/19/00
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

5/30/00
DATE

DEPARTMENT OF EDUCATION

MAY 31 2000
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Joint Exhibits

J-1 Collective Bargaining Contract for School Years 1993 through 1996

J-2 Job Description for School Psychologist

J-3 Stipulations of Fact

For Petitioner[6]

P-1 Pupil-Personnel Services Professional Staff Procedures

P-2 Staff Evaluation, Margaret Sidberry, 1993-94

P-3 Staff Evaluation, Margaret Sidberry, 1994-95

P-4 Performance Rating, Margaret Sidberry, February 23, 1996

P-5 Memo to Margaret Sidberry from Margaret Wolford, April 25, 1994

P-6 Memo to Margaret Sidberry from Margaret Wolford, May 17, 1994

P-7 Memo to Margaret Sidberry from Margaret Wolford, May 26, 1994

P-8 Memo to Margaret Sidberry from Margaret Wolford, May 31, 1994

P-9 Memo to Margaret Sidberry from Margaret Wolford, June 3, 1994

P-10 Memo to Margaret Sidberry from Margaret Wolford, June 14, 1994

P-11 Handwritten memo to Margaret Wolford from Doris Salagi, June 24, 1994

P-12 Memo Margaret Sidberry from Margaret Wolford, June 27, 1994

P-13 Memo to Margaret Sidberry from Margaret Wolford, July 21, 1994

P-14 Handwritten note to file by Margaret Wolford, July 28, 1994

P-15 Memo to Margaret Sidberry from Margaret Wolford, October 11, 1994

P-16 Handwritten memo to Margaret Wolford from Doris Salagi, October 31, 1994

P-17 Memo to Margaret Sidberry from Margaret Wolford, November 4, 1994

P-18 Memo to Margaret Sidberry from Margaret Wolford, January 20, 1995

P-19 Memo to Margaret Sidberry from Margaret Wolford, January 31, 1995

P-20 Memo to Margaret Sidberry from Margaret Wolford, February 22, 1995

P-21 Memo to Margaret Sidberry from Margaret Wolford, March 7, 8, 1995

P-22 Memo to Margaret Sidberry from Margaret Wolford, April 27, 1995

P-23 Memo to Margaret Sidberry from Margaret Wolford, May 2, 1995

P-24 Memo to Margaret Sidberry from Margaret Wolford, May 3, 1995

P-25 Memo to Margaret Sidberry from Margaret Wolford, May 30, 1995

P-26 Memo to Margaret Sidberry from Margaret Wolford, June 19, 1995

P-27 Handwritten note to file by Margaret Wolford, July 19, 1995

P-28 Memo to Margaret Sidberry from Margaret Wolford, July 20, 1995

P-29 Memo to Margaret Sidberry from Margaret Wolford, July 21, 1995

P-30 Memo to Margaret Sidberry from Margaret Wolford, August 21, 1995

P-31 Memo to Margaret Sidberry from Margaret Wolford, August 25, 1995

P-32 Memo to Joan McAndrew from Margaret Wolford, September 11, 1995

P-33 Memo to Dr. Geraldyn O. Foster, Superintendent from Margaret Wolford, September 20, 1995

P-34 Memo to Margaret Wolford from Margaret Sidberry, September 21, 1995

P-35 Memo from the Desk of Joan Cooper, September 22, 1995 with attached letter to Margaret Sidberry from Assistant Superintendent Joan McAndrew dated September 22, 1995

P-36 Memo to Dr. Foster, Superintendent, from Margaret Sidberry, September 26, 1995

P-37 Memo to Assistant Superintendent McAndrew from Margaret Wolford, September 27, 1995

P-38 Memo to Assistant Superintendent McAndrew from Margaret Wolford, October 2, 1995

P-39 Memo to Assistant Superintendent McAndrew from Margaret Sidberry, October 5, 1995

P-40 Memo to Marge Wolford from Assistant Superintendent McAndrew, October 12,1995

P-41 Memo to Assistant Superintendent McAndrew from Margaret Wolford, October 17, 1995

P-42 Professional Improvement Plan, September 28, 1995

P-43 Handwritten memo to Joan from Marge, October 23, 1995

P-44 Memo to Dr. John Wasinda, Principal, from Assistant Superintendent McAndrew, October 25, 1995

P-45 Professional Improvement Plan Review of November 28, 1995, extending improvement period to January 25, 1996

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[6] With the exception of P-1 and P-100 through P-109, all of the Board's exhibits are contained in a black, three-ringed

P-46 Letter to Margaret Wolford from K. B. Hewko, Grievance Chairperson, October 25, 1995, attaching a grievance re: Margaret Sidberry (with attached Code section)

P-47 Memo to Assistant Superintendent McAndrew from Margaret Wolford, November 3, 1995

P-48 Memo to K. B. Hewko, Grievance Chairperson from Margaret Wolford, November 3, 1995

P-49 Letter to Superintendent Foster from K. B. Hewko, Grievance Chairperson, November 17, 1995, with attached grievance re: Margaret Sidberry

P-50 Memo to Assistant Superintendent McAndrew from Margaret Wolford, November 21, 1995

P-51 Certification by Margaret Sidberry of receipt of letter from McAndrew on November 22, 1995 with attached letter dated November 22, 1995

P-52 Memo to Margaret Sidberry from Margaret Wolford, November 27, 1995

P-53 Memo to WHS Child Study Team Member from Margaret Wolford, November 27, 1995

P-54 Memo to Margaret Sidberry from Margaret Wolford, November 27, 1995

P-55 Memo to Margaret Sidberry from Margaret Wolford, December 11, 1995

P-56 Memo to Margaret Sidberry from Margaret Wolford, December 21, 1995

P-57 Memo to Margaret Sidberry from Margaret Wolford, January 3, 1996

P-58 Memo to Margaret Sidberry from Margaret Wolford, January 8, 1996

P-59 Memo to Margaret Sidberry from Margaret Wolford, January 16, 1996

P-60 Memo to Margaret Sidberry from Margaret Wolford, January 22, 1996

P-61 Memo to Margaret Sidberry from Margaret Wolford, January 29, 1996

P-62 Certification signed by Margaret Sidberry of receipt of letter with attached letter from Assistant Superintendent McAndrew dated February 6, 1996

P-63 Memo to Margaret Sidberry from Margaret Wolford, February 16, 1996

P-64 Memo to Margaret Sidberry from Margaret Wolford, February 20, 1996

P-65 Memo to Margaret Sidberry from Margaret Wolford, February 26, 1996

P-66 Memo to Margaret Sidberry from Margaret Wolford, February 26, 1996

P-67 Memo to Assistant Superintendent McAndrew from Margaret Wolford, March 1, 1996

P-68 Acknowledgment of receipt of a 90 day Professional Improvement Plan, to be implemented March 1, 1996 to May 29, 1996, with handwritten notation by Assistant Superintendent McAndrew that Ms. Sidberry refused to sign on advice of union representative

P-69 Letter to Margaret Sidberry from Ernestine Hyland, Board Secretary, dated March 1, 1996,

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binder provided by the Board.

referring to attached certified tenure charges dated February 28, 1996, with acknowledgment of receipt signed by Ms. Sidberry

P-70 Memo to Norine Donnelly, Dorothy Landis and Margaret Sidberry from Margaret Wolford, March 18, 1996

P-71 Memo to Margaret Sidberry from Margaret Wolford, March 19, 1996

P-72 Memo to Margaret Sidberry from Margaret Wolford, April 2, 1996

P-73 Memo to Margaret Sidberry from Margaret Wolford, April 4, 1996

P-74 Memo with attachment to Margaret Sidberry from Margaret Wolford, April 25, 1996

P-75 Memo with attachment to Margaret Sidberry from Margaret Wolford, May 23, 1996

P-76 Memo to Margaret Sidberry from Margaret Wolford, May 28, 1996

P-77 Memo to Margaret Sidberry from Margaret Wolford, June 13, 1996

P-78 Memo to Margaret Sidberry from Margaret Wolford, June 20, 1996

P-79 Memo to Margaret Sidberry from Margaret Wolford, July 15, 1996

P-80 Letter to Michael Damm, Esq. from James Granello, Esq., July 17, 1996

P-81 Memo to Margaret Sidberry from Margaret Wolford, August 21, 1996

P-82 Letter to James Grannello, Esq. from Michael Damm, Esq. August 28, 1996

P-83 Memo to Assistant Superintendent McAndrew from Margaret Wolford, August 26, 1996

P-84 Memo with attachment to Margaret Sidberry from Margaret Wolford, September 30, 1996

P-85 Memo to Margaret Sidberry from Margaret Wolford, October 3, 1996

P-86 Handwritten memo to Marge from Margaret, October 18, 1996

P-87 Memo to Margaret Sidberry from Margaret Wolford, November 1, 1996

P-88 Time Management Calendars for Margaret Sidberry from September 23 to November 29, 1996

P-89 Memo to Margaret Sidberry from Margaret Wolford, November 18, 1996

P-90 Memo to Margaret Sidberry from Margaret Wolford, November 22, 1996

P-91 Memo to Margaret Sidberry from Margaret Wolford, December 6, 1996

P-92 Memo to Margaret Sidberry from Margaret Wolford, December 9, 1996

P-93 Memo to Margaret Sidberry from Margaret Wolford, December 16, 1996

P-94 Memo to Margaret Sidberry from Margaret Wolford, January 10, 1997

P-95 Professional Improvement Plan; implementation date of March 1, 1996; review date of May 29, 1996

P-96 Professional Improvement Plan; implementation date of September 3, 1996; review date of December 2, 1996

P-97 Memo to Margaret Sidberry from Margaret Wolford, January 13, 1997

P-98 Memo to Assistant Superintendent McAndrew from Margaret Wolford, January 27, 1997

P-99 Memo with attachment to Assistant Superintendent McAndrew from Margaret Wolford, February 4, 1997

P-100 List of cases with status assigned to Margaret Sidberry during 1995/1996 school year

P-101 List of cases with status assigned to Margaret Sidberry during 1996/1997 school year

P-102 Calendars for Pupil Personnel Services, September 1994 to May 1995

P-103 Identification only

P-104 Calendars for Pupil Personnel Services, September 1996 to January 1997

P-105 Memo to Assistant Superintendent McAndrew from Doris Salagi, January 7, 1998

P-106 Handwritten document setting forth goals of Margaret Sidberry for 1995/96 school year

P-107 Handwritten document setting forth status of cases for 1995/1996 school year (initially prepared by Margaret Sidberry, R-30 in evidence, with notations made by Ms. Wolford)

P-108 Handwritten document setting forth status of cases for 1993/1994 school year (initially prepared by Margaret Sidberry, R-23A in evidence, with notations added by Ms. Wolford)

P-109 (Handwritten document setting forth status of cases for 19994/1995 school year (initially prepared by Margaret Sidberry, R-26A in evidence, with notations added by Ms. Wolford)

For Respondent

R-1 Special Education Plan for Willingboro Public Schools for the years 1993-1996

R-2 Special Education Plan for Willingboro Public Schools for the years 1996-1999

R-3 Employment status of members of the Willingboro Child Study Teams, 1992 to 1997

R-4 Calendars for Pupil Personnel Services, September 12, 1994 to February 13, 1995

R-5 Grievance submitted by the Willingboro Education Association, October 14, 1994

R-6 Opinion and Award by Arbitrator James P. Begin, May 14, 1997

R-7 Memo to Assistant Superintendent McAndrew from Margaret Sidberry, December 8, 1995

R-8 Handwritten memo to Marge Wolford from Margaret Sidberry, August 9, 1996

R-9 1996-97 Child Study Team Assignments

R-10 Memo to Dr. Foster, Superintendent, from Margaret Wolford, June 5, 1995

R-11 Handwritten document with dates of evaluations and reports from October 18, 1996 to April 30, 1997

R-12 Handwritten document with dates of assessments and reports between September 28, 1995 and April 27, 1997

R-13 Individualized Education Program Plan form

R-14 Stanford-Binet Intelligence Test

R-15 MSCS Record Booklet

R-16 Psychological Evaluation for a student

R-17 Psychological Evaluation for a student

R-18 Psychological Evaluation for a student

R-19 Case Management Functions

R-20 Pupil Personnel Services Calendars from September 1993 to June 1994

R-21 Handwritten list of students listed to be tested by Phyllis Friedman from September 20, 1993 to January 14, 1994

R-22 Employment Contract between Margaret Sidberry and Board, March 1, 1994

R-23 Handwritten list prepared by Margaret Sidberry of students evaluated during 1993-1994

R-24 1993-1994 School Calendar

R-25 Letter to Margaret Sidberry from Delia Melton, M. D., October 14, 1997 with attachments

R-26 Handwritten list prepared by Margaret Sidberry of students evaluated during 1994-1995

R-27 1994-1995 School Calendar

R-28A Waiver request from attendance policy for student, June 23, 1994

R-28B Waiver request for attendance policy for student for 1993-94 year

R-28C Memo to Larry Hampton, Director of Guidance from Margaret Wolford, December 20, 1994

R-28D Form "Action Plan to Remediate Attendance"

R-28E Waiver request from attendance policy for student, April 3, 1995

R-28F Waiver request from attendance policy for student, April 10, 1995

R-29A Photographs of work space, October 1995

R-29B Photographs work space, October 1995

R-30 Handwritten list prepared by Margaret Sidberry "Evaluation Dates," 1995/96

R-30A Handwritten list prepared by Margaret Sidberry "Evaluation Dates," 1995/96 (with references to Petitioner's Exhibits)

R-31 Memo to Margaret Wolford from Margaret Sidberry, re: memo of August 21, 1996

R-32 Handwritten list prepared by Margaret Sidberry re: Board's response to Interrogatory 36 (psychological evaluations referred to outside agency)

R-33 Board's response to Interrogatory 36 (re: psychological evaluations referred to outside agency)

R-34 Letter to Joan Kane Josephson, Esq. from Michael C. Damm, December 31, 1997

R-35 Daily Appointment Forms and Time Management Calendars for Margaret Sidberry, October 16, 1995 to April 29, 1996

R-36 1995-1996 School Calendar

R-37 Series of memos to Case Managers and CST members from Margaret Wolford, from February 2, 1995 to January 2, 1997

R-38 Department of Pupil Personnel Services Calendars from September 1996 to January 1997

R-39 1996/1997 School Calendar

R-40 Handwritten memo from Marge Wolford to Margaret Sidberry, September 25, 1996

R-41 Handwritten list prepared by Margaret Sidberry of student evaluations for 1996/97 school year

R-42 Handwritten list prepared by Margaret Sidberry of student evaluations for 1996/97 school year

R-43 Letter to Marge from Margaret Sidberry, January 16, 1997

R-44 October 29, 1996 page from Margaret Sidberry's Appointment Dairy

R-45 Handwritten notations of Case Management Activity of Margaret Sidberry of various dates

WITNESSES

For Petitioner

Margaret Wolford

Jay Albert

Doris Salagi

Marvin Schuck

Thomas Mole

Penelope Webb

Dorothy Landis

Joan McAndrew

For Respondent

Joyce Payne

Shirley Wright

Linda Taylor

Noreen Donnelly

Nancy Bullett

Kurt Jarvis

Margaret Sidberry

OAL DKT. NO. EDU 0952-97S
AGENCY DKT. NO. 30-1/97

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGARET SIDBERRY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WILLINGBORO,	:	DECISION
BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent first charges that the Initial Decision is deficient, requiring remand, because the Administrative Law Judge (ALJ) based her factual findings solely on the testimony of one of the Board's witnesses, Margaret Wolford, and fails to make any mention of the detailed testimony proffered by respondent and other witnesses, specifically: Joyce Payne, Shirley Wright, Linda Taylor, Noreen Donnelly, Nancy Bullett, Kurt Jarvis, and Jay Albert. (Respondent's Exceptions at 3) Thus, respondent argues, because the ALJ failed to discuss the testimony of any of these other individuals, it cannot be ascertained which testimony the ALJ credited or discredited in reaching her ultimate conclusion. Respondent argues that, pursuant to *N.J.S.A.* 52:14B-10(d), parties and a reviewing body should be able to ascertain "the precise factual basis upon which a result has been reached [rather than being] forced to speculate as to the rational basis for conclusions reached." (citations omitted) (*Id.* at 4) Consequently,

respondent advances, this matter must be remanded for more detailed findings which consider the testimony of "all of the witnesses." (*Ibid.*)

Respondent next contends that the ALJ failed to consider and weigh the aggravating and mitigating factors, as required by *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), in concluding that termination was the appropriate penalty in this matter. (Respondent's Exceptions at 5) She advances that "evidence as to provocation, extenuation or aggravation" must be taken into consideration along with "any harm or injurious effect which the teacher's conduct may have had on the maintenance of the proper administration of the school system. *Id.* at 422" (*Ibid.*) She contends "[t]here is no analysis [in the Initial Decision] as to how the ALJ reached the conclusion that the most severe penalty, revocation of tenure, with all its dire consequences, should be imposed." (*Id.* at 4) Again, respondent argues, should the Commissioner ultimately determine that the Board has sustained its charge of inefficiency, the absence of this required weighing analysis dictates that this matter be remanded to the OAL. (*Id.* at 7)

Notwithstanding respondent's recommendation of remand to OAL for penalty analysis, she cites extensively to the Initial Decision and specific hearing testimony, asserting that these establish that, in balancing the aggravating and mitigating factors in this matter, "this is not a case which should result in tenure revocation." (Respondent's Exceptions at 7) Respondent contends that, although the ALJ's decision referred to many of the mitigating factors highlighted in her exceptions, such as respondent's overall good record in other aspects of her job, along with staff cut backs and shortages, her increased case management duties, her extra assignments, scheduling difficulties, and the huge volume of students assigned to her for processing -- all of which interfered with her writing and submission of reports -- the ALJ failed

to take any of these into consideration when recommending an appropriate penalty. Respondent further charges that the ALJ failed to consider that there was no showing that respondent's alleged failure to submit timely reports was deliberate, negatively impacted the District in any way, or served to cause any student to be denied an "appropriate" education. (Respondent's Exceptions at 20) Respondent argues that if all of these mitigating factors had been reviewed and considered as required by *Fulcomer, supra*, a proposed penalty short of termination could have been fashioned, such as a financial penalty or closer monitoring or mentoring. (*Id.* at 23) Respondent requests that the Initial Decision be rejected or, at the very least, remanded with direction that the ALJ perform the required *Fulcomer* penalty analysis.

In reply, the Board urges that the ALJ correctly found that it had sustained its burden of establishing the charges of inefficiency against respondent based upon her "failure to prepare and submit psychological assessment reports in a timely [manner] as required by Federal and State law," and that such failure justifies respondent's removal from her tenured position. (Board's Reply Exceptions at 1) The Board posits that such a result is amply supported by evidence in the record, namely:

1. 53 memos from the Director of Pupil Personnel Services reminding her of overdue psychological reports.

2. Three annual evaluations (by two different evaluators) reprimanding her for overdue reports.

3. Increment withheld.

4. 300 days of professional improvement plans to guide her to improve the submission of her reports. (*Ibid.*)

The Board discounts respondent's assertion that the ALJ made insufficient factual findings based on the testimony of certain witnesses. In this regard, it submits that three of the

witnesses identified, Joyce Payne, Linda Taylor and Shirley Wright, were merely character witnesses who had no knowledge and advanced no testimony as to whether respondent filed timely psychological reports. (Board's Reply Exceptions at 2) Further, the Board claims, it is obvious that the ALJ's decision did consider the testimony of Child Study Team (CST) members Marvin Shuck, Jay Albert, Noreen Donnelly, Kurt Jarvis and Tom Mole, as well as 109 Board exhibits and 38 respondent exhibits. (*Ibid.*) Most importantly, the Board urges, it is fully evident that "the testimony of the primary witnesses, who had direct knowledge of the entire matter, [Respondent Margaret Wolford, and Assistant Superintendent Joan McAndrew] were thoroughly reviewed in the decision." (*Ibid.*) The Board argues that the ALJ's credibility assessments based on the proffered testimony of these witnesses are, likewise, obvious in her decision, wherein she held that:

> "Based on her demeanor and the consistency of her testimony I found Ms. Wolford to be a credible witness. I also found her testimony credible and convincing because she gave credit to Ms. Sidberry when credit was called for ***." [citing the Initial Decision at 5]; "I credit Ms. McAndrew's testimony that the June 1995 incident has no relation to her actions regarding Ms. Sidberry's late filing of reports." [Citing the Initial Decision at 35] (Board's Reply Exceptions at 3)

As to the ALJ's evaluation of respondent's credibility, the Board states that the ALJ made the following observation:

> "***I have considered and rejected the arguments of Ms. Sidberry justifying her late reports. While I do not suggest that Ms. Sidberry lacked credibility as a witnesses, her explanations for her repeated failures to submit timely reports were simply not convincing to the undersigned." [Citing the Initial Decision at 34] (*Ibid.*)

As such, the Board asserts that after 15 days of hearing already held in this matter, and given that the factual basis for the ALJ's conclusion is abundantly clear, respondent's advancement as to the necessity of remand for more detailed findings is preposterous. (*Ibid.*)

The Board next rejects respondent's claim that, in reaching her recommended penalty of termination, the ALJ failed to weigh the aggravating and mitigating factors pursuant to *Fulcomer.* It proffers that the ALJ dedicated more than 30 pages to reviewing the details in connection with respondent's late reports and carefully reviewed and analyzed the extensive exhibits surrounding the individual case assignments and report completion, along with the Professional Improvement Plans implemented to assist respondent. (Board's Reply Exceptions at 3-4) The Board argues that the ALJ also fully reviewed and considered all of respondent's proffered reasons for the untimeliness of her reports, *i.e.,* "[respondent's] lack of [a] place to test students, inability to locate students, unreasonable demands on her work day, changes in [students'] daily schedules, shortage of professional and clerical staff, claims of training new staff, and an allegation that the tenure charges were motivated by anger resulting from an incident concerning an OAL appeal of a graduation problem." (*Id.* at 4) Upon such examination, the Board proffers, the ALJ concluded that the conditions faced by respondent were identical to those faced by the other child study team members; all of whom were able to submit timely reports. Consequently, it argues, the ALJ did, in fact, consider "evidence as to 'provocation, extenuation or aggravation'" in reaching her recommended penalty. (*Ibid.*) The Board also discounts respondent's assertion that the District was not harmed by her routinely untimely reports

> [T]he administration of the school is seriously injured when special education reports are not submitted in a timely fashion. The Individuals With Disabilities Education Act (IDEA) 20 U.S.C. Sec. 1400 et seq. requires that an Individual Education Program (IEP)

> must be implemented within 90 days after receipt of parental approval for evaluation and without it the child is denied a free and appropriate education that is guaranteed by the IDEA. (*Ibid.*)

It further points to the ALJ's initial decision observation stating that:

> "[f]ailure to submit reports in a timely manner has resulted in the delayed implementation of programs. Students have been denied access to appropriate educational programs and you have contributed to placing the district in jeopardy of noncompliant status...." [Citing the Initial Decision at 24] (Board's Reply Exceptions at 7)

Likewise, the Board rejects respondent's claim that she should not be terminated because of an "overall good record," asserting that such is not the case. While she was proficient as a case manager, and her reports, when finally completed, were adequate, it advances, "CST members test and write reports three days, meet to develop IEP's one day and have one day for case management." As such, **"[f]our-fifths of Margaret Sidberry's performance was very sub-standard**." (emphasis in text) (Board's Reply Exceptions at 5)

The Board next reasons that, although it may be difficult to definitively ascertain whether or not respondent's failure to perform her duties was "deliberate *** after 53 memos, three evaluations' notations, an increment withheld and four PIP's," it must be assumed that there was some "deliberate aspect" to her performance, particularly when considering that the other CST members were faced with the same "conditions" facing respondent and were able to submit timely reports. (*Id.* at 7)

Finally, the Board urges that respondent's suggestion of a lesser penalty, such as "closer monitoring or mentoring" would be of no avail here. It asserts:

> Progressive discipline principles were painstakingly followed in this case. [Respondent] was given every opportunity to correct her deficiencies and not be placed in jeopardy of losing her job. She was cautioned that if she failed to improve she would face tenure

> charges. And, even after the tenure charges were filed and she was given an additional PIP, her performance did not improve. (Board's Reply Exceptions at 8-9)

As such, the Board urges that the Initial Decision be affirmed by the Commissioner and respondent be terminated from her position.

Upon his independent and comprehensive review of the record,[1] the Commissioner agrees with the ALJ's findings and conclusion that the Board has sustained its charges of inefficiency against respondent, after providing her a period of remediation during which it accorded her reasonable support to assist her in overcoming such inefficiencies, which she was unwilling or unable to do and, consequently, the appropriate result is respondent's removal from her position.

In so determining, respondent's exceptions are deemed to be without merit. Initially, the Commissioner does not find the ALJ's lack of specific factual findings based on testimony offered by certain witnesses violative of *N.J.S.A.* 52:14B-10(d).[2] To the contrary, he determines that the ALJ's Initial Decision satisfies the necessary factual requirements of that statutory provision, presenting a detailed and accurate summary and analysis of all *relevant*,

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[1]It is noted that the record includes transcripts of 10 of the 15 days of hearing conducted at the OAL in this matter, specifically, January 12, 13, 14, 15 and 21, 1998, March 23 and 24, 1998, June 4, 5, and 10, 1998. Respondent's exceptions state that official transcripts were not obtained for the testimony of Board witness Margaret Wolfold, and respondent offers to submit her "unofficial" transcription of hearing tapes of this testimony if the Commissioner so desires. (Respondent's Exceptions at 1) In that the Initial Decision contains extensive detail with respect to the testimony of this witness, the substance of which was not challenged by either party, the Commissioner finds the absence of these particular transcripts to have no prejudicial effect on his consideration of this matter.

[2]This provision, in pertinent part specifies:

> ***A final decision shall include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director.
>
> Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. The final decision may incorporate by reference any or all of the recommendations of the administrative law judge. ***

credible testimonial and documentary evidence adduced at hearing, which amply supports the ALJ's ultimate conclusion that the Board has proven an overall pattern of poor performance by respondent which warrants her dismissal.

Similarly, the Commissioner finds incongruous respondent's contention that remand of this matter for further factfinding with respect to a *Fulcomer* aggravating and mitigating factor analysis is warranted. Rather, he concurs with the Board that the ALJ not only considered all of respondent's "justifications" for her repeated failure to prepare and submit timely reports, but also presented a detailed analysis as to why she rejected each of these proffers. (*See* Initial Decision at 34-35), an analysis which the Commissioner finds amply supported by the record and with which he is in full accord.

Additionally, although the Commissioner cannot necessarily conclude that respondent's failure to complete her required psychological reports in a timely fashion was "deliberate," he nonetheless rejects as untenable her claim that there was no deleterious effect to either students or the District as a result of such failure. At a very minimum, the untimely preparation and submission of her reports delayed the initial or re-evaluative placement of students in appropriate educational programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and statute statutes and regulations governing the rights of classified students.

Finally, in considering the ALJ's recommendation with regard to penalty, the Commissioner was mindful that it is by now well established that:

> Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. *Redcay v. State Bd. of Ed.,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944)

Here, the ALJ specifically found:

> [T]his was not an isolated event of failure to submit reports, but rather an on-going failure beginning in May 1994 and continuing through December 1996. During this period, Ms. Sidberry was given numerous memos documenting her late reports and was provided three PIP periods in order to correct her deficiencies. In addition, Ms. Wolford and Ms. McAndrew provided Sidberry with assistance in the form of allowing her additional writing days; providing her with time management audio tapes and attendance at a workshop; offering her the assistance of an aide in locating students; altering the schedule for submission of her written reports; providing student schedules and providing a dedicated office for her to do student testing. (Initial Decision at 33-34)

The within record demonstrates that respondent was long aware of the District's concern with her performance as evidenced by its withholding of her increment, numerous memoranda, evaluations and a remediation period well in excess of that prescribed by law. Notwithstanding the District's significant efforts to provide support and assistance to encourage her improvement, whether due to unwillingness or inability, respondent clearly failed to reach an acceptable level of performance. Even duly weighing her years of service in the District and the fact that in certain areas her performance was adequate, or even commendable, respondent's failure to fulfill the responsibilities of her position, despite the provision of repeated assistance above and beyond that provided other CST members, evidences that there can be no reasonable expectation that respondent can conform her performance to the level reasonably expected of a CST member in the District in the foreseeable future. Consequently, she cannot be allowed to continue in her position.

Accordingly, respondent is terminated from her tenured school psychologist position in the Willingboro School District as of the date of this decision. This matter shall be

transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 28 2000

[3]This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

272-00

EDU #0952-97S
C # 272-00
SB # 57-00

IN THE MATTER OF THE TENURE HEARING :

OF MARGARET SIDBERRY, SCHOOL : STATE BOARD OF EDUCATION

DISTRICT OF THE TOWNSHIP OF : DECISION

WILLINGBORO, BURLINGTON COUNTY. :

Decided by the Commissioner of Education, August 18, 2000

For the Petitioner-Respondent, Parker, McCay & Criscuolo
(Joan Kane Josephson, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(Michael C. Damm, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 3, 2001

Date of mailing JAN 04 2001

273-00

J.M., on behalf of minor child, R.G.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 3340-99

AGENCY DKT. NO: 36-3/99

J.M. on behalf of Minor Child R.G.V.,

Petitioner,

v.

FORT LEE BOARD OF EDUCATION,

Respondent.

Norberto H. Yacono, Esq., for petitioner

Robert T. Tassaro, Esq., for respondent

Record Closed: June 28, 2000 Decided: July 7, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 24, 1999, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement.

Having reviewed the contents of the attached Settlement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

7/7/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

7/13/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

(1)

JUNE 28 2000

EDU 3340-99

The parties hereby agree to settlement of all claims regarding the within matter on the following terms:

1) Petitioner, J. N., shall pay the total sum of $4,000 in full and complete satisfaction of all claims for tuition by the Respondent, as follows:

a) The sum of $1,000.00 shall be paid to Respondent by Petitioner on or before September 15, 2000;

b) The sum of $250.00 per month shall be paid on the 15th day of October, 2000, and on the 15th day of each consecutive month for 12 months, until the balance of $3000.00 is paid;

2a

(2)

c) In the event Petitioner shall default in making any installment payment provided for herein for 10 days 5 JPM, Respondent shall be entitled, upon application to the ~~Court~~ OAL (SAG), for entry of judgment in the amount of $5,500.00, upon affidavit of Counsel, less credit for prior payments. Notice of Application for Judgment shall be sent to NORBERTO YACONO. ESQ.

D) The Respondent acknowledges that R.G.V. shall reach the age of majority (18) on July 7, 2000, and shall be entitled to establish his own domicile WITH PETITIONER 11 JPM in the Borough of Fort Lee, and he shall be entitled to attend the Fort Lee Public Schools without any additional tuition.

Robert T. Tessalone
Robert T. Tessalone
Attorney for Respondent

Petitioner
JUBERTO MARTINS

JUNE 28 2000
ALJ

EDU3340-99

OAL DKT. NO. EDU 3340-99
AGENCY DKT. NO. 36-3/99

J.M., on behalf of minor child, R.G.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 28 2000

274-00

WOODBINE EDUCATION ASSOCIATION AND PAULA HARRIS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, certificated school nurse with 32 years of service to the District, alleged the Board improperly subjected her to a RIF while retaining less senior individuals to perform her duties. Petitioner contended she was given a choice between a low-paying part-time job without benefits and premature retirement with benefits. (Initially, the Board attempted to subcontract or privatize her school nursing services notwithstanding the fact that under the Education Laws, a duly certified school nurse must perform certain services.)

The ALJ concluded that the Board did violate petitioner's tenure and seniority rights when it failed to assign petitioner to teach its health curriculum when it reduced her school nurse assignment from full-time to part-time of 19-3/4 hours per week. The ALJ found that petitioner, who possessed an educational services certificate with its school nurse endorsement and an instructional certificate with its teacher of health education endorsement, was appropriately certificated to perform all the duties of a school nurse and to instruct pupils in health education. Moreover, the ALJ found that the Board, in its determination to impose a RIF to petitioner's nursing duties, failed to recognize her seniority with respect to her teaching of its health curriculum and assigned less senior teaching staff members to perform those duties. The ALJ ordered petitioner reinstated to her proper school nurse teaching position on a full-time basis and ordered the Board to provide petitioner with mitigated compensation, retroactive to September 1, 1998.

The Commissioner concurred with the ALJ's conclusion that respondent violated petitioner's tenure and seniority rights when it failed to assign her to teach the health classes in dispute herein and adopted the ALJ's order that petitioner be reinstated to her school nurse position on a full-time basis with mitigated compensation. The Commissioner determined that pursuant to *Ellicott*, petitioner was entitled to tenure protection in all assignments within her tenurable position of school nurse, the job description for which, in the instant matter, included health instruction both prior to and subsequent to the Board's RIF affecting petitioner's school nurse position. Pursuant to *N.J.A.C.* 6:11-11.7, the school nurse endorsement authorizes service as a school nurse *and* teaching in health-related areas. Thus, during the time period at issue, petitioner's teaching of health was authorized by her school nurse endorsement. Because a school nurse is not required to possess *both* an instructional certificate with an authorization to teach health *and* an educational services certificate with a school nurse endorsement, petitioner's possession of such an instructional certificate was immaterial to determining the present matter. The Commissioner noted that petitioner taught health pursuant to her school nurse endorsement, not her instructional certificate; hence, petitioner's tenure and seniority rights accrued under a school nurse position, and not under the separately tenurable position of teacher. The Commissioner, however, upon examination of the record, observed that the school nurse job description as revised and approved by the Board revealed that the teaching of health was in fact not eliminated from the school nurse position. Thus, the Board's argument that it abolished petitioner's school nurse position, which included both school nurse and health teaching responsibilities, and created two separate and distinct positions, one for school nurse and one for teaching health, was not supported by the record. Therefore, under the facts herein, assigning the teaching of health to teaching staff members who possessed less seniority than petitioner was deemed to be violative of her tenure and seniority rights. Since an individual holding only a county substitute certificate was in a school nurse position for two years, the Commissioner directed the county superintendent to determine the District's compliance with the mandates of *N.J.A.C.* 6:11-4.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6686-98

AGENCY REF. NO. 228-7/98

WOODBINE EDUCATION ASSOCIATION

AND PAULA HARRIS,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF WOODBINE, CAPE MAY COUNTY,

Respondent.

Keith Waldman, Esq., for petitioners, (Selikoff and Cohen, attorneys)

Ronald Sahli, Esq., for respondent, (Sahli and Padovani, attorneys)

Record Closed: May 18, 2000 Decided: July 10, 2000

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that the Board of Education of the Borough of Woodbine (Board) certificated school nurse was improperly subjected to a reduction in force (RIF) and that others who are less senior to petitioner are performing her duties.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing order was issued in this matter on January 26, 1999, with hearing dates established for May 20, 27 and 28, 1999. Subsequent discovery problems, a change in attorney for the Board and, the Board's attorney's illness and surgery delayed the matter. Petitioner now propounds her Motion for Summary Decision.

Petitioner's Position

Preliminary Statement

This case involves an attempt by the Board to perform nursing services "on the cheap." Intent upon eliminating the salary of school nurse Paula Harris – a career employee who faithfully served the district for 32 years – the Board acted in reckless disregard of the requirements of the Education Laws. At first, the Board acted to "subcontract" and "privatize" school nursing services, notwithstanding the fact that, under the Education Laws, a duly certified school nurse must perform certain services. Then, caught in this scam to circumvent the law, the Board engaged in a sham RIF, attempted to create a part-time 19-3/4 hour school nurse position while, at the same time, reassigning teaching functions formerly performed by Harris to less senior and non-tenured people in derogation of her tenure and seniority rights. The Board's refusal to honor Ms. Harris' tenure and seniority rights improperly forced her into the artificial choice between a low-paying part-time job without benefits and premature retirement with benefits. If this were not enough, the Board has since staffed the part-time school nurse position with a new hire that does not have a proper certification and has expanded the teaching responsibilities of less senior teachers. As of the 1999-2000 school year, the people who are

teaching Health and performing the school nursing functions are actually working more duty hours per week than Ms. Harris was before the sham RIF.

Statement of Uncontested Facts

As of the 1997-98 school year, Paula Harris worked as a school nurse for the Board for 32 years. Exh. A, seniority list, Bates No. 100054[3] Harris Certif., ¶2.

At all times, she taught Health as part of her job duties. Harris Certif. ¶3.

She has held an Educational Services Certificate with a school nurse endorsement since September of 1971 and a Teaching Certificate with a Teacher of Health Education endorsement since October of 1974. Harris' Educational Services and Teaching Certificates are attached to the Harris Certification as Exh. A.

Most recently, during the 1997-98 school year, she worked on a full-time basis and worked 29 hours of duty time per week. Harris Certif. ¶5.

At its May 11, 1998 meeting, the Board considered subcontracting all school nursing services. Exh. A., Board Minutes, Bates Nos. 100056-57. At the meeting, Ms. Harris appeared with her counsel and placed the Board on notice that the Board could not legally subcontract all school nursing services under the decisional law of the Commissioner of Education; in particular, under the decisions in *Old Bridge Education Association v. Old Bridge Board of Education,* CD-621-97; and *Dover Education Association v. Board of Education of Town of Dover,* CD-637-97.[4] Exh. A, Board secretary's unofficial handwritten minutes, Bates No. 100102; Board Minutes, Bates No. 100056. *These documents demonstrate that the Board was specifically made aware of these cases and the illegality of its action to privatize all school nursing services before it acted.*

[3] The Bates numbered documents included Exh. A to this brief are the Board's answers to interrogatories, the Board's supplements to its answers and true copies of the documents furnished by the Board as Exhibits to its answers to interrogatories and supplements. For the convenience of the Court, reference will be made by the nature of the document and bates number.

[4] These cases are discussed in detail in the Law and Argument section of this letter brief.

Nonetheless, the Board adopted a motion subcontracting all school nursing services. Exh. A., Board Minutes, Bates No. 100057.

At the Board's June 29, 1998 meeting, the Board admitted by conduct the illegality of its earlier action to privatize all school nursing functions. At the June meeting, the Board acted to create a 19-3/4 hour school nurse position which included the school nurse functions which the Board had previously acted to privatize. Exh. A., Board Minutes, Bates No. 100058; Job Description, Bates Nos. 100042-44.[5] The Board then offered the position to Ms. Harris by and through its labor consultant, William Yanonis, and its Superintendent, Roseann Cialella, at a meeting on June 29, 1998. Harris Certif., ¶6; Exh. A., Memorandum from Roseann Cialella to Paula Harris dated June 29, 1998, Bates Nos. 100061-62.

Under the terms of the collectively negotiated agreement between the Board and the Woodbine Education Association, Ms. Harris - as a "grandfathered" employee – was eligible for benefits so long as she worked a minimum of 20 hours per week. Harris Certif., ¶7; Exh. B thereto.

As a result, Harris accepted the position, subject to the Board's acknowledging her tenure and seniority rights to teach the Health courses. Harris Certif., ¶8 and Exh. C thereto. Ms. Harris' greatest concern was maintaining health benefits for her family. *Id.* For close to 15 years, Ms. Harris had been the sole source of health benefits for her family. *Id.*

The Board responded by memorandum. Exh. A. Memorandum from Roseann Cialella to Paula Harris dated July 10, 1998, Bates No. 100063. Significantly, in the memorandum, the Board made clear that the school nurse position would be a maximum of "19.5 hour [sic] a week"[4] and that additional hours would not be offered to Ms. Harris to conduct Health instruction. *In short, the Board claimed that the Health instruction was included in the 19-3/4 hour position.*

---

[5] Compare the nursing functions restored by job description *with* nursing functions listed in *Old Bridge*. *See,* pages 7 and 8 below.

The memorandum failed and refused to acknowledge or even discuss Harris' bumping rights to teach the Health courses which were being taught by Kimbra Goodwin, a much less senior teacher who had worked for the district only seven years as of the end of the 1997-98 school year and who had taught Health on a very limited part-time basis for no more than two years as of that time. *Id. Cf.* Exh. A., Seniority List, Bates No. 10054 *and* Harris Certif., ¶10.

The Board's refusal to acknowledge Ms. Harris' tenure and seniority rights to teach the Health courses forced Ms. Harris to choose between a 19-3/4 hour part-time job without benefits and premature retirement at a date earlier than she had planned to retire. Harris Certif. ¶11. She was forced to retire to maintain health benefits for her family, including her son in college, who she continues to support on her pension. The pension provides her with a substantially reduced income. *Id.*

Significantly, the Board's discovery responses and supplemental discovery responses admit that during the 1998-99 and 1999-2000 school years, *in addition to the 19-3/4 hours being worked by the part-time school nurse, other non-tenured or less senior people were, in fact, teaching additional hours of Health instruction.*

Specifically, the Board's supplemental answer to interrogatory 16(b)(4) admits that Christine Neill, the part-time school nurse, has worked 19-3/4 hours per week from November 1998 to present. Exh. A., Supplemental Interrogatory Answer 16(b)(4), Bates No. 100175 and Nurse's history, Bates Nos. 100176-77.[5]

The Board also provided schedules for all people who taught Health classes. Exh. A. Health instructor schedules, Bates Nos. 100110-11; 100180-83. The schedules show that during the 1998-99 school year, the less-senior Ms. Goodwin taught 3 hours, 20 minutes of Health per week. Exh. A, Goodwin's Health instruction schedule, Bates Nos. 100110-11. The schedules also show that during the 1999-2000 school year, the less-senior Ms. Goodwin taught 150

[5] The Board's discovery responses also reveal that the Board employed a cadre of nurses from September to early November of 1998 to fill the 19-3/4 hour per week part-time school nurse position. Exh. A., Nurse's history, Bates No. 100177. While not necessary to this motion, it appears that during substantial periods of time, the Board had only an LPN on site in violation of *N.J.A.C.* 13:37-6.2(c), which requires an RN to supervise an LPN at all times. Compare Exh. A., Nurse's history, Bates No. 100177 with Simsick LPN certificate, Bates No. 100067.

minutes of Health, a Ms. Sharon Gunn taught 250 minutes of Health and a Mr. Stephen Hensil taught 150 minutes of Health. Exh. A, Health instruction schedules, Bates Nos. 100180-82. Ms. Gunn and Mr. Hensil also had less seniority than Ms. Harris as of the date of the claimed RIF. Exh. A., Seniority list, Bates No. 10054.

Even if in July of 1998 the Board mistakenly believed that a part-time nurse could perform the nursing services and the Health instruction within 19-3/4 hours per week, *as of September of 1998- based upon the Board's own duty schedules – it was clear that all of the functions could not be performed within the 19-3/4 hours and were not, in fact, being performed within the part-time nurse's hours.*

In September, with the assignment of 3 hour, 20 minutes of Health instruction to the less-senior Ms. Goodwin, in addition to the 19-3/4 hours being worked by part-time school nurse McNeill, Ms. Harris' seniority and recall rights were triggered and the Board should have provided her with an opportunity to perform the school nurse functions ***and*** the Health instruction that were being performed by less senior or non-tenured people. If all of the duty hours were aggregated together and if the Board had honored Ms. Harris' tenure and seniority rights, in 1998-99 school year, the Board would have offered her part-time employment with benefits for the 23 hours, 5 minutes of duty time and, in the 1999-2000 school year, the Board would have offered her full-time employment for the 28 hours, 55 minutes of duty time.[6]

YEAR	SCHOOL NURSE DUTIES	HEALTH INSTRCTION	TOTAL DUTY HOURS
1997-98			
Harris-Full Time	(not broken down)	(not broken down)	29 hours
1998-99			
McNeill	19 hours, 45 minutes		
Goodwin		3 hours, 20 minutes	
			23 hours, 5 min.

1999-2000

McNeill	19 hours, 45 minutes	
Goodwin		2 hours, 30 minutes
Hensil		2 hours, 30 minutes
Gunn		4 hours, 10 minutes
		28 hours, 55 min.

Christine Neill was not certified as a school nurse. Instead, she holds only a county substitute teacher's certificate. Exh. A. Neill's certificate, Bates No. 100070.

The Board's payroll records and nurse's history reflect that at no time did Ms. Neill substitute for another person who was working in the position of school nurse. Exh. A., Payroll records, Bates No. 100073-88; Nurse's history, Bates No. 100177.

Law and Argument

Petitioner is Entitled to Summary Decision

II. The Legal Standard for Summary Decision

The case of *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520 (1996) has clarified the legal standard for summary judgment and, hence, summary decision.

In *Brill,* the New Jersey Supreme Court adopted the federal standard for summary judgment. *Brill* requires the trial court to engage in evaluation, analysis and sifting of evidence as if the court had before it a motion for involuntary dismissal under *R.* 4:37-2(b). Thus, under *R.* 4:46-2, summary judgment motions are to be decided by determining whether the competent evidence presented, when viewed in the light most favorable to the non-movant, is still sufficient to permit a rational fact finder to resolve the disputed issue in favor of the moving party. The judge is not to weigh the evidence and determine the truth of the matter, but to determine only

[6] This is substantially the same duty time than Ms. Harris worked per week during the 1997-98 school year. Harris Certif. ¶5.

whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 *U.S.* at 249, 106 *S. Ct.* 2505, 91 *L.Ed.* 2*d.* 202 (1986).

In deciding such motions, *Brill* requires that only those disputes go to trial which are "substantial" and not "imaginary" or "unreal." 142 *N.J.* at 529. In this connection, the court said that the "essence of the inquiry" is "whether the evidence presents a *sufficient* disagreement to require submission to a jury . . ." *Id.* at 533. "[W]here the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." *Id.* at 529 (citations omitted). An award of summary judgment is appropriate when "*the competent evidential materials* presented . . . when viewed in the light most favorable to the non-moving party, [are not] sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Brill,* 142 *N.J.* at 540.

III. Paula Harris is Entitled to Summary Decision

1. The Board's Action to Subcontract the Position of School Nurse Violated Statutory and Regulatory Law and the Decisional Law of the Commissioner of Education

There is no question that at its May 11, 1998 meeting, the Board acted to abolish the school nurse position and to privatize all of its function. The Board's minutes clearly reflect this action having been taken:

> Based upon the district's reorganization and a more efficient delivery of services being offered to our students, the President recommends that the Board approve *the position of school nurse to be abolished and that same services be subcontracted to a private company.* Motion by: L. Fisher, Second: D. Zweigenbaum. Ayes: Feliciano, Fisher, Forbes, Rodriguez, Youmans. Noes: Johnson. Abstain: Zweigenbaum (emphasis supplied).

On its face, the Board's action plainly violated the Education Laws and, in particular, the Commissioner of Education's decisions in *Dover Education Association v. Board of Education of Town of Dover,* CD-637-97, and *Old Bridge Education Association v. Old Bridge Board of Education,* CD-621-97. In *Dover,* the school board contracted out some nursing functions.

However, even after it privatized the services, the board still had two full-time school nurses on payroll. The Commissioner held that the board could fill in with non-certificated nurses so long as they did not perform the duties specifically reserved for certificated nurses. In the process, the Commissioner wrote:

> Initially, *the Commissioner observes that the education laws clearly require each school district to employ at least one school nurse,* who must be appropriately certified by the state board of examiners and who is considered a teaching staff member for purposes of salary, tenure and evaluation and to perform duties expressly reserved to school nurses. p. 9. (Emphasis supplied)

In short, *Dover* says that a local board of education has to have at least one school nurse as an employee. In *Dover,* after the privatization, the Board still had two school nurses on the payroll.

The Board's conduct in privatizing all nursing functions was also contrary to the Commissioner's decision in *Old Bridge Education Association v. Old Bridge Board of Education,* CD-621-97. In that case, the Commissioner ruled that:

> It is clear that under the Education Laws, *each school district must employ at least one school nurse,* who must be appropriately certified by the State Board of Examiners and is considered a teaching staff member for purposes of salary, tenure and evaluation. p. 13. (Emphasis supplied)

Old Bridge continues by specifically listing the school nursing services which the Board cannot privatize:

> It is clear that under the education laws, each school district must employ at least one school nurse, who must be appropriately certified by the State Board of Examiners and is considered a teaching staff member for purposes of salary, tenure and evaluation. *N.J.S.A.* 18A:40-1, 18A:26-2, 18A:1-1, 18A:28-5, 18A:29-4.2; *N.J.A.C.* 6:11-11.7, 6:3-4.1/3, 6:29-1.2(b)[FN1-A registered nurse may, upon receipt of a county substitute teacher certificate pursuant to *N.J.A.C.* 6:11-4.5, substitute for a certified school nurse on a short-term basis within the express limitations prescribed by that rule. (footnote in the original)]. The duties expressly reserved to "school nurses" are recognized as "school nursing services" pursuant to *N.J.S.A.* 18A:40-3.1, and include

> lecturing to teachers on recognition and prevention of communicable disease and other health concerns (*N.J.S.A.* 18A:40-3; *N.J.A.C.* 6:29-1.2(b)li, 6:29-1.2(b)lii.), examining pupils for the presence of scoliosis (18A:40-4.3; *N.J.A.C.* 6:29-1.2(b)1i.), recommending exclusion from school due to illness or exposure to disease (18A:40-7/8; *N.J.A.C.* 6:29-1.2(b)1v.), reporting, receipt of reports and examinations in instances of suspected substance abuse (18A:40A-12, *N.J.A.C.* 6:29-6.5), vision screenings, health appraisals and various consultative functions with respect to evaluation for and provision of special education services (*N.J.A.C.* 6:28-3.2 *et. seq.*, 6:28-11.3 *et. seq.*), audiometric screening (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)iii., 6:29-5.1), maintaining awareness of safe procedures for handling of body fluids (*N.J.A.C.* 6:29-2.5), accessing employee health records when permitted by the employee (*N.J.A.C.* 6:29-7.4), serving as liaison to the local board of health on issues relating to pregnancy and prenatal health (*N.J.A.C.* 8:52-5.3), administration of Snellen vision screenings for special learner's permits for obtaining a driver's license (*N.J.A.C.* 13:21-7.1 *et seq.*), testing for tuberculosis infection (*N.J.A.C.* 6:29-2.3), and completion or approval, as designated thereon, of health forms required to be submitted to the State. Additionally, where so assigned, the school nurse will provide instruction to students within the limitations of the school nurse endorsement (*N.J.S.A.* 18A:26-2; *N.J.A.C.* 6:11-11.7, 6:29-4.2). [FN2- It is noted that non-certified nurses may serve as resource persons for family life programs pursuant to 6:29-4.2(h), but may not actually instruct pupils. (footnote in the original).
>
> As these services are both required by law and, apart from pupil instruction, specifically reserved to certificated school nurses, each board of education must employ a sufficient number of such nurses to ensure their adequate provision. *N.J.S.A.* 18A:40-1, 18A:40-3.1.[7]

Notwithstanding the express prohibition in *Old Bridge and Dover,* the Board nonetheless acted to privatize all school nursing services in the district. In the process, the Board plainly violated the *Old Bridge and Dover* decisions.

II. The Board's Refusal to Honor Ms. Harris' Tenure and Seniority Rights Improperly Forcing Her to Choose between a Low-Paying Paying Part-time Job without Benefits and Premature Retirement

[7] On July 1, 1999, the Legislature enacted *P.L.* 1999c. 153, *N.J.S.A.* 18A:40-3.2 *et seq.*, codifying the rule of law articulated by the Commissioner in *Old Bridge and Dover.*

With Benefits

After the Board acted to privatize all school nursing function and had the illegality of this action brought to its attention, the Board belatedly recognized that it could not privatize all functions of the job. Yet, the administration was so intent upon performing school nursing services "on the cheap" that it set out to do so without regard for such statutory imperatives as Ms. Harris' tenure and seniority rights. At its June 29, 1998 meeting, the Board voted to create a 19-3/4 hour school nurse position. Given the 20 hour per week floor for benefits for "grandfathered" employees (Collectively negotiated agreement, Harris Certif., Exh. B), it is plain to see that the administration set the schedule for the part-time nurse position at 19-3/4 hours in an effort to avoid having to offer Ms. Harris a part-time position *with benefits.* However, the administration neglected to take into account the fact that for 32 years, Ms. Harris had taught the Health in the school district, that she had tenure and seniority rights in this area of instruction and that she had bumping rights to teach these hours of Health instruction.

As a result, when the Board offered her the 19-3/4 hour school nurse position, Ms. Harris asked the Board to recognize her bumping rights to teach the 11.2 hours of Health instruction which had been performed by her and the less-senior Ms. Goodwin during the 1997-98 school year. Harris Certif. Exh. C. The Board failed to do this, at first engaging in a sham RIF by claiming that the duties of Health instruction were included within the duties of the part-time school nurse. However, the fact that this was a sham RIF and the duties were actually to be performed by a less-senior person became clear as of the very first week of the 1998-99 school year. The Board's discovery responses plainly reveal that in addition to the 19-3/4 hours worked by the non-tenured school nurse, during the 1998-99 school year, the less-senior Ms. Goodwin taught an additional 3 hours, 20 minutes of Health instruction. Exh. A., Supplemental Interrogatory Answer 16(b)(4), Bates No. 100175; Nurse's history, Bates Nos. 100176-77. When these hours are added to the part-time school nurse's hours, it is clear that 23 hours, 5 minutes of duty hours could have been and should have been offered to Ms. Harris. The sham nature of the RIF became even more egregious during the 1999-2000 school year. For the 1999-2000 school year, when the 19-3/4 duty hours worked by the part-time school nurse are aggregated with the 9 hours, 10 minutes of Health instruction being conducted by less-senior teaching staff members, a full-time job with 28 hours, 55 minutes of duty time should have been made available to Ms. Harris.

When a board abolishes a full-time position, it is ordinarily obliged to aggregate the duties of remaining part-time positions in order to provide continuing full-time employment to the riffed tenured full-time teaching staff member, *e.g., Brueck v. Fairview Board of Education,* 97 *N.J.A.R.* 2*d.* (EDU) 283, 10 Jan 97, appeal dismissed, 97 *N.J.A.R.* 2*d.* (EDU) 555, 7 May 97 (Full-time teachers who were riffed when physical education, health and music programs were assigned to departmentalized 7-8 classroom teachers were entitled to teach those subjects, plus subjects requiring no specific certification, over less senior secondary teachers); *Kojak v. Mount Arlington Board of Education,* 94 *N.J.A.R.* (EDU) 295 (Speech corrections riffed to part-time was entitled to the LDTC-C duties assigned to non-tenured person and for which the speech corrections qualified by an unused LDTC-C endorsement); *McGlynn v. Sea Girt Board of Education,* 93 *N.J.A.R.* 2*d.* (EDU) 438 (Social Studies teacher riffed to part-time was entitled to have the remaining social studies classes rescheduled to afternoon so that he could also teach the available morning kindergarten class); *Laufenberg v. Ramapo Indian Hills Regional Board of Education,* 91 *S.L.D.* 2447 (English teacher riffed to a supplemental teaching position was entitled to the full-time aggregate of part-time positions held by non-tenured teachers); *Bartz v. Green Brook Board of Education,* 86 *S.L.D.* 1486, aff'd 87 *S.L.D.* 2520 (Absent educational reasons for the replacement of two full-time home economics positions with two four-sevenths home economics positions, the board was ordered to reorganize the positions so that the more senior teacher could continue to enjoy the remaining full-time position); *Valinski v. Garwood Board f Education, State Board of Education* Dkt. No. 20-85, 8 Nov. 85 (unreported). (State Board invalidated the reduction of two physical education positions from full-time to four-fifths time, because one of the positions was held by a tenured teacher and the other was held by a non-tenured teacher, and the tenured teacher was entitled to continue in a full-time position); *Lingelback v. Hopatcong Board of Education,* 84 *S.L.D.* 1955; aff'd *N.J. Super., App. Div.,* 85 *S.L.D.* 1953 (Board could not replace one full-time social worker with two part-time social workers, performing the same duties in less time and at considerably lower hourly rates); *Miles v. Watchung Board of Education,* 84 *S.L.D.* 1058 (Vocal music teacher, riffed from full-time to four-fifths time while a non-tenured music teacher was retained in a four-fifths position in another school, was entitled to work one day a week in the other school, reducing the non-tenured teacher to three-fifths in order to reconstitute the tenured teacher's full-time position).

The only exception to the legal requirement to aggregate duties is where the Board has set forth specific "educationally based reasons" for dividing the remaining work into part-time positions, *Bartz, supra.* In the present case, the Board failed to provide any educationally based reasons to justify dividing the remaining work into part-time positions. To the contrary, a close examination of the teaching schedules for the Health instruction classes for the 1998-99 and 1999-2000 school years reveals that one person could have taught all the classes with absolutely no disruption to or revision of the schedule for Health instruction. For the 1998-99, the composite schedule for health instruction was as follows:

TIME	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
8:55-9:45			Goodwin-5th		
9:45-10:35		Goodwin-6th	Goodwin-7th		
10:35-11:25					
12:50-1:40	Nurse-Young	Nurse-Farnan	Nurse-Harris	Nurse-Casebeer	Nurse-Klemic

See Exh. A, Bates Nos. 100110-11.

For 1999-2000. the composite schedule for health insurance is as follows:

TIME	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
8:55-9:45				Goodwin-8	Hensil-6C
9:45-10:35			Hensil-5G	Hensil-5N	
10:35-11:25	Goodwin-6J			Goodwin-7	
1:15-2:05	Gunn-KH	Gunn-4H	Gunn-4Y	Gunn-1	Gunn-KF
2:05-2:55	Nurse-2 Rinck	Nurse-3 Barile	Nurse-3 Newman		Nurse-2 Hendes

See, Exh. A., Health instruction schedules, Bates Nos. 100180-183.

In conclusion, the Board failed to abide by its legal obligation to aggregate the remaining duties in order to provide continuing full-time employment to Ms. Harris in the 1998-99 or 1999-2000 school year or to provide her with part-time employment which exceeded the 20 hour benefit floor for "grandfathered" employees under the collectively negotiated agreement. Harris Certif. Exh. B. The Board's violation of Ms. Harris' tenure and seniority rights forced her into an artificial choice between a part-time job with benefits and retirement at an earlier date than she had planned so that she could maintain benefits for herself and her family. As a direct and proximate cause of the Board's violation of her tenure and seniority rights, Ms. Harris was forced to resign and retire to mitigate her damages.

Under the circumstances, this tribunal should craft a remedy to reverse the effect of the Board's illegal refusal to aggregate the job duties to which Ms. Harris had tenure and seniority rights; reinstating her with back pay, pension contributions and credit for the time she lost as a result of the Board's illegal actions and allowing her to take a portion of the back pay award to repay the pension benefits she has drawn and to reinstate her account. This is the only remedy that will make Ms. Harris whole.

3. The Board Has Violated and Continues to Violate the Education Regulations and the Decisional Law of the Commissioner of Education By Having Non-Qualified People Serve as Part-time School Nurse Using Substandard Certifications.

If the Board's efforts to privatize school nursing functions and to ignore Ms. Harris' tenure and seniority rights were not enough, the Board has since staffed the part-time school nurse position with a new hire who does not have a proper certification. Mrs. Neill, the part-time nurse, does not even have an Educational Services certificate with a school nurse endorsement. Instead, she has held the position for more than 20 days utilizing a county substitute teacher's certificate. Exh. A. Neill's certificate, Bates No. 100070. In further violation of the Education Regulations, the Board's payroll records and the Nurse's history demonstrate that she substitutes for no one. Exh. A. Payroll records, Bates Nos. 100074-88; Nurse's history, Bates Nos. 100176-77.

The Commissioner has recognized that this particular misuse of a county substitute certificate is a clear violation of the Education Regulations. *Pennsville Education Association v. Pennsville Township Board of Education,* CD-141-5/98 (9/9/99). In that case, the petitioner argued that the only proper use of a county substitute certificate is to substitute for a properly certificated employee in a position for no more than 20 days.[8] The Commissioner specifically adopted this legal contention, holding that "[p]ersons who hold substitute certificates *are* to be employed only in the manner prescribed by *N.J.A.C.* 6:11-4.5." (emphasis in the original).

In the present case, the net result of the Board's pattern of illegal conduct is that an inadequately qualified nurse is available in the school for only a part of each school day. Should a medical emergency arise, due to the Board's illegal actions, Paula Harris – a person who has the proper qualifications and who diligently served the district for 32 years – is not available to meet the needs of a student or staff member in crisis.

For the foregoing reasons, petitioner Paula Harris, requests that this tribunal issue an order:

a. finding and declaring that respondent's action to deprive petitioner of a full-time teaching position was in violation of her tenure and seniority rights;

b. directing respondent to recognize petitioner's tenure and/or seniority rights by reinstating her to a full-time position as a school nurse;

c. directing respondent to provide petitioner with all salary, benefits and emoluments she is entitled to by law and under the negotiated agreement in force and effect in the Woodbine School District, retroactive to September 1, 1998;

d. attaching both pre- and post-judgment interest to any back pay award as permitted by law;

e. directing respondent to take all actions necessary to assure that petitioner receives proper pension credit retroactive to September 1, 1998, including but not limited to the making of retroactive pension contributions, and

[8] This restriction is clearly set forth on the face of Ms. Neill's certificate. Exh. A. Neill Certificate, Bates No. 100070.

f. granting such other relief as is deemed appropriate.

The Board's Position

Preliminary Statement

In contrast to the Preliminary Statement of the petitioner, this case involves an issue of reduction in force (RIF) and whether the respondent performed the RIF in accordance with the requirements. The intent of the Woodbine Board of Education (Board) was to cut back on the position of school nurse in accordance with the Educational Laws that govern such RIFs. It is true that the Board initially attempted to subcontract and/or privatize the school nursing services in an effort to save money, however, after investigation and research and prior to implementation regarding the reduction of the position for economic reasons, it was determined by the Board that the position could not legally be subcontracted and/or privatized. There was no attempt to circumvent the law, the Board was not aware of the prohibition regarding subcontracting and/or privatizing when it conducted its investigation. However, upon being apprised of the Educational Law the Board did not pursue this method of economic relief any further. Counsel elects to classify what happened to the petitioner subsequently as a sham RIF.

The Board upon consulting with labor consultant, William Yanonis of Casseta, Taylor and Weisman, determined that savings could be realized by the Board if a part-time, 19-3/4 hours per week school nurse position were to be created. The Board determined that in order to realize sorely needed savings in its operation, the aforesaid part-time position would be created and in so doing, the reduced position was first offered to the petitioner Paula Harris as set forth in petitioner's exhibits at Bates Nos. 100061 and 100062. The petitioner chose to retire as set forth in petitioner's exhibits at Bates Nos. 100035, 100036, 100037 and 100038.

At all times the tenure rights and seniority rights of the petitioner and her co-workers were considered when making the RIF. The thrust of the RIF by the Board at all times was to cause an economy to assist the Board in a more efficient delivery of educational services that would be offered to the students of the community they represented. The economic problems

that were facing the Board had been initially identified in a meeting with the Mayor of Woodbine as set forth in petitioner's exhibits at Bates Nos. 100118, 100119, 100122, 100123, 100124 and 100125. The RIF was part of an ongoing effort of a school board that was experiencing State of New Jersey funding cuts as a small school system that has approximately 400 students. The position of school nurse as it was redefined by the Board was first offered to the petitioner, and it was the petitioner's duty to either accept or refuse the position. The petitioner chose to refuse the position as it was redefined with new part-time hours.

The position was filled with qualified personnel and the petitioner in her sole discretion, decided to retire. At all times that are relevant to the decision of the Board and the petitioner, the only certification that had ever been presented and was on file with the Board's administrative offices as that of school nurse as set forth in petitioner's exhibits at Bates No. 100022. The petitioner was employed by the Board in accordance with Board policy as set forth in the petitioner's exhibits at Bates Nos. 100040 and 100041.

The assertion of counsel for the petitioner is stated that people who have replaced the petitioner to teach Health and perform nursing functions are actually working more school hours. As a result, counsel for the petitioner has labeled this a "sham RIF." However, the costs of the benefits that are no longer afforded the new employees in the positions is not taken into account of petitioner's counsel's analysis nor was the amount that was the reduced amount that is being paid for the cut back position of school nurse. The Board was, and continues to be, in financial crisis and any sums that could be saved to maintain the efficient delivery of educational services to the students of the community they represented had to be considered.

Further, the petitioner in her certification presents, at Exhibit A., an Educational Services certificate with a school nurse endorsement dated September of 1971. In the same exhibit she further provides a Teaching certificate with Teacher of Health Education endorsement dated October of 1974. The court should take special notice regarding this certificate of October of 1974. It is a duplicate and is signed by the Commissioner, who, at the time, was Leo Klagholtz. This certificate was never on file with the Board until after the RIF had taken place as set forth in Exhibit C of the petitioner's certification. As you can see, the first time that a Teaching Certificate with Teacher of Health Education endorsement dated October of 1974 was provided

to the Board was under cover of June 30, 1998. It has been the respondent's position that the petitioner only taught health education under the Nurse's Certificate since it was not on file with the Board and not under the Certificate with the Teacher of Health Education endorsement. Accordingly, the petitioner did not have any seniority as a teacher as is alleged in the motion for summary decision which would afford her the rights claimed. This recites the issues of the matter before the court.

Statement of Uncontested Facts

Petitioner's counsel has taken the liberty to recite facts which are clearly disputed by the respondent. In order to address the items of petitioner regarding uncontested facts the respondent has address its response to correlate with each paragraph written by the petitioner in this section. Respondent sets forth its qualifications to the facts as recited on the brief of the petitioner as follows:

1. As of the 1997-98 school year, the petitioner, Paula Harris, worked as a school nurse under a school nurses certificate only for the 32 years that she was employed. The Exh. A seniority list at petitioner's Bates No. 100054 only lists seniority and not New Jersey Department of Education certificates on file with the Board.

2. The Board only agrees that the petitioner did teach health under a school nurse's certificate only as part of her job duties.

3. The only Educational Services certificate that was ever provided to the Board prior to the aforesaid Exhibit C transmittal by the petitioner of June 30, 1998, was that with a school nurse endorsement as provided at Bates No. 100022. The Teaching Certificate with a Teacher of Health Education endorsement as set forth in Exhibit A came with the letter in Exhibit C and was a duplicate.

4. During the 1997-98 school year, petitioner worked on a full-time basis.

5. The actions that are set forth by petitioner's counsel regarding May 11, 1998 are correct, however, petitioner's counsel

fails to recite that the subcontracting of all school services was never implemented.

6. The actions that are set forth by petitioner's counsel regarding May 11, 1998 are correct, however, petitioner's counsel fails to recite that it was not until June 30, 1998, that Exhibit C of Harris' certification was a Certificate with a Teacher of Health Education endorsement provided to the Board.

7. Under the terms of the collectively negotiated agreement between the Board and the Woodbine Education Association, Ms. Harris – would not be a "grandfathered employee" since the position was reduced to 19-3/4 hours per week as set forth at petitioner's Bates No. 100061 and 100062.

8. Petitioner's concerns were that she did want to maintain health benefits, however, the Board had to focus on a more efficient delivery of educational services that would be offered to the students of the community they represented and continued on cost-saving measures as set forth in petitioner's Bates Nos. 100118 and 100119. The Board had no obligation to accept the conditions that the petitioner placed on petitioner's acceptance of 19-3/4 hours per week position when asked to recognized tenure and seniority rights when it did not have, nor was it ever aware of, the Certificate with a Teacher of Health Education endorsement that was claimed by the petitioner after the fact.

9. The memo of July 10, 1998 that petitioner's counsel sets forth at Bates No. 100063 speaks for itself in that a school nurse position for 19-3/4 hours per week was created and does not need any interpretation.

10. The Board was under no obligation to discuss bumping rights with regard to the petitioner's teaching certificate with Teacher of Health Education endorsement since it was not aware of nor was it on file with the Board at the time of the RIF. Board's position is that it did not have to review seniority relative to the petitioner as it pertained to a teaching position for health since the petitioner only taught health under a school nurse's certificate.

11. Petitioner exercised her right to retire.

12. The Board was under no obligation to discuss bumping rights with regard to the petitioner's teaching certificate with Teacher of Health Education endorsement since it was not aware of nor was it on file with the Board at the time of the RIF. The Board's position is that it did not have to review seniority relative

to the petitioner as it pertained to a teaching position for health since the petitioner only taught health under a school nurse's certificate.

13. Christine Neill was hired as a school nurse under certification as set forth in Bates No. 100070 and has worked as the part-time 19-3/4 hours per week, nurse since the commencement of the 1998-99 school year and has not received any benefits.

14. The positions of school nurse and the Teaching of Health were separated into two separate and distinct positions. The part-time school nurse was obligated to follow the job descriptions as set forth in Bates Nos. 100042, 100043, 100044 and 100061. The health instruction was primarily provided by other certified personnel. Health education does not have to be provided by a person that is holding a school nurse's certificate.

15. The positions of school nurse and the Teaching of Health were separated into two separate and distinct positions. The part-time school nurse was obligated to follow the job description as set forth in Bates Nos. 100042, 100043, 100044 and 100061. The health instruction was primarily provided by other certified personnel. Health education does not have to be provided by a person that is holding a school nurse's certificate.

16. The chart that is presented by counsel for the petitioner shows that the duties of the petitioner were clearly separated into two areas; School Nurse Duties and Health Instruction. By the Board separating the duties it was able to achieve further economy in a more efficient delivery of education services that would be offered to the students of the community they represented. Time was not the governing factor for the RIF; money was.

17. Christine L. Neill holds a County Substitute Certificate to act as a school nurse.

18. The initial employment of a school nurse was to Daniel Headley for the 1998-99 school year who was subsequently replaced by Christine Neill. Both meet the requirements to be employed by the Board as the school nurse. See Exhibit B.

Law and Arguments

Petitioner's Request for Summary Decision Should Be Dismissed and the Request for Summary Decision Should Be Granted

g. The Legal Standard for Summary Decision

The federal standard for summary judgment was adopted by the New Jersey Supreme Court in the case of *Brill v. Guardian Life Insurance Co.,* 142 *N.J.* 520 (1996). The *Brill* case requires the trial court to engage in the evaluation, analysis and sifting of evidence as if the court had before it a motion for involuntary dismissal under *R.* 4:37-2(b). The legal standard for summary judgment and before this court summary decision follows under *R.* 4:46-2, summary judgment motions which are to be decided by determining whether competent evidence presented, when viewed in the light most favorable to the non-movant, is still sufficient to permit a rational fact finder to resolve the disputed issue or issues. In deciding such issues or issues when such motions are brought, *Brill* requires that only those disputes go to trial which are "substantial" and not "imaginary" or "unreal."

B. The Board is entitled to Summary Decision and the request for Paula Harris for Summary Decision should be dismissed.

1. The Board's action to subcontract the position of school nurse to reduce costs was never implemented and was abandoned by the Board in favor of its right to reduce a full-time position to a part-time position of less than 20 hours per week.

Although the Board initially acted to abolish the full-time school nurse position by privatization and/or subcontracting, the Board did not carry out the plan after the appropriate research was performed. Unless the plan was carried out, there is no violation of law or the rights of the petitioner. Counsel for the petitioner recites the case of *Dover Education Association v Board of Education of the Town of Dover,* CD-637-97 as to the alleged violation. However, the argument that counsel makes fails since the *Dover* case the Board "went through and contracted out some nursing functions." In the case at hand, the petitioner is correct that the Commissioner observes that the education laws clearly requires each school district to employ at

least one school nurse. However, nowhere in the law is it stated that the employment must be full-time versus part-time. The Commissioner also pointed out that the board could fill in with non-certified nurses so long as they did not perform the duties specifically reserved for certificated nurses. Again nothing is said regarding the fact that the certified nurse must be employed full-time.

Many school districts employ less than one school nurse for each school building and seek to have other personnel perform some of the functions of the school nurse in the school nurse's absence. While *N.J.S.A.* 18A:40-1 requires every school district to "employ one or more school nurses," case law decided by the Commissioner has made it clear that the school nurse position need not be full-time, nor is it necessary to employ one school nurse for each school building.

Where the school nurse's position is less than full-time or where one school nurse is required to cover more than one school building, the school district is usually faced with the necessity of employing other personnel to perform many of the functions of the school nurse in the school nurse's absence. Some functions of the school nurse which may be assigned to other personnel were discussed by the Commissioner of Education in the case of *Wyckoff Education Association v. Wyckoff Board of Education,* 1982 *S.L.D.* 590, and also in the case of *Bernards Township Education Association vs. Board of Education of Bernards Township,* 1981 *S.L.D.* 1071, aff'd by the *State Board,* 1982 *S.L.D.* 1443 subsequently, aff'd by the *Superior Court, Appellate Division.*

Additionally, because the Board was faced with a financial crisis which required a RIF for reasons of economy, many Boards will often decide to reduce a full-time position workload to part-time. A Board will usually assume that such a determination on its part is, in effect, a "reduction in force" under *N.J.S.A.* 18A:28-9 which does not need to be negotiated with the teachers union.

Accordingly, the Board concludes and asserts to the court that it did not violate any case law or statute in the final analysis of the RIF of the position of school nurse from full-time to a part-time position. In the analysis on this issue the Board respectfully requests that the court rule

that the claim summary decision that the Board acted properly with the RIF of the position of school nurse from full-time to a part-time position since it did not ever implement privatization and/or subcontracting of the school nurse position.

2. The Board did not have a duty to provide the petitioner regarding tenure and seniority rights since the petitioner only taught Health with the Board under an Educational Services certificate with a school nurse endorsement dated September of 1971.

The Board takes the position that petitioner never filed with the Board a Teaching Certificate with Teacher of Health Education endorsement until the transmittal from the petitioner dated June 30, 1998. Further, after an inquiry of the Cape May County Office of the Superintendent (CMCOS) it was determined that the same certificate was not on file with them. This fact is documented in the attached Exhibit A. This documentation that was recently provided by the CMCOS and submitted for review by the CMCOS, clearly demonstrates in the reports titled New Jersey Department of Education, Report of Certificated Staff for October 14, 1994, October 14, 1995, October 15, 1996 and October 15, 1997, Final Staff Listing that the petitioner did not have a teaching certificate with Teacher of Health Education endorsement on file.

The Board, as required, would always honor tenure and seniority entitlement in accordance with appropriate provisions of *N.J.S.A.* 18A. However, it is the responsibility of the employees of the Board to keep the administration apprised of any new or additional endorsements to their Department of Education Certification or earned new additional certifications. This was not done in over 25 years. It is from this information that seniority and/or tenure lists are established on a year-to-year basis. The only position that the petitioner had documented seniority and/or tenure rights to were that of the school nurse. According to the records of the Board a teaching certificate with Teacher of Health Education endorsement was never presented prior to the RIF and as a result the petitioner had no tenure and/or seniority rights as a teacher within the district. The Board only had an obligation to offer the part-time position for school nurse to the petitioner under the circumstances and the petitioner's assertion that the petitioner was entitled to bump into teaching position is simply not founded. Further, the intent of the RIF was to split the position into two separate segments, one of the school nurse and one

to teach health. The petitioner cannot combine the positions presented because she believes she has an entitlement that was never documented within the Board or the CMCOS. Counsel for the petitioner is quick to cite *Brueck v. Fairview Board of Education,* 97 *N.J.A.R.* 2nd. (EDU) 283, 10 January 1997, appeal dismissed, 97*N.J.A.R.* 2nd. (EDU) 555, 7 May 1997. However, a review of this matter shows that each person involved in the case held a teaching certificate and did have tenure and seniority rights which are not available to the petitioner. The same is true with the cite of *Kojak v. Mount Arlington Board of Education,* 94 *N.J.A.R.* 2nd. (EDU) 295, which again deals with the rights of teachers that have teaching certificates. If a teaching certificate is not on file, it has no merit when calculating seniority and/or tenure.

The entitlement of tenure as claimed by the petitioner is effectively restricted by case law. In the case of *DeCarlo v. South PlainfieldBoard of Education*, 1988 *S.L.D.* 1796 it is stated that entitlement to tenure does *not* extend to certificates which a person has not served. Petitioner never served under any certificate under other than that of a school nurse. Similar restrictions were recited in the case of *Kaprow v. Berkley Township Board of Education,* 1989 *S.L.D.* 2885, aff'd *State Board of Education* 1991 *S.L.D.* 2561, aff'd *N.J. Super.,* 76 (*App. Div.* 1992), aff'd 131 *N.J.* 572 (1993). Under the circumstances, the Board was permitted to RIF as aforesaid and pursuant to *N.J.S.A.* 18A:28-9 *et seq.,* since Boards may reduce staff for reasons of economy, reduction in pupils, change in administrative or supervisory or other good cause. The issue of seniority that is alleged by the petitioner is set forth in *N.J.A.C.* 6:3-5.1 which calls for a rating of academic or calendar years of employment, or fraction thereof, in district in specific categories. The only category that the petitioner accrued tenure and/or seniority was that of a school nurse.

In all the cases cited by petitioner, it is the assertion of the petitioner that the petitioner has rights under a teaching certificate and alleges that the Board may not have had "educationally based reasons" for dividing the position. It is the Board's contention that the position was not divided and the school nurse position was a RIF from a full-time position to be a part-time position, and that there were other teaching positions with the appropriate certifications available to create continuity of education with the use of existing staff. By doing this, the Board could provide a more efficient delivery of educational services that would be offered to the students of the community the Board represented.

Just because one person could have done both jobs does not preclude the Board from a RIF nor does it prevent the Board from separating the duties that were being performed to part-time school nurse and other staff members either full-time or part-time.

Based on the assertions and the interpretation of the case law regarding this issue the Board respectfully requests that this tribunal rule that the petitioner did not have tenure and/or seniority rights. The petitioner never provided the Board with a teaching certificate with Teacher of Health Education endorsement that provided the petitioner with the rights that petitioner is alleging. Further it is requested that this tribunal rule in favor of the Board that it acted properly with the RIF of the position of school nurse from full-time to a part-time position, and not providing the petitioner with bumping rights which petitioner is seeking in the petitioner's request for a summary decision.

3. The Board at all times has used properly credentialed personnel in filling the part-time school nurse position.

Petitioner continues to allege that the personnel employed by the Board do not meet the qualification necessary to perform the duties of the position in which they have been placed. The Board asserts that all positions for the entire district are reviewed annually for compliance by the CMCOS. Since the RIF of the school nurse position from full-time to part-time as aforesaid in June of 1998 there has been one school year completed and a second year near completion, and the Board has not been cited for any impropriety. Further the Exhibits at B, C and D reflect the certification codes for the personnel who have held the position of school nurse for the Board. The codes that is listed in all instances is #3000 which is listed as the appropriate code in the legend provided for in Exhibit A.

Based on the assertions and the interpretation of the case law regarding this issue as set forth in prior arguments of law and the presentation of the position of the Board in this brief, the Board respectfully requests that the Court rule that the petitioner was entitled to the position of part-time nurse and solely declined to accept the position of part-time nurse at 19-3/4 hours per week. Further that the Board, when offering the position of school nurse as a RIF that it had no

obligation to offer the petitioner a teaching position as a teacher of health and that the Board is entitled to have a part-time nurse provide the services of school nurse.

For the foregoing reasons, respondent, Board, requests that this tribunal issue an order:

a. Dismissing the Motion for Summary Decision of the petitioner;

b. Find and declare that the respondent was not obligated to provide a full-time teaching position to the petitioner;

c. Find and declare that the respondent was not obligated to review tenure and/or seniority of the petitioner under a Teaching certificate with Teacher of Health Education endorsement that was never on file with the Board and/or the CMCOS.

d. Find and declare that the petitioner only had rights of tenure and/or seniority under the Educational Services certificate with a school nurse endorsement dated September of 1971.

f. Find and declare that the petitioner's election to retire was done as the petitioner's sole action and was not a result of the RIF implemented by the Board.

e. Granting such other relief as is deemed appropriate.

Petitioner's Reply to the Board's Position

Preliminary Statement

The Board makes a two-pronged attack upon Ms. Harris' legal position. First, the Board argues that it never implemented its decision to subcontract the position and, instead properly acted to reduce the position from full-time to part-time in a RIF. Second, the Board argues that it had no obligation to notify Ms. Harris regarding tenure and seniority rights because she had taught Health under an Educational Services certificate with a school nurse endorsement and, therefore, did not have tenure or seniority to teach these courses under her Instructional

certificate with its teacher of Health Education endorsement. Although both of these arguments have an appeal on first blush, they are not supported by the factual record in this case, the tenure and seniority statutes, or the decisional law of the Commissioner.

This brief sets forth a detailed analysis of the facts of this case, the applicable law, and why the law requires that summary decision by entered in Ms. Harris' favor. Before addressing the Board's arguments on a detailed basis, it is important to stop and focus on the Educational Services certificate with the school nurse endorsement. The State Board's regulation clearly provide that this [school nurse] endorsement authorizes service as a school nurse . . . *and teaching in areas related to health." N.J.A.C.* 6:11-11.7(a) (emphasis supplied). Given: (a) that the State Board has by regulation, determine that the school nurse endorsement is an appropriate endorsement for the teaching of health-related courses; (b) given that it is undisputed that Ms. Harris' held this endorsement at all times during her 32 years of service (which included her continuously teaching Health for the Board) – and given that, as of the date of the purported RIF, she was by far the most senior, tenured health instructor, by virtue of her continuous services in the position as the holder of two appropriate certificates, the Board plainly violated her tenure rights by failing to give her an opportunity to teach the health courses and instead retaining less senior teachers to teach health.

Supplemental Statement of Uncontested Facts

The Board has responded to Ms. Harris' Statement of Uncontested Facts with a number of "qualifications." Ms. Harris' Statement of Uncontested Facts sets forth a specific basis for each asserted fact in the Certification of Paula Harris dated February 7, 2000 (Harris Certification or Harris Certif.), the Board's certified answers to interrogatories and exhibits thereto and the pleadings. In contrast, an alarming number of the Board's factual contentions made in its "qualifications" are without record support.

Nonetheless, this brief will carefully review the facts as set forth in Ms. Harris' Initial Brief, the Board's "qualifications" to those facts, and Ms. Harris' response to the Board's qualifications:

1. Ms. Harris' initial brief says that as of the 1997-98 school year, Ms. Harris worked as a school nurse for the Board for 32 years, Initial Brief at 2 citing Exh. A thereto (seniority list, Bates No. 100054) Harris Certif.¶2. Without providing any record support, the Board's qualifications contend that Ms. Harris worked as a school nurse "under a school nurse's certificate only." Bb. at 3, ¶1[9] In contrast, the certification of Paula Harris dated May 12, 2000 (Harris' Second Certification or Harris Certif. II) clearly demonstrates that the Board notice that Ms. Harris had the Instructional Certificate with the Teacher of Health Education endorsement in 1974. Ms. Harris had been paid on a separate guide until that time. Harris Certif. II at ¶2. In a significant admission by conduct, in 1974, when Ms. Harris received her Instructional Certificate with its Teacher of Health Education endorsement, the Board placed her on the Teacher's guide of the contract at that time. *Id.* The only rational inference that can be drawn was that the Board receive a copy of the Instructional certificate in 1974 and moved her onto the Teacher's guide in reliance upon that certificate. The Board fails to present any credible or competent evidence that it did not receive a copy of the Instructional certificate in 1974.

2. Ms. Harris' Initial Brief notes that, at all times, she taught health as part of her job duties. Initial Brief at 2 citing Harris' Certif. ¶3. The Board's "qualifications" admit that Ms. Harris taught health. [10] However, without any evidentiary support, the Board maintains that she taught health "under a school nurse's certificate only." This contention is contrary to the facts set forth in Harris' Second Certification. It is also a distinction without any legal importance given that the Educational Services certificate with the school nurse endorsement is an appropriate endorsement for the teaching of health. *N.J.A.C.* 6:11-11.7(a).

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[9] These cases are discussed in detail Ms. Harris's Initial Brief. Since, Ms. Harris' Initial Brief was filed, the State Board's Legal Committee has issued its report in *Dover Education Association, supra.* Underscoring the impropriety of subcontracting school nursing services as defined by statute. A true copy of the Legal Committee Report is attached as Exh. A.

[10] *Compare* the nursing functions restored by job description *with* nursing functions listed in *Old Bridge.* *See,* pages 7 and 8 below.

3. Ms. Harris' Initial Brief demonstrates that Ms. Harris has held an Educational Services certificate with a school nurse endorsement since September of 1971 and an Instructional certificate with a Teacher of Health Education endorsement since October of 1974. Initial Brief at 2 citing Harris Certif., Exh. A. Without record support, the Board denies having received Ms. Harris' Instructional certificate with its Teacher of Health Education endorsement before the purported RIF. The Board's unsupported contention is directly contradicted by Harris' Second Certification, ¶2.

4. Ms. Harris' Initial Brief says that during the 1997-98 school year, she worked on a full-time basis and worked 29 hours of duty time per week. Initial Brief at 2 citing Harris Certif., ¶5. The Board does not contest these facts.

5. Ms. Harris Initial Brief says that at its May 11, 1998, the Board considered subcontracting all school nursing services. Initial Brief at 2 citing Exh. A thereto, Board Minutes, Bates Nos. 100056-57. At the meeting, Ms. Harris appeared with her counsel and placed the Board on notice that the Board could not legally subcontract all school nursing services under the decisions in *Old Bridge Education Association v. Old Bridge Board of Education,* CD-621-97, and *Dover Education Association v. Board of Education of Town of Dover,* CD-637-97.[11] Initial Brief at 2 citing Exh. A thereto, Board secretary's unofficial handwritten minutes, Bates No. 100102; Board Minutes, Bates No. 100056. *These documents demonstrate that the Board was specifically made aware of these cases and the illegality of its action to privatize all school nursing services before it acted.* Nonetheless, the Board adopted a motion subcontracting all school nursing services. Initial Brief at 2 citing Exh. A thereto, Board Minutes, Bates No. 100057. The Board admits that it took this action. Bb4, ¶5. However, the Board notes that it never implemented the action it took to subcontract the school nursing services. *Id.* The Board appears to contend that there was "no harm, no

[11] These cases are discussed in detail in Ms. Harris' Initial Brief. Since, Ms. Harris Initial Brief was filed, the State Board's Legal Committee has issued its report in *Dover Education Association, supra.,* underscoring the impropriety of subcontracting school nursing services as defined by statute. A true copy of the Legal Committee Report is attached as Exhibit A.

foul" as a result of its initial action. However, even if not ultimately consummated, the passage of the motion to privatize was itself a violation of the Education Laws. The action is also relevant and probative because it shows that the Board was so intent upon eliminating Ms. Harris' position that it acted to adopt the motion in willful indifference of the requirements of the Education Laws. The Board's initial action sets the stage for the Board's efforts to subvert Ms. Harris' tenure and seniority rights in the sham RIF that followed.

6. Ms. Harris' Initial Brief reveals that at the Board's June 29, 1998 meeting, the Board admitted by conduct the illegality of its earlier action to privatize all school nursing functions. At the June meeting, the Board acted to create a 19-3/4 hour school nurse position which included the school nurse functions which the Board had previously acted to privatize. Initial Brief at 3 citing Exh. A thereto, Board Minutes, Bates No. 100058; Job Description, Bates Nos. 100042-44.[12] On June 29, 1998, late in the afternoon, *and shortly before the Board's meeting that evening,*[13] the Board offered the position to Ms. Harris by and through its labor consultant, William Yanonis, and its Superintendent, Roseann Cialella. Initial Brief at 3. The Board admits its actions on June 29, 1998. However, without any evidentiary support, the Board contends that it did not receive Ms. Harris' Instructional Certificate until June 30, 1998, *after* it acted on June 29, 1998. This is inconsistent with Harris' Second Certification which demonstrates that in 1974, in reliance upon the Board's receipt of Ms. Harris' Instructional Certificate, the Board placed her on the Teacher's guide. Harris Cert. II, ¶¶2-3. Even if the Board knew that she had the certification before it acted. In Harris' Second Certification, she explains that during the Harris-Yanonis-Cialella meeting, Cialella and Yanonis were told that Ms. Harris had both the Educational Services certificate with a school nurse endorsement and an Instructional certificate with a Teacher of Health Education endorsement. Harris Certif. II, ¶5. Although

[12] *Compare* the nursing functions restored by job description *with* nursing functions listed in *Old Bridge*. *See,* pages 7 and 8 below.

[13] Ms. Harris' Initial Brief and the Board's brief incorrectly recite that the Cialella-Yanonis-Harris meeting took place *after* the Board meeting. Harris' Second Certification clarifies the sequence of these events. Harris' Certif. II at ¶¶4-7.

Cialella and Yanonis claimed not to know that Ms. Harris had the Instructional Certificate and Teacher of Health Education endorsement, Cialella acknowledged that Ms. Harris could teach Health under her school nurse endorsement anyway. *Id.* At the Harris-Yanonis-Cialella meeting, Ms. Harris told the Board's representatives that a less senior teacher, Kimbra Goodwin, had taught five 42 minute periods of Health during the 1997-98 school year and Ms. Harris asked Cialella and Yanonis whether the Board would acknowledge her seniority and tenure rights to teach all of the Health classes. Harris Certif. II, ¶5. *Accordingly, before the June 29, 1998 meeting, the Board had notice that Ms. Harris had an Instructional Certificate and that she was claiming tenure and seniority rights to teach Health courses which were being taught by a less senior teaching staff member.* Although Yanonis and Cialella told Ms. Harris that they would look into the matter, the Board never offered Ms. Harris the opportunity to teach the Health courses.

7. Ms. Harris' Initial Brief says that under the terms of the collectively negotiated agreement between the Board and the Woodbine Education Association, Ms. Harris as a "grandfathered" employee-was eligible for benefits so long as she worked a minimum of 20 hours per week. Initial Brief at 3 citing Harris Certification, ¶7; Exh. B thereto. The Board's qualifications claim that she would not be a grandfathered employee because the school nurse position offered to her was only 19-3/4 hours. Bb5, ¶7. However, the Board's contention completely disregards her bumping rights to teach the Health courses, given that she had both certificates at the time of the sham RIF and that both certificates were appropriate for the teaching of Health.

8. Ms. Harris' Initial Brief notes that she accepted the position, subject to the Board's acknowledging her tenure and seniority rights to teach the Health courses. Initial Brief at 3 citing Harris' Certification ¶8 and thereto. Ms. Harris greatest concern was maintaining health benefits for her family. *Id.* For close to 15 years, Ms. Harris had been the sole source of health benefits for her family. *Id.* The Board claims that it made the choice as a cost saving measure in a RIF and, without any

evidentiary support, claims, that it had no obligation to offer Ms. Harris the opportunity to teach the Health courses because neither it nor the County Superintendent of Schools had any record that she had at the Instructional Certificate. The Board's factual contentions are undercut by the following: (a) under the State Board of Education's regulations. *(N.J.A.C.* 6:11-11.7), an Educational Services certificate with a school nurse endorsement is an appropriate certificate for the teaching of Health; (b) a fair inference may be drawn that the Board had the Instructional certificate ever since 1974 (the year that Ms. Harris received the certificate and the Board placed her on the Teachers' guide in reliance upon the certificate); (c) Ms. Harris specifically told the Board that she had the certificate before the purported RIF; and (d) contrary to the Board's contentions, a computerized abstract furnished by the County Superintendent to Ms. Harris on May 12, 1998, plainly shows that as of that date – which was after the Board's effort to privatize the position of May 11, 1998 *but before the purported RIF* – the County Superintendent did, in fact, have a record that Ms. Harris possessed an Instructional Certificate with a Teacher and Health Education endorsement. True copies of the letter and the abstract are attached to this brief as Exhibit B.

9. Ms. Harris' Initial Brief says that the Board responded by memorandum. Initial Brief at 3 citing Exh. A. thereto, Memorandum from Roseann Cialella to Paula Harris dated July 10, 1998. Bates No. 100063. Significantly, in the memorandum, the Board made clear that the school nurse position would be a maximum of "19.5 hour [sic] a week" and that additional hours would not be offered to Ms. Harris to conduct Health instruction. *In short, the Board claimed that the Health instruction was included in the 19-3/4 hour position.* The Board responds by stating that the memorandum speaks for itself. Bb4, ¶9.

10. Ms. Harris' Initial Brief says that the memorandum failed and refused to acknowledge or even discuss Ms. Harris' bumping rights to teach the Health courses which were being taught by Kimbra Goodwin, a much less senior teacher who had worked for the district only seven years as of the end of the 1997-98 school year and who had taught Health on a very limited part-time basis for no more than

two years as of that time. Initial Brief at 3 citing Seniority List, Bates No. 100054 *and* Harris Certif. ¶10. The Board responds that it had no obligation to discuss bumping rights and, with no evidentiary support, contends that it was unaware that Ms. Harris had the Instructional Certificate at the time of the RIF. The Board further argues that it did not have to review Ms. Harris' seniority for a teaching position for Health because Ms. Harris only taught Health under her school nurse endorsement. Bb4, ¶10. The Board's contentions are unsupported by an evidentiary record and are undercut by the following: (a) under the State Board's regulations *(N.J.A.C.* 6:11-11.7), an Educational Services certification with a school nurse endorsement is an appropriate certification for the teaching of Health; (b) a fair inference may be drawn that the Board had the Instructional Certificate ever since 1974 (the year that Ms. Harris received the certificate and the Board placed her on the Teachers' guide in reliance upon the certificate); and (c) Ms. Harris specifically told the Board that she had the certificate before the purported RIF.

11. Ms. Harris' Initial Brief notes that the Board's refusal to acknowledged Ms. Harris' tenure and seniority rights to teach the Health courses forced Ms. Harris to choose between a 19-3/4 hour part-time job without benefits and premature retirement at a date earlier than she had planned to retire. Initial Brief at 4 citing Harris Certif., ¶11. She was forced to retire to maintain health benefits for her family, including her son in college, who she continues to support on her pension. The pension provides her with a substantially reduced income. *Id.* The Board responds by claiming Ms. Harris merely exercised her right to retire. Bb4, ¶11. However, Ms. Harris' correspondence to the Board makes clear that her choice to retire was coerced. Ms. Harris retired under protest and with full reservation of rights because, in failing to acknowledge her bumping rights, the Board improperly caused Ms. Harris to choose between a 19-3/4 hour position without benefits and premature retirement with benefits. Harris Certif., Exh. C.; Ms. Harris' Initial Brief, Exh. A. Bates No. 100033.

12. Ms. Harris' Initial Brief notes that the Board's discovery responses and supplemental discovery responses admit that during the 1998-99 and 1999-2000 school years, *in addition to the 19-3/4 hours being worked by the part-time school nurse, other non-*

tenured or less senior people were, in fact, teaching additional hours of Health instruction. Initial Brief at 4. The Board responds that it was under no obligation to discuss bumping rights because Ms. Harris' instructional certificate was not on file at the time of the RIF, nor was it aware that she had the certificate. Bb4¶12. The Board's contentions are unsupported by an evidentiary record and are undercut by the following: (a) under the State Board's regulations (*N.J.A.C.* 6:11-11.7), an Educational Services certification with a school nurse endorsement is an appropriate certification for the teaching of Health; (b) a fair inference may be drawn that the Board had the instructional certificate since 1974 (the year that Ms. Harris received the certificate and the Board placed her on the Teachers' guide in reliance upon the certificate); and (c) Ms. Harris specifically told the Board that she had the instructional certificate before the purported RIF.

13. Ms. Harris' Initial Brief specifically cites to the Board's supplemental answer to interrogatory 16(b)(4) which admits that Christine Neill, the part-time school nurse, has worked 19-3/4 hours per week from November 1998 to present. Initial Brief at 4 citing Exh. A thereto, Supplemental Interrogatory Answer 16(b)(4), Bates No. 100175 and Nurse's history, Bates Nos. 100176-77.[14] The Board does not contest this contention though it notes that Neill has worked without benefits. Bb4-5, ¶13.

14. Ms. Harris' Initial Brief cites the Board's schedules for all people who taught Health classes. Initial Brief at 4 citing Exh. A. thereto, Health instructor schedules, Bates Nos. 10010-11; 100180-83. The schedules show that during the 1998-99 school year, the less-senior Ms. Goodwin taught 3 hours, 20 minutes of Health per week. Exh. A. Goodwin's Health instruction schedule, Bates Nos. 100110-11. The schedules also show that during the 1999-2000 school year, the less-senior Ms. Goodwin taught 150 minutes of Health, a Ms. Sharon Gunn taught 250 minutes of Health and a Mr. Stephen Hensil taught 150 minutes of Health. Exh. A., Health instruction schedules,

[14] The Board's discovery responses also reveal that the Board employed a cadre of nurses from September to early November of 1998 to fill the 19-3/4 hour per week part-time school nurse position. Exh. A., Nurse's history, Bates No. 100177. While not necessary to this motion, it appears that during substantial periods of time, the Board had only an LPN site in violation of *N.J.A.C.* 13:37-6.2(c), which requires an RN to supervise an LPN at all times. Compare Exh. A., Nurse's history, Bates No. 100177 with Simsick L.P.N. certificate, Bates No. 100067.

Bates Nos. 100180-82. Ms. Gunn and Mr. Hensil also had less seniority than Ms. Harris as of the date of the claimed RIF. Exh. A, Seniority list, Bates No. 10054. The Board responds by contending - again without any evidentiary support - that the positions of school nurse and teaching [sic] of Health were separated into two distinct and separate positions. Bb5, ¶14. The Board notes that the Health instruction was conducted by other certificated personnel and that Health instruction does not have to be provided by a person with a school nurse endorsement. *Id.* However, the Board neglects to note that each of the people teaching Health were less senior than Ms. Harris and also implicitly concedes that Health instruction may be provided by a person with a school nurse endorsement. It is extremely significant that all functions previously performed by Ms. Harris are still being performed in the school district, although the teaching functions are being performed by other, less senior people. This serves as the factual basis for Ms. Harris' claim that the RIF was a sham RIF.

15. Ms. Harris' Initial Brief notes that, even if in July of 1998 the Board mistakenly believed that a part-time nurse could perform the nursing services and the Health instruction within 19-3/4 hours per week, *as of September of 1998 – based upon the Board's own duty schedules – it was clear that all of the functions could not be performed within the 19-3/4 hours ands were not, in fact, being performed within the part-time nurse's hours.* The Board responds by contending - yet again without any evidentiary support – that the positions of School Nurse and Teaching [sic] of Health were separated into two distinct and separate positions. Bb5, ¶14. The Board notes that the Health instruction was conducted by other certificated personnel and that Health instruction does not have to be provided by a person with a school nurse endorsement. *Id.* However, the Board neglects to note that each of the people teaching Health were less senior than Ms. Harris and also implicitly concedes that Health instruction may be provided by a person with a School Nurse endorsement.

16. Ms. Harris' Initial Brief says that in September, with the assignment of 3 hour, 20 minutes of Health instruction to the less-senior Ms. Goodwin, in addition to the 19-3/4 hours being worked by part-time School Nurse McNeill, Ms. Harris' seniority and recall rights were triggered and the Board should have provided her with an

opportunity to perform the school nurse functions *and* the Health instruction that were being performed by less senior or non-tenured people. If all of the duty hours were aggregated together and if the Board had honored Ms. Harris' tenure and seniority rights, in 1998-99 school year, the Board would have offered her part-time employment with benefits for the 23 hours, 5 minutes of duty time and, in the 1999-2000 school year, the Board would have offered her full-time employment for the 28 hours, 55 minutes of duty time.[15] For the Court's convenience, this information has been reduced to a chart:

YEAR	School Nurse Duties	Health Instruction	Total Duty Hours
1997-98			
Harris-Full Time	(Not broken down)	(Not broken down)	29 hours
1998-99			
McNeill	19 hours, 45 minutes		
Goodwin		3 hours, 20 minutes	
Goodwin			23 hours, 5 minutes
1999-2000			
McNeill	19 hours, 45 minutes		
Goodwin		2 hours, 30 minutes	
Hensil		2 hours, 30 minutes	
Gunn		4 hours, 10 minutes	

[15] This is substantially the same duty time than Ms. Harris worked per week during the 1997-98 school year. Harris Certification, ¶5.

28 hours, 55 minutes

The Board responds that the above chart shows that petitioner's duties were divided into two areas – nursing and Health instruction; the Board contends that "time was not the governing factor for the RIF; money was." Bb5, ¶16. However, the Board's position fails to explain why it failed and refused to honor Ms. Harris' bumping rights to the Health instruction functions; functions for which she was appropriately certificated. (*N.J.A.C.* 6:11-11.7), in which she was tenured and in which she had 32 years of seniority.

17. Ms. Harris' Initial Brief says that Christine Neill was not certified as a school nurse. Instead, she holds only a County Substitute Teacher's Certificate. Exh. A. Neill's certificate, Bates No. 100070. The Board contends that a County Substitute Certificate qualifies her to act as a school nurse. Bb5, ¶17. As will be discussed below, this position is directly contrary to the decisional law of the Commissioner.

18. Ms. Harris' Initial Brief says that the Board's payroll records and nurse's history reflect that at no time did Ms. Neill substitute for another person who was working in the position of school nurse. Exh. A. Payroll records, Bates Nos. 100073-88; Nurse's history, Bates No. 100177. The Board responds by claiming that a Daniel Headley and Christine Neill each served as school nurse and claims – again without any record support – that both "meet the requirements to be employed by the [Board] as the school nurse." Bb5, ¶18. Contrary to the Board's contentions, the Board has supplied only a registered nurse certification for Neill (Bb, Exh. C), no credentials whatsoever for Headley, and has failed to supply an Educational Services certificate with a School Nurse endorsement for either.

Under the circumstances, it is plain that the Board has failed to have a duly-qualified school nurse in place.

Law and Argument

II. The Board did not Properly Act to Reduce the Position from Full-Time to Part-Time in a RIF

The Board suggests that it merely engaged in an even-handed RIF in reducing the school nurse position from a full-time to part-time in a RIF. To the contrary, intent upon eliminating Ms. Harris from the Board's payroll, the Board acted in a reckless disregard of the requirements of the Education Laws. At first, the Board passed a motion to "subcontract" and "privatize" school nursing services, notwithstanding the fact that, under the Education Laws, certain services must be performed by a duly-certified school nurse. The Board had specific notice of the requirement of the Education Laws before it acted. Nonetheless, at its May 11, 1998 meeting, it adopted a motion to improperly subcontract school nursing services.

Upon reflection, the Board apparently reconsidered its initial action to subcontract and decided to reduce the functions of the school nurse position to part-time instead of eliminating the position all together. If the Board had actually eliminated the amount of Health instruction or if the Board had recognized Ms. Harris' bumping rights in the RIF and had given her the opportunity to teach Health, it could have lawfully reduced its payroll expenses by RIFing a less senior or non-tenured person.

Instead, the Board again acted in violation of the Education Laws; this time in violation of Ms. Harris' tenure and seniority rights and, in particular, her right to "bump" less senior people who have been assigned to teach Health instruction. There is no question that her educational services certification with its school nurse endorsement was an appropriate certification for the teaching of Health, *N.J.A.C.* 6:11-11.7. Given that Ms. Harris had taught Health for each of her 32 years in the district, it is plain that Ms. Harris had tenure and seniority to teach Health.

When the Board abolishes a full-time position, it is ordinarily obliged to aggregate the duties of remaining part-time positions in order to provide continuing full-time employment to the RIFed tenured full-time teaching staff member. *E.g., Brueck v. Fairview Board of Education,* 97 *N.J.A.R.* 2*d.* (EDU) 283, 10 Jan. 97, appeal dismissed, 97 *N.J.A.R.* 2*d.* (EDU) 555, 7 May 97 (Full-time teachers who were RIFed when physical education, Health and music programs were assigned to departmentalized 7-8 classroom teachers were entitled to teach those subjects, plus subjects requiring no specific certification, over less senior secondary teachers); *Kojak v. Mount Arlington Board of Education,* 94 *N.J.A.R.* 2*d.* (EDU) 295 (Speech corrections RIFed to part-time was entitled to the LDT-C duties assigned to non-tenured person and for which the speech corrections qualified by an unused LDT-C endorsement); *McGlynn v. Sea Girt Board of Education,* 93 *N.J.A.R.* 2*d.* (EDU) 438 (Social studies teacher RIFed to part-time was entitled to have the remaining social studies classes rescheduled to afternoon so that he could also teach the available morning kindergarten classes); *Laufenberg v. Ramapo Indian Hills Regional Board of Education,* 91 *S.L.D.* 2447 (English teacher RIFed to a supplemental teaching position was entitled to the full-time aggregate of part-time positions held by non-tenured teachers); *Bartz v. Green Brook Board of Education,* 86 *S.L.D.* 1486, aff'd 87 *S.L.D.* 2520 (Absent educational reasons for the replacement of two full-time home economics positions with 2-4/7th home economics positions, the Board was ordered to reorganize the positions so that the more senior teacher could continue to enjoy the remaining full-time position); *Valinski v. Garwood Board of Education, State Board,* Dkt. No. 20-85, 8 Nov. 85 (unreported). (State Board invalidated the reduction of two physical education positions from full-time to four-fifths time, because one of the positions was held by a tenured teacher and the other was held by a non-tenured teacher, and the tenured teacher was entitled to continue in a full-time position); *Lingelbach v. Hopatcong Board of Education,* 84 *S.L.D.* 1955; *aff'd. N.J. Super., App. Div.* 85 *S.L.D.* 1953 (Board could not replace one full-time social worker with two part-time social workers, performing the same duties in less time and at considerably lower hourly rates); *Miles v. Watchung Board of Education,* 84 *S.L.D.* 1058 (Vocal music teacher, RIFed from a full-time to 4/5ths position in another school, was entitled to work one day a week in the other school, reducing the non-tenured teacher to 3/5ths in order to reconstitute the tenured teacher's full-time position).

The only exception to the legal requirement to aggregate duties is where the Board has set forth specific "educationally based reasons" for dividing the remaining work into part-time

positions. *Bartz, supra.* In the present case, the Board failed to provide any educationally based reasons to justify dividing the remaining work into part-time positions. To the contrary, as set forth in Ms. Harris' Initial Brief, a close examination of the teaching schedules for the Health instruction classes for the 1998-99 and 1999-2000 school years reveals that all of the work continued to be performed in the District and one person could have taught all of the classes with absolutely no disruption to or revision of the schedule for Health instruction.

The decisional law of the Commissioner says that in a RIF the local board need not consider every possible scheduling permutation in order to retain the most qualified, senior and tenured person. However, in the present case, the schedule plainly reflects that no such permutations were required. To the contrary, in the present case, the facts suggest that the Board set out with the goal of terminating Ms. Harris' employment and that it then tried to use every permutation possible to try to achieve that goal, irrespective of the fact that the Board could not legitimately privatize the position, that the Board could not legitimately retain less senior or non-tenured people to teach Health, or that the Board could not retain unqualified people to perform school nursing services as defined by statute.

II. Ms. Harris Plainly Had Seniority and Tenure in the Teaching Of the Health Courses

Paula Harris actually taught Health for 32 years in the Woodbine School District. Assuming for the sake of argument that Ms. Harris did not even have an Instructional certificate with a Teacher of Health Education endorsement, under the State Board's regulations, a school nurse endorsement is an appropriate certificate to teach Health. *N.J.A.C.* 6:11-11.7. In addition, for 32 years, the Board recognized the appropriateness of the certificate by allowing her to continue to teach Health to generations of students.

Even if she only had tenure and seniority to the extent of the Educational Services certificate, given that the State Board has determined that the Educational Services certificate with the school nurse endorsement is an appropriate certificate for the instruction of Health, she plainly has seniority and bumping rights to teach all courses to which the certificate and

endorsement qualify her to teach – namely, Health. *N.J.A.C.* 6:11-11.7. By failing to offer her the opportunity to teach Health, the Board violated her tenure and seniority rights.

While Ms. Harris does not believe any further inquiry is necessary for the Commissioner to grant her Motion for Summary Decision and deny the Board's cross-motion, Ms. Harris also notes that she is entitled to teach the Health courses by virtue of the fact that she has also held an Instructional certificate with a Teacher of Health Education endorsement since 1974 and has taught Health in the district continuously ever since that time. The Board argues that even though Ms. Harris had the Instructional certificate and taught Health continuously since 1974, she lacks tenure and seniority under this certificate because the Board did not know that she had the Instructional Certificate. This position finds no support under the facts of the case or the law.

First, on the facts as set forth in the Statement of Facts above, Harris' Second Certification clearly demonstrates that the Board had notice that Ms. Harris had the Instructional Certificate with the Teacher of Health Education endorsement in 1974. Ms. Harris had been paid on a separate guide until that time. Harris Certif. II at ¶2. In a significant admission by conduct, in 1974, when Ms. Harris received this teaching credential, the Board placed her on the Teache4r's guide at that time. *Id.* The only rational inference that can be drawn was that the Board received a copy of the Instructional Certificate in 1974 and moved her onto the Teacher's guide in reliance upon that Instructional Certificate. The Board fails to present any credible or competent evidence that it did not receive a copy of the Certificate in 1974. The Board, having paid her on a Teacher's guide for years in obvious reliance upon the Instructional Certificate, no rational finder of fact could determine that the Board never had notice that Ms. Harris held the Instructional Certificate. The Board's unsubstantiated contentions in this regard are further undercut by Exh. B to this Brief, which plainly reveals that the County Superintendent did, in fact, have a record that Ms. Harris held the Instructional Certificate as of the RIF.

Second, the law does not support the Board's position. Given that Ms. Harris continuously taught Health since 1971 and that she continuously taught Health since 1974 under both her Educational Services certificate with its school nurse endorsement and her Instructional Certificate with its Teacher of Health Education endorsement, she accrued seniority in Health Instruction simultaneously in both categories. *N.J.A.C.* 6:3-5.1(f). The Board's attempts to limit

Ms. Harris' seniority to one endorsement or the other is contrary to the plain language of this regulation.

In addition, given that she held both certificates at all relevant times, the Board's efforts to carefully parse out whether Ms. Harris functioned as a teacher of Health under a school nurse endorsement or as a teacher of Health under an Instructional Certificate exalts form over substance. She had the certificate. She did the work. She is entitled to recognition of her seniority in the position. The decisional law has long recognized that, in assessing tenure and seniority claims, it is the duties performed in the position, not the title which is "the crucial factor." *E.g., Quinlan v. Bd. of Ed. of North Bergen Tp.,* 73 *N.J. Super.* 40, 50 (*App. Div.* 1962). *See also, Christie v. East Orange Bd. of Ed.* 1985 *S.L.D.* 299, 307 ("the duties performed, rather than the title of the position or the job description, are controlling; one must look to the substance rather than the form.")

III. The Board Has Plainly Failed to Use Properly Credentialed Personnel to Fill the Part-Time School Nurse Position

As set forth in Ms. Harris' Initial Brief, the Board has since staffed the part-time school nurse position with Cynthia Neill, a new hire who does not have a proper certification. Ms. Neill, the part-time nurse, does not even have an Educational Services certificate with a school nurse endorsement. Instead, she has held the position for more than 20 days utilizing a *county substitute teacher's certificate.* Initial Brief, Exh. A Neill's certificate, Bates No. 100070. In further violation of the Education Regulations, the Board's payroll records and the Nurse's history demonstrate that she substitutes for no one. Initial Brief, Exh. A. Payroll records, Bates Nos. 100074-88; Nurse's history, Bates Nos. 100176-77.

The Commissioner has recognized that this particular misuse of a county substitute certificate is a clear violation of the Education Regulations. *Pennsville Education Association v. Pennsville Township Board of Education,* CD-141-5/98 (9/9/99). In that case, the petitioner argued that the only proper use of a county substitute certificate is to substitute for a properly

certificated employee in a position for no more than 20 days.[16] The Commissioner specifically adopted this legal contention, holding that "[p]ersons who hold substitute certificates *are* to be employed only in the manner prescribed by *N.J.A.C.* 6:11-4.5" (emphasis in the original).

For the foregoing reasons as well as the reasons set forth in petitioner Paula Harris' Initial Brief, petitioner Paula Harris, requests that this tribunal issue an order:

a. finding and declaring that respondent's action to deprive petitioner of a full-time teaching position was in violation of her tenure and seniority rights.

b. directing respondent to recognize petitioner's nurse and/or seniority rights by reinstating her to a full-time position as a school nurse;

c. directing respondent to provide petitioner with all salary, benefits and emoluments she is entitled to by law and under the negotiated agreement in force and effect in the Woodbine School District, retroactive to September 1, 1998;

d. attaching both pre-and post-judgment interest to any back pay award as permitted by law;

e. directing respondent to take all actions necessary to assure that petitioner receives proper pension credit retroactive to September 1, 1998, including but not limited to the making of retroactive pension contributions, and

f. granting such other relief as is deemed appropriate.

CONCLUSIONS

I **CONCLUDE** that the legal standard for summary decision, pursuant to *Brill, supra.,* has been met.

[16] This restriction is clearly set forth on the face of Ms. Neill's certificate. Exh. A, Neill Certificate, Bates No. 100070.

The primary issue for determination by this tribunal is whether or not the Board violated petitioner's tenure and/or seniority rights when it acted to impose a RIF to her school nurse position and, thereafter, reduce the position from a full-time to a part-time position of 19-3/4 hours per week, *sans* any consideration of her prior teaching assignments.

The issue as to whether or not the Board acted to privatize and subcontract the school nurse position is of no moment to these proceedings and, therefore, will not be discussed nor decided here.

There is no question that a board of education may exercise the statutory provision to abolish a certificated position and impose a RIF of its teaching staff members for reasons of economy, among other reasons. *N.J.S. A.* 18A:28-9. The Board's action, however, must in good faith. *Werlock v. Woodbridge Twp. Bd. of Ed.,* 5 *N.J. Super.* 140 (*App. Div.* 1949); *Camp v. Bd. of Ed. of the Borough of Glen Rock,* 1977 *S.L.D.* 706; *Popovich v. Bd. of Ed. of the Borough of Wharton,* 1977 *S.L.D.* 440; *Polaski v. Bd. of Ed. of the Burlington County Voc-Tech. H.S.* 1977 *S.L.D.* 346. Nor is there any question or doubt that petitioner had acquired a tenure status with the Board.

In the instant matter, the Board was faced with a fiscal crisis and determined that a RIF of its school nursing services was the manner in which it could economize to resolve, in part, its financial problem. In so doing, the Board abolished petitioner's full-time position and replaced it with a part-time position. However, it ignored the fact that petitioner also taught its health program in its schools and replaced her in these teaching duties with teachers with less seniority than petitioner.

The Board avers that it was unaware that petitioner was in possession of an Educational Services certificate with a school nurse endorsement and a Teaching Certificate with a Teacher of Health endorsement. The Board asserts that petitioner never advised it of her Teacher of Health Teaching Certificate although it had assigned her to teach in the specific area. The Commissioner has held that the procuring of certification is the primary responsibility of the

teaching staff member. *Sydnor v. Bd. of Ed. of the City of Englewood* 1976 *S.L.D.* 113, 117. Moreover, the Commissioner also held in the same case that:

> It is also the responsibility of the Superintendent to insure that all teaching staff members are either certified or apply in a timely fashion for appropriate certificates. *Id. at 117.*

Petitioner has clearly demonstrated that she is appropriately certificated by the State Board of Examiners to perform all of the duties of a school nurse and to instruct pupils in health education. The Board, in its determination to impose a RIF to petitioner's nursing duties, failed to recognize petitioner's seniority with respect to her teaching of its health curriculum and assigned less senior teaching staff members to perform these duties. As the petitioner observes, when a board of education initiates a RIF, it is obliged to aggregate the duties of the part-time position in order to provide full-time employment to the teaching staff member subjected to the RIF. *Brueck, supra., Kojak, supra., McGlynn, supra., Laufenberg, supra.*

I **CONCLUDE**, therefore, that the Board did, in fact, violate petitioner's tenure and seniority rights when it failed to assign petitioner to teach its health curriculum when it reduced her school nurse assignment from full-time to part-time of 19-3/4 hours per week.

ORDER

Having carefully considered all of the arguments of the parties, I **CONCLUDE** that, as a matter of law, **SUMMARY DECISION** is hereby **ENTERED** on behalf of **PETITIONER, PAULA HARRIS.** The Board's request for Summary Decision is **DENIED** and **DISMISSED.**

Consequently, it is **ORDERED** that petitioner be **REINSTATED** to her proper school nurse-teaching position on a full-time basis and that the Board shall provide petitioner with all salary, benefits and other emoluments to which she is entitled, less mitigation, to make her whole. It is **FURTHER ORDERED** that the Board take all necessary steps to assure that petitioner is in receipt of all proper pension credits available to her, retroactive to September 1, 1998.

Petitioner's request for pre- and post- judgment interest is hereby **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 July 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/12/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 6686-98
AGENCY DKT. NO. 228-7/98

WOODBINE EDUCATION ASSOCIATION AND PAULA HARRIS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record and factual circumstances presented in the instant matter, the Commissioner concurs with and adopts the Administrative Law Judge's (ALJ) conclusion, for the reasons set forth below, that respondent violated petitioner's tenure and seniority rights when it failed to assign her to teach the health classes in dispute herein.

As held by the State Board of Education in *Elissa A. Kish v. Board of Education of the Borough of Elmwood Park, Bergen County*, 92 *N.J.A.R.*2d (EDU) 367:

> [T]enure is achieved within a "position," *Howley v. Bd. of Ed. of Ewing Township*, decided by the Commissioner of Education, 1982 *S.L.D.* 1328, *aff'd* by the State Board of Education, 1983 *S.L.D.* 1554, and tenure protection as against nontenured individuals following a reduction in force extends only to assignments *within that tenured position* for which the individual is qualified by virtue of his or her certification. *Kaprow v. Board of Education of the Township of Berkeley,* decided by the State Board of Education, January 9, 1991, slip op. at 9, *aff'd* [255 *N.J. Super.* 76 (App. Div. 1992), *aff'd,* 131 *N.J.* 572, 583 (1993)]. See *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987), *certif. den.*, 110

> *N.J.* 512 (1988); *Capodilupo v. West Orange Bd. of Ed.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. den.*, 109 *N.J.* 514 [1987]; *Herbert v. Board of Education of the Township of Middletown*, decided by the State Board of education, August 1, 1990, *aff'd*, Docket #A – 318-90T1 (App. Div. 1991). Such protection does *not* extend to assignments within the purview of separately tenurable positions in which the staff member has not achieved tenure pursuant to *N.J.S.A.* 18A:28-5 or *N.J.S.A.* 18A:28-6. (emphasis in text)

As to the issue of positions involving educational services certificates, the State Board held in *Ellicott v. Board of Education of the Township of Frankford, Sussex County*, 1990 *S.L.D.* 1714, 1718, *aff'd* 251 *N.J. Super.* 342 (App. Div. 1991) that:

> With the exception of school nurse, assignments within the purview of the educational services certificate are not enumerated in *N.J.S.A.* 18A:28-5 as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate *are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement.* (citation omitted) Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in "educational services" and *are entitled to tenure protection in all assignments within that tenurable position* for which the endorsements on their certificates qualify them.*** (emphasis supplied)

See also *Harriet Wallen v. Board of Education of the Rancocas Valley Regional High School District, Burlington County,* 93 *N.J.A.R.*2d (EDU) 301.

Applying the legal holdings set forth above to the facts of the instant matter, petitioner acquired tenure in the position of school nurse, having served for 32 years under her educational services certificate in the position of school nurse, a separate and distinct position from that of teacher. *N.J.S.A.* 18A: 28-5. Consequently, she is entitled to tenure protection in all assignments within the position of school nurse for which the endorsement on her educational services certificate qualifies her.

Pursuant to *N.J.A.C.* 6:11-11.7, the school nurse endorsement authorizes service as a school nurse and teaching in health-related areas. Thus, during the time period at issue herein, petitioner's teaching of health was authorized by her school nurse endorsement. Because a school nurse is not required to possess both an instructional certificate with an authorization to teach health *and* an educational services certificate with a school nurse endorsement, petitioner's possession of such an instructional certificate is immaterial to determining the present matter. The facts of this case reveal that petitioner taught health pursuant to her school nurse endorsement, not her instructional certificate. Moreover, the circumstances herein are unlike those found in *Dennery v. Bd. Of. Ed. of Passaic County Regional High School District*, 131 *N.J.* 626 (1993), wherein it was determined that a board of education acted properly in requiring dual certification to qualify for a single educational position. No such requirement was imposed herein. Thus, as stated above, petitioner's tenure and seniority rights herein accrued under a school nurse position, and not that of the separately tenurable position of teacher.

It is the Board's contention that, upon abolishment of petitioner's school nurse position:

> The positions of School Nurse and the Teaching of Health were separated into two separate and distinct positions. The part-time school nurse was obligated to follow the job description as set forth in Bates Nos. 100042, 100043, 100044 and 100061. The health instruction was primarily provided by other certified personnel.[1] Health education does not have to be provided by a person that is holding a School Nurse certificate. (Respondent's Brief at 5)

See also Initial Decision at 21. However, upon examination of the record, the Commissioner

[1] Upon review of the record, it is noted that the copy of the instructional certificate found at Bates No. 100072 for Kimbra (Osborn) Goodwin, one of the teachers assigned to teach health after the abolishment of petitioner's school nurse position, has the endorsement of "Teacher of Physical Education." Pursuant to *N.J.A.C.* 6:11-6.2(a)17, such an endorsement authorizes the holder to teach physical education, **not** health **and** physical education.

observes that the school nurse job description, as revised and approved by the Woodbine Board on June 29, 1998 (Bates Nos. 100042-44, in particular 100043, paragraph 11) and the superintendent's June 29, 1998 memorandum to petitioner regarding the newly created school nurse position (Bates Nos. 10061-100062, in particular paragraph m), both reveal that the teaching of health was in fact *not* eliminated from the school nurse position.[2] Thus, the Board's argument that it abolished petitioner's school nurse position, which included both school nurse and health teaching responsibilities, and created two separate and distinct positions, one for school nurse and one for teaching health, is not supported by the record.

Consequently, the Commissioner finds and determines that, pursuant to *Ellicott, supra*, petitioner is entitled to tenure protection in *all assignments within her tenurable position of school nurse*, the endorsement and the job description for which, in the instant matter, included health instruction both prior *and* subsequent to the Board's RIF affecting petitioner's school nurse position. Therefore, under the facts of this matter, assigning the teaching of health to teaching staff members who possess less seniority is deemed to be violative of petitioner's tenure and seniority rights.

Further, the Commissioner is constrained to qualify the statement on page 46 of the Initial Decision in which the ALJ agrees with petitioner that "***when a board of education initiates a RIF, it is obligated to aggregate the duties of the part-time position in order to provide full-time employment to the teaching staff member subjected to the RIF. *Brueck, supra., Kojak, supra., McGlynn, supra., Laufenberg, supra.*" As to this, the Commissioner notes that each of the cases cited involved the rights of tenured staff to positions or assignments held by nontenured

[2] The June 29, 1998 school nurse job description, Bates No. 100043, paragraph 11, states that the school nurse "[t]eaches assigned health classes." The superintendent's June 29, 1998 letter to petitioner (Bates No. 100062, paragraph m), states that the school nurse will "additionally, when so assigned, provide instruction to students within the limitations of the school nurse endorsement***."

teaching staff members. The Commissioner also wishes to stress that where there does exist an obligation to aggregate assignments, such obligation is a general principle of law, *not* an absolute one. *See, e.g., Taxman v. Piscataway Township Board of Education*, 93 *N.J.A.R.*2d (EDU) 189, a case involving a tenured teacher's claim to the assignments/classes of three part-time teachers. In *Taxman*, the Commissioner addressed the issue of a board's duty to attempt to aggregate assignments for a tenured staff member who is subject to a RIF, stating that:

> ***Likewise the Board knew or should have known that if it was shown that petitioner was qualified to teach the positions, she would be entitled to them *unless the Board could demonstrate a compelling educational reason to defeat her tenure rights. See* [*Capodilupo, supra, Bednar, supra*]. Moreover, while the law may still be "evolving" in the sense that there is no clear-cut formula to define when *a tenured teacher's claim may be defeated because of the disruptive impact the accommodation of those rights may cause on the scheduling of courses or assignment of teachers to given classes*, the law is not in the least new or unsettled that a tenured teacher has employment rights which must be given the utmost deference except when it can be demonstrated that the board would have to stand on its head to honor those rights. (citations omitted) (emphasis supplied) (*Taxman* at 195)

Finally, the Commissioner will address petitioner's allegations regarding a school nurse position being filled since 1998 with an individual who possesses only a county substitute certificate. Upon review of the record in the instant matter, the Commissioner agrees with petitioner's argument that *Pennsville, supra*, is applicable herein. In *Pennsville*, an individual with a county substitute certificate was employed by the board of education, ostensibly as a library aide, upon the retirement of its educational media specialist. However, the individual was found in fact *not to be substituting* for any teaching staff member. The Commissioner held that, "Contrary to the Board's urging, persons who hold substitute certificates *are* to be employed only in the manner prescribed by *N.J.A.C. 6:11-4.5.****" (emphasis in text) *Pennsville, supra,* at 38. This admonition applies equally in instances such as herein, where a county substitute certificate is issued, pursuant to *N.J.A.C.* 6:11-4.5(h), to a holder of a valid New Jersey registered

nurse license to *substitute* for a school nurse. As indicated in *N.J.A.C.* 6:11-4.5(c), county substitute certificates are intended only for persons *temporarily performing the duties of a fully certificated and regularly employed teaching staff member.* The county superintendent is, therefore, directed to determine whether or not all staff assigned to teach health since September 1998 in the Woodbine School District possessed appropriate instructional endorsements for teaching that subject.

Accordingly, for the reasons set forth above, the Commissioner adopts the ALJ's order that petitioner be reinstated to her school nurse position on a full-time basis and that she be provided all salary, emoluments and benefits to which she is entitled, less mitigation, to make her whole, including all proper pension credit, retroactive to September 1, 1998. The Commissioner also adopts the ALJ's denial of pre- and post-judgment interest, finding that, pursuant to *N.J.A.C.* 6A:3-1.17, no basis has been established to warrant the former and a request for the latter is prematurely made. Finally, because of the concerns stated above with respect to the employment of an individual for two school years in a school nurse position who holds only a county certificate, the county superintendent is to determine forthwith if the District is complying with the mandates of *N.J.A.C.* 6:11-4.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 28 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

275-00

PAULSBORO EDUCATION ASSOCIATION AND GUS WILSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 919-00

AGENCY DKT. NO. 393-12/99

PAULSBORO EDUCATION

ASSOCIATION AND GUS WILSON,

Petitioners,

v.

PAULSBORO BOARD OF EDUCATION,

GLOUCESTER COUNTY

Respondent.

Stephen B. Hunter, Esq., for petitioner, Paulsboro Education Association (Klausner, Hunter & Rosenberg, attorneys)

Gus Wilson, petitioner, *pro se*

Philipp Duvilla, Esq., for the respondent

Record Closed: July 7, 2000 Decided: July 12, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 6, 2000, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-. 19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

JUL 12 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7/14/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 18 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

KLAUSNER, HUNTER & ROSENBERG, ESQS.
63 East High Street
P.O. Box 1012
Somerville, N.J. 08876
(908) 685-1552
Attorneys for Petitioners

PAULSBORO EDUCATION ASSOCIATION and GUS WILSON Petitioners, vs. PAULSBORO BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY : : OAL DOCKET NO. EDU-919-00 AGENCY DOCKET NO. 393-12/99 : : STIPULATION OF SETTLEMENT AND DISMISSAL

The parties in the above captioned matter, Paulsboro Education Association (hereinafter the "Association"), Gus Wilson (hereinafter "Wilson") and the Paulsboro Board of Education (hereinafter the "Board") hereby agree to the following in full settlement of the above captioned Petition of Appeal:

1. The Board agrees that during the 2000-2001 school year it will not enter into any contract with any private school for the handicapped to operate a self contained special education program in facilities owned by the Paulsboro Public Schools. Moreover the Board agrees to exclusively utilize in-district,

properly certificated personnel to provide academic instructional services to all school children within the District for the 2000-2001 school year.

2. The co-Petitioners in the above captioned matter; i.e. the Association and Wilson, agree that, in consideration of the Board of Education's agreements as set forth within the first paragraph of this Settlement Agreement they will withdraw the above captioned Petition of Appeal.

Dated: 6-15-2000 _____
Paulsboro Education Association

Dated: 6-16-00 /S/ Gus Wilson
Gus Wilson

Dated: 6/22/00 _____
Paulsboro Board of Education

OAL DKT. NO. EDU 919-00
AGENCY DKT. NO. 393-12/99

PAULSBORO EDUCATION ASSOCIATION AND GUS WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 18 2000

Date of Mailing: AUG 28 2000

279-00

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE RANDOLPH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	

August 30, 2000.

AGENCY DKT. NO. 255-7/00

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE RANDOLPH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	

For the Board, Mary E. Hennessy, Esq. (Murray, Murray & Corrigan)

Lawrence Randolph, *Pro Se*

This matter having been opened before the Commissioner of Education on July 19, 2000, through certification of tenure charges of unbecoming conduct, chronic and excessive absenteeism and excessive lateness and neglect of duties against a tenured custodian by the Board of Education of the City of Elizabeth; and

The Commissioner having directed respondent, via both certified and regular mail on July 19, 2000, the certified copy having been signed for on July 22, 2000, to file an Answer to the tenure charges against him; and

Such notice clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall* **have 15 days from the date such charges are filed with the Commissioner** *to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period will result in the charges being deemed admitted; and

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges against respondent by the Board and the statement of evidence in support of those charges indicate that respondent

1. On September 23, 1999 left the school during his lunch break and never returned. While on his lunch break, he attempted to purchase a controlled dangerous substance (heroin) and was arrested. He had previously failed a drug test administered by the Board and had been given an opportunity to rehabilitate himself and remain in his position.

2. During the 1999-2000 school year, during which respondent only worked from July 1, 1999 until September 24, 1999 (when he was suspended with pay), he was absent from work 24-1/2 days; during the 1998-99 school year he was absent a total of 43 days; during 1997-98 43 days; and during 1996-97 respondent used 19 sick days, of which 5 were unauthorized. Although counseled about his excessive absenteeism, both verbally and in writing, he failed to remedy the problem, which resulted in a significant negative impact on the delivery of custodial services to the Elizabeth schools; and

3. Respondent has been excessively late in arriving to begin performance of his duties, at least 6 times in 1998-99, 4 in 1997-98, 12 in 1996-97, and very often fails to call to inform his supervisor of his anticipated late arrivals, which are often in excess of one hour.

Having deemed such charges to be admitted by operation of rule, the Commissioner has determined, pursuant to *N.J.S.A.* 18A:6-16, that respondent's actions constitute unbecoming conduct and chronic and excessive absenteeism warranting his dismissal from his tenured position; now, therefore

IT IS SO ORDERED this 30th day of August 2000 that Lawrence Randolph shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order. *

COMMISSIONER OF EDUCATION

Date of Decision: AUG 30 2000

Date of Mailing: AUG 30 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#280-00

280-00

BENJAMIN SEABROOK AND WILLS, O'NEILL & MELLK,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, a teaching staff member in respondent District and a law firm that represented the teacher in connection with civil and criminal matters arising from his employment as a teacher, sought reimbursement of legal fees for work performed in furtherance of his criminal defense.

The ALJ determined that, although another attorney primarily represented the teacher in the criminal proceedings, the petitioning firm "was of significant and critical assistance to" petitioning teacher's criminal defense, and that respondent therefore must reimburse the teacher for the fees for the criminal defense work performed by the firm. However, the ALJ determined that the requested fees should be reduced from $9,649.45 to $ 8,043.45 because a portion of the fees sought related to the civil defense work performed by the law firm, rather than the criminal defense work.

The Commissioner concurred with the determination of the ALJ that the petitioning law firm significantly assisted Seabrook's criminal defense, which led to a successful resolution of the charges against him. Therefore, Seabrook is entitled, pursuant to *N.J.S.A.* 18A:16-6.1, to reimbursement of the legal fees charged by the law firm from respondent. The Commissioner also agreed with the ALJ that the fees should be reduced because a portion of the funds sought were for the efforts expended in connection with the civil action, which are not compensable in this proceeding.

August 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6701-98

AGENCY DKT. NO. 345-7/98

BENJAMIN SEABROOK AND

WILLS, O'NEILL & MELLK,

Petitioners,

v.

BOARD OF EDUCATION OF THE

CITY OF TRENTON, MERCER

COUNTY ,

Respondent.

Arnold Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorney)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: June 2, 2000 Decided: July 14, 2000

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a teacher employed by the Board of Education of the City of Trenton, seeks reimbursement for legal fees and disbursements totaling $9,649.45 from respondent pursuant to *N.J.S.A.*18A:16-6.1 in connection with his successful defense against criminal charges. Petitioner, through his attorney, Wills, O'Neill & Mellk, submitted a bill for legal services to respondent on March 26, 1998. By letter dated June 30, 1998, attorney for respondent notified petitioner's attorney that respondent denied the request for reimbursement. Petitioner then filed a

petition on July 20, 1998. The matter was transmitted to the Office of Administrative Law (OAL) on August 12, 1998, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on August 27, 1998 and was scheduled for a hearing to be held on December 16, 1998. The hearing scheduled for December 16, 1998, was adjourned due to a scheduling conflict and was rescheduled for December 23, 1998. The hearing scheduled for December 23, 1998, was converted to a telephone status conference at the joint request of counsel due to witness unavailability. On that date, it was agreed that the matter would be rescheduled for June 23, 1999. In the meantime the parties agreed to submit affidavits and/or certifications and relevant documents to determine if the matter could be decided on the papers. After reviewing these submissions, the undersigned determined that an evidentiary hearing would be necessary. Accordingly, an Order Denying Summary Decision was entered on June 24, 1999.

The matter was rescheduled for hearing on December 20, 1999, and on that date a hearing was held and concluded. Through inadvertence, the record in this matter was not closed until June 2, 2000.

FACTUAL DISCUSSION

1. Discussion of the Certifications submitted by the parties

This matter was previously the subject of a motion for summary decision. However, the affidavits and certifications submitted by the parties were found to be at odds in addressing relevant factual issues. Therefore, the motion for summary decision was denied and it was determined that it was necessary to take testimony and make factual determinations in order to decide: (1) whether the Wills, O'Neill and Mellk law firm was retained by Mr. Seabrook to act as co-counsel for Mr. Seabrook in the criminal matter; (2) whether the Wills, O'Neill and Mellk law firm did, in fact, provide assistance to Mr. Seabrook's criminal defense counsel which led to the dismissal of the indictment against Mr. Seabrook, or whether it merely cooperated with the criminal defense attorney. In order to understand the substance of the testimony in this matter, a discussion of the certifications submitted by the parties is necessary.

In support of its contention that petitioner is not entitled to reimbursement for legal fees of the Wills, O'Neill and Mellk law firm, respondent submitted the affidavit of Katherine D. Hartman, Esq. (R-1). Ms. Hartman is an attorney at law of New Jersey and she specializes in criminal defense. She represented petitioner in connection with a criminal indictment which arose out of allegations by two minor students against Mr. Seabrook alleging second degree sexual assault and second degree endangering the welfare of a child (R-1, Exhibit A). As Mr. Seabrook's attorney, Ms. Hartman was successful in having the indictment dismissed based upon a ruling by Hon. Andrew J. Smithson, J.S.C. that one of the students was incompetent to testify (R-1, Exhibit B). The Mercer County prosecutor then moved to dismiss the indictment based upon the court's pretrial ruling that the child victim, P.F., was incompetent to testify and P.F.'s out of court statements were inadmissible. As a result, the quantity of the evidence was dramatically reduced and this adversely affected the quality of the evidence. Since the strength of the charges of assaulting another child was dependent on the strength of the P.F. case, it was requested that these additional charges also be dismissed. An Order dismissing the indictment was entered on December 14, 1997 (R-1).

Ms. Hartman indicated in her affidavit that she was the only attorney of record representing Mr. Seabrook in the criminal matter and, to her knowledge was the only attorney notified by the court of status conferences and trial appearances in the criminal matter. At no time did any attorney from Wills, O'Neill and Mellk, appear at any criminal court proceeding as the attorney for Mr. Seabrook. At no time did any attorney for the law firm of Wills, O'Neill and Mellk advise her that Mr. Seabrook had retained their firm to assist her in his criminal defense.

Ms. Hartman indicated that Mr. Seabrook did advise her that Wills, O'Neill and Mellk was representing him in defense of a tenure charge that was pending before the Commissioner of Education. The tenure proceeding against Mr. Seabrook arose out of the same facts and circumstances upon which the criminal indictment was based.

Ms. Hartman indicated that during her representation of Mr. Seabrook she communicated with Wills, O'Neill and Mellk to discuss the status of their respective criminal and tenure charge matters and to share information.

Following the dismissal of the criminal charges against Mr. Seabrook, Ms. Hartman requested reimbursement of Mr. Seabrook's attorney fees and she was paid $14,112.52 for representing Mr. Seabrook. She was never under the impression that Wills, O'Neill and Mellk were co-counsel for Mr. Seabrook in the criminal matter and she did not instruct or request anyone from Wills, O'Neill and Mellk to perform any work in preparation for Mr. Seabrook's criminal defense.

The Certification of G. Robert Wills, Esq. (P-1) identified the bill submitted to respondent on March 26, 1998 for services rendered to petitioner in this matter (P-1, Exhibit A). Mr. Wills indicated in his Certification that in the cover letter (P-1, Exhibit A) he explained that his firm assisted the law firm of Hartman, Nugent and Zamost in the pretrial preparation of the criminal case and handled some of the preliminary work on the civil suit contemplated by the children who were allegedly molested by Mr. Seabrook. In the letter submitting the bill to respondent, Mr. Wills indicated to Mr. Sumners that he did not believe there was any duplication of services with the Hartman firm.

Mr. Wills relied upon the documentation that was previously provided to respondent in discovery as demonstrating that his law firm cooperated extensively with the Hartman firm in preparing the criminal case for trial. Rather than making reference to each of these documents, Mr. Wills invited a review of the documentation (P-1, Exhibit C) in order to become aware of the nature of this cooperation.

The bill forwarded to respondent on March 26, 1998 (P-1, Exhibit A), indicates what the law firm did beginning on June 4, 1996, and concluding on December 22, 1997. He asserts that the bill is fairly detailed and he believes that a review of it will provide additional support for the contention that the law firm significantly assisted Ms. Hartman in the pretrial preparation of the criminal matter and that there was no unnecessary duplication of effort between his law firm and the Hartman firm.

Mr. Wills indicates that during the initial portion of the work of the law firm, Ms. Ratner performed most of the services on behalf of Mr. Seabrook, but in the spring of 1997, Ms. Ratner left the firm, following which he did the work. He also refers to a letter of April 2, 1997 (P-1,

Exhibit D), sent to him by Ms. Hartman requesting reports of the law firm's investigation with respect to witnesses to be called. On April 7, 1997, he responded to Ms. Hartman's request and forwarded the reports that she wanted (P-1, Exhibit D).

Mr. Wills indicates that in all cases involving both criminal charges and tenure charges, the criminal charges must be resolved first because of fifth amendment issues. The fact that when the criminal charges are dismissed, a dismissal of the tenure charges often follows, has never caused his law firm not to be paid for work done on the criminal charges. He refers to another case involving Mr. Richard Cleghorn in which his firm also assisted Hartman, Nugent and Zamost and were paid for their participation in the matter by the Burlington County Board of Education.

Mr. Wills asserts in his Certification that a review of even a portion of the Hartman firm's correspondence to his firm reveals that the Hartman firm relied upon and appreciated the assistance of the Wills, O'Neill and Mellk law firm. He refers to a letter from Ms. Hartman dated February 11, 1997 (P-1, Exhibit E), indicating that the trial had been scheduled and that it was her hope to use the information provided by his firm and gathered by their investigator, Kim Steiner-Out. Ms. Hartman also notified the Wills, O'Neill and Mellk law firm that the matter had been scheduled for trial on July 28, 1997 and to mark their calendar accordingly (P-1, Exhibit F).

Mr. Wills indicates that the most recent entries on their bill for services clearly indicates that the law firm continued to provide assistance to the Hartman firm up until the pretrial dispositive motion before Judge Smithson, and he refers to entries beginning on December 5, 1997 through December 22, 1997, as describing the services rendered (P-1, Exhibit A).

The Certification of Kim Steiner-Out (P-2) indicates that she was retained by Wills, O'Neill and Mellk through the New Jersey Education Association (NJEA) to conduct an investigation on behalf of Benjamin Seabrook. She performed that work from August 22, 1996 through December 1, 1997. Ms. Steiner-Out indicates that the position of respondent is totally inaccurate in that her work on behalf of Mr. Seabrook was exclusively devoted to the defense of his criminal charges and that she worked almost exclusively for the firm of Wills, O'Neill and

Mellk, who then relayed the results of her investigation to the Hartman firm as part of their joint criminal defense of Ms. Seabrook. Ms. Steiner-Out indicates that she performed polygraph examinations of defendant Benjamin Seabrook for the exclusive purpose of assisting Mr. Seabrook's criminal defense. The entire focus of her work was relating to the criminal charges and not to the tenure charges and it is her belief that Ms. Ratner and Mr. Wills were focused exclusively on the criminal charges.

The Certification of Patricia L. Ratner, Esq. (P-3) indicates that from June 1996 into the Spring of 1997, she assisted in providing a criminal defense on behalf of Benjamin Seabrook who was the subject of an indictment. She specializes in criminal defense work and has represented NJEA members involving numerous criminal charges throughout New Jersey. Both Mr. Wills and she devoted themselves to the defense of criminal charges and they did very little, if any, work relating to tenure charges brought against NJEA members, including Mr. Seabrook. Rather, defense of tenure charges was normally performed by Arnold L. Mellk, Esq., almost always after the criminal charges had been resolved.

Ms. Ratner indicates that she submitted time slips encompassing her work in assisting the Hartman firm in providing Mr. Seabrook with the defense of the criminal charges in the form of conducting extensive pretrial investigation and preparation on his behalf. She reviewed the affidavit submitted by Katherine D. Hartman, Esq. and she emphatically disagrees in particular with paragraph 7 which alleges that at no time did any attorney from the law firm of Wills, O'Neill and Mellk advise her that Mr. Seabrook had retained their firm to assist her in his criminal defense; paragraph 12 wherein she insists that she was never under the impression that Wills, O'Neill and Mellk were co-counsel for Mr. Seabrook in the criminal matter; and paragraph 13 to the effect that Ms. Hartman did not instruct or request anyone from Wills, O'Neill and Mellk to perform any work in preparation for Ms. Seabrook's criminal defense.

Ms. Ratner indicates that she coordinated the work of Kim Steiner-Out who was the only investigator in the case, and forwarded the results of this work to the Hartman firm, she oversaw the conducting of a polygraph examination of defendant Seabrook, she communicated with DYFS regarding its investigation of Mr. Seabrook, she relayed the information she obtained to

the Hartman firm, and she oversaw the preliminary work done in defense of a possible civil action against Mr. Seabrook, which services are also compensable under *N.J.S.A.* 18A:16-6.

Finally, Ms. Ratner indicates that Mr. Seabrook was not only aware that the firm of Wills, O'Neill and Mellk was assisting in the defense of his criminal charges, but he specifically asked that the law firm provide such help. She indicates that to the best of her knowledge there was little, if any, duplication of the services rendered in his criminal defense.

The Certification of petitioner, Benjamin Seabrook indicates that while he was a teacher employed by the Trenton Board of Education he was charged in an indictment with various criminal charges relating to students of his at Stokes Elementary School. Under the auspices of his union, the NJEA, he was provided with the services of Wills, O'Neill and Mellk to assist him in his defense in both the criminal and tenure charges. He refers to a legal services plan form which was to be attached, but there was no such attachment to his Certification. He asserts that the work relating to the criminal charge took precedence over anything to be done on the tenure charges.

Mr. Seabrook indicates that both Patricia L. Ratner, Esq., and G. Robert Wills, Esq., assisted him in the defense of the criminal charges beginning in June 1996 and concluding in December 1997, and they cooperated with the Hartman firm in this effort. There is no doubt in his mind that the law firm of Wills, O'Neill and Mellk assisted significantly in the preparation of his defense against the criminal charges. For example, they interviewed witnesses, oversaw the work of investigator Kim Steiner-Out, arranged and supervised his taking of two polygraph examinations that related only to the criminal charges, met with him numerous times on the criminal case, and kept him informed of progress with respect to the case.

2. Discussion of the testimony elicited at the hearing

Pursuant to the Order Denying Motion for Summary Decision, a hearing was held in order to make a record for the finding of disputed facts.

G. Robert Wills of the Wills, O'Neill & Mellk law firm, testified that he is an attorney at law of New Jersey and was admitted to the bar in 1971. In connection with the Benjamin Seabrook matter, Ms. Ratner who is a former assistant prosecutor, was the lead attorney in Mr. Seabrook's criminal defense. Mr. Wills indicated that under the New Jersey Education Association (NJEA) Legal Service Plan, Arnold Mellk, Esq., who is his law partner, was assigned to assist Benjamin Seabrook in the criminal investigation. (Exhibit P-5, Exhibit A attached thereto). This was done on July 31, 1996. He personally assisted Ms. Ratner and they retained the assistance of Kim Steiner-Out as an investigator. Their law firm has used Ms. Steiner-Out as an investigator in approximately 10 to 20 cases.

Mr. Wills identified his letter of March 26, 1998, addressed to the Trenton Board of Education enclosing his law firm's bill for services rendered on behalf of Mr. Seabrook (P-1, Exhibit A). This bill includes investigator's fees of $1,863.68. Polygraph fees were paid directly by the NJEA, and this is only done in connection with a criminal matter. Mr. Wills indicated that he has never worked on a teacher tenure case in his life. In fact, he indicated that he is not sure whether he was aware of the tenure charges when he handled the criminal matter. He was not aware of Mr. Mellk representing Mr. Seabrook in the tenure case. However, Mr. Mellk was aware of the criminal proceeding. There was an authorization from the NJEA which provided for the law firm's retainer. Mr. Seabrook requested that the NJEA assist him and he understood that the Wills O'Neill and Mellk law firm was representing him in his criminal matter.

The indictment against Mr. Seabrook was dismissed in late 1997 or early 1998. The firm was then retained to defend Mr. Seabrook in civil claims. Mr. Wills became aware of Ms. Hartman's involvement in the criminal matter and the trial was to be conducted by the Hartman firm, but his firm was to handle certain aspects of the criminal case. For example, Ms. Hartman asked that Ms. Ratner subpoena certain witnesses, and she also obtained and delivered certain documents to Mr. Hartman. He referred to a letter from Francis J. Hartman Esq., dated October 10, 1996 (Exhibit P-1, letter number 7) in which Mr. Hartman discusses with Ms. Ratner a motion for consolidation of the indictment. He indicated that he does not know if any papers were filed by his law firm in connection with the criminal matter but he admitted that he did not make any appearance in the criminal proceeding. He testified that his law firm paid for the

polygraphs and any transcripts. He is not sure if he sent a letter to the Board of Education with respect to the criminal matter.

Patricia R. Ratner, Esq., testified that she was employed by Wills, O'Neill and Mellk and that she represents teachers who have been accused of crimes. She indicated that she provided that representation on behalf of Mr. Seabrook in this matter. She testified that none of the bills submitted to respondent in this matter relate to the tenure charges. Mr. Seabrook did not want the Wills, O'Neill and Mellk law firm to try his criminal case but he requested and she provided as much assistance as she could through the private investigator. Two polygraphs of Mr. Seabrook were authorized and she retained Kim Steiner-Out in order to investigate this matter. Ms. Ratner decided what people should be interviewed in connection with this investigation. It was she that stumbled upon a Division of Youth and Family Services (DYFS) witness, and she obtained a release of information with respect to this DYFS information and went to part of a *Michaels* hearing. She explained that a *Michaels* hearing is a criminal proceeding considering the competence of young witnesses to see if their testimony is tainted. All witness information was provided to Catherine D. Hartman, Esq. She disputes paragraph 13 of Ms. Hartman's certification of January 28, 1999 (R-1) in which Ms. Hartman indicates that she did not instruct or request anyone from Wills, O'Neill and Mellk to perform any work in preparation for Mr. Seabrook's criminal defense. She admitted that neither she nor the law firm appeared as counsel of record in the criminal matter, and she admitted that they were not co-counsel. However, it is absolutely impossible to say that she and the law firm were not involved in the criminal matter. The DYFS worker turned out to be a critical witness in Mr. Seabrook's successful criminal defense.

Ms. Ratner testified on cross-examination that she became involved in this matter in late Spring of 1996. This was in the pre-indictment phase. Mr. Seabrook was indicted a couple of months thereafter in August 1996. She was shown an NJEA claim form (R-3) which was used to apply for insurance coverage. She was assigned by the NJEA to handle a civil matter involving Mr. Seabrook as well. The only difference between this matter and the Richard Cleghorn matter involving the Burlington County Board of Education and the Hartman law firm was that in Cleghorn she was listed as counsel of record in the criminal matter because she made certain pretrial motions.

Kim Steiner-Out testified that she is a licensed private investigator and a certified polygraphist. She was an investigator for the Wills, O'Neill and Mellk firm and was a polygraphist in connection with Mr. Seabrook's criminal matter. She worked with Ms. Ratner and with Mr. Wills and located witnesses, interviewed witnesses and issued reports. These interviews were to determine what the witnesses would say in the criminal trial. She has worked with Wills, O'Neill and Mellk in criminal defense investigations in the past. She was not aware that there was a teacher tenure matter also pending.

Benjamin R. Seabrook testified that he was employed by the Trenton Board of Education as a music teacher. He had a relationship with Wills, O'Neill and Mellk and they assisted him in the defense of certain criminal charges brought against him. He was also represented by Ms. Hartman of another law firm. Ms. Steiner-Out is an investigator and he is aware that reports were provided by Ms. Steiner-Out to the Hartman firm. Any of his polygraph examinations were arranged by Wills, O'Neill and Mellk. There was never any question that the Wills, O'Neill and Mellk law firm was retained to assist him in his criminal defense.

Mr. Seabrook testified on cross-examination that he first contacted Wills, O'Neill and Mellk because his first attorney, Mike Barrett, Esq., was very busy. As a result he sought another attorney and he was recommended to Patty Ratner. He believes that he signed something to retain Wills, O'Neill and Mellk but is not sure what. He also went to the Hartman firm about the same time. He recalls vaguely letting Catherine Hartman know that he wanted Patty Ratner to work with her. He is sure that there was a letter that he wanted the two attorneys to work together. The tenure charges were also dismissed by way of a settlement and he returned to work in January 1998 after his indictment was dismissed in December 1997.

Arnold M. Mellk, Esq., testified that he is a partner in the Wills, O'Neill and Mellk law firm and is a litigator with that firm. He testified that he generally does not do criminal defense work. He billed no time whatsoever on the criminal matter involving Mr. Seabrook. Tenure charges were filed against Mr. Seabrook in January 1997. No work on the tenure charges was done from June 1996 to January 1997. The NJEA provides legal services to its member and their law firm's real client is the NJEA. Mr. Seabrook is a member of the NJEA union and Mr.

Seabrook had to have made an application to the NJEA in order to have his law firm represent him. The investigation occurred just prior to the indictment.

On cross-examination, Mr. Mellk testified that he has seen the bill submitted to respondent previously. He admitted that at least two of the entries concern the civil action. He also indicated that the law firm is no longer representing Mr. Seabrook in the civil matter. He does not know if Mr. Seabrook is presently represented by an NJEA attorney.

Katherine Hartman Esq. testified that she is an attorney at law in the State of New Jersey and is with the firm of Hartman and Zamost, Chartered. Her specialty is criminal defense and labor law. She represented Benjamin Seabrook in a matter which arose out of his employment. He was indicted and she believes that she became involved with this case at the pre-indictment stage. She knows that Wills, O'Neill and Mellk also represented Benjamin Seabrook, but was her understanding that they represented him in his tenure matter and with respect to problems with his employment arising out of the tenure charge and indictment. She admitted that she was in touch with Patty Ratner and Bob Wills of the Wills, O'Neill and Mellk firm.

Ms. Hartman testified that the outcome of the criminal charges was that the indictment was dismissed. During the criminal proceedings she was the attorney of record and all court notices came to her. She appeared at the trial by herself. The Mellk office was very helpful because they had hired a private investigator. However, she had no co-counsel in the criminal matter and no one at Wills, O'Neill and Mellk ever told her that they considered themselves co-counsel. Wills, O'Neill and Mellk never consulted with her or instructed her concerning the law or strategy applicable to the criminal matter. There was a symbiotic relationship in that if either side acquired information they would share it with each other. Her law firm had a retainer agreement with Benjamin Seabrook and the Board of Education paid her attorney fees. She was paid $14,112.52 for handling the criminal defense.

Ms. Hartman subsequently became aware that Wills, O'Neill and Mellk had made a claim for payment in connection with the criminal defense. She never gave much thought to who was paying Wills, O'Neill and Mellk for their services. She spoke to Benjamin Seabrook about this

case last week and he never indicated that Wills, O'Neill and Mellk was a criminal defense attorney on his behalf.

On cross-examination Ms. Hartman indicated that Mr. Seabrook had the right to seek other counsel to assist him (P-4, paragraph 5). She understood that Kim Steiner-Out was handling the civil matter. There were phone calls and correspondence back and forth between the Wills, O'Neil and Mellk law firm and her law firm.

On redirect-examination, Ms. Hartman indicated that she has been a criminal defense attorney for eight years and was not aware of any such arrangement as is being claimed by petitioner herein.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:16-6.1 provides for indemnity of employees upon a favorable final disposition of a criminal action. This statutory provision is as follows:

> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

N.J.S.A. 18A:16-6.1 became effective January 11, 1968. The statement to the bill explained its purpose as follows:

> This bill also proposes legal help under limited circumstances in the event of a criminal action against an employee. The Board of Education will be required to reimburse the employee for defense costs and counsel fees, for the original hearing or trial, and for all appeals, provided the action is dismissed or results in a final disposition in favor of such employee. Employees who are found guilty would be responsible for paying their own expenses.

As the foregoing statement makes clear, the obvious purpose of the bill was to have the Board of Education pay for the legal expenses of the employee who has been successful in defending a criminal action, but let that employee be responsible for paying his or her own expenses when found guilty in a criminal proceeding. Compare this to *N.J.S.A.* 40A:14-155 providing similar rights to a police officer, who if a criminal proceeding is dismissed or determined in his favor, is to "be reimbursed for the expense of his defense." See *Sekular v. Montgomery Township Bd. of Ed.*, Superior Court, Appellate Division, Dkt. No. A-000091-96 T1 (decided May 8, 1997) (unreported).

Attorney for respondent submitted a letter on respondent's behalf dated February 22, 1999 (R-2) in which he set forth the position of respondent in this matter. He indicated that respondent does not dispute the extensive work performed by the Wills, O'Neill and Mellk as identified in Mr. Wills' certification. He argues, however, that the fact that the work was performed does not justify an entitlement to have legal fees paid by the Board as the result of the dismissal of the criminal charges against petitioner. He asserts that tenure charges against petitioner were based upon the same facts and circumstances upon which the criminal indictment was based against petitioner. There is no dispute that Wills, O'Neill and Mellk were the only counsel of record for the administrative matter and they were apparently paid by Mr. Seabrook or his collective bargaining representative, NJEA. He asserts that any attorney providing legal services to a petitioner in the administrative matter would naturally have the need to work with and share information with the criminal defense attorney, relative to his administrative hearing defense. The information clearing him in one matter would further the goal to clear him of the tenure charges in the other matter. It is asserted that the Wills, O'Neill and Mellk law firm has not provided a copy of any retainer agreement between his firm and Mr. Seabrook demonstrating Mr. Seabrook's decision to retain his firm in the criminal matter. Additionally, there is no indication that Wills, O'Neill and Mellk were listed as attorneys of record in the criminal matter. Cooperation with the criminal defense attorney does not establish that Wills, O'Neill and Mellk represented petitioner in the criminal matter.

Attorney for respondent also argues that the claim by petitioner that the law firm is entitled to payment of counsel fees pursuant to *N.J.S.A.* 18A:16-6, with respect to the civil suit brought against Mr. Seabrook is not an issue in this matter since the petition of appeal does not

seek payment of fees for a civil defense. Finally, he asserts that there is no entitlement for payment of counsel fees in successful defenses of tenure charges.

The position of respondent at the hearing was that Mr. Seabrook's criminal defense attorney and the Board of Education were not aware of any relationship between Benjamin Seabrook and Wills, O'Neill and Mellk. He argued that the testimony of Katherine Hartman was more credible. There was no retainer or other evidence of retention of Wills, O'Neill and Mellk by Mr. Seabrook in connection with the criminal proceeding. On the other hand, there was a retainer agreement between Ms. Hartman and Benjamin Seabrook. He also argued that Ms. Ratner acknowledged some working connection with the civil suit and there are numerous references in the bill to the civil suit. He indicated that Mr. Seabrook did not truly know what was going on.

Attorney for petitioner argued that the reimbursement statute has never been used to prevent reimbursement for legal assistance in a criminal matter. He pointed out that Mr. Seabrook stated that he hired Wills, O'Neill and Mellk to represent him in connection with the criminal matter. He argued that the key is what is it that the client wishes or intends. No prior approval of a Board of Education is required for reimbursement. There was also no tenure case going on during this entire time. He argued that the services for the civil action were peripheral and that Mr. Seabrook and the union has the right to be reimbursed. There is nothing in the record which establishes that there was any duplication of services. He also indicated that there is nothing in the record to show that the services were not provided by the Wills, O'Neill and Mellk law firm.

As I previously indicated, this matter was the subject of a motion for summary decision. As a result of my review of the affidavits and certifications submitted by the parties I found that because the affidavits and certifications addressing the relevant factual issues were at odds, it was necessary to take testimony and make factual and, if necessary, credibility determinations. Therefore, I denied the motion for summary decision on the basis that certain critical facts are in dispute. Thus, I felt that it was necessary to decide the following issues: (1) whether the Wills, O'Neill and Mellk law firm was retained by Mr. Seabrook to act as co-counsel for Mr. Seabrook in the criminal matter; (2) whether the Wills, O'Neill and Mellk law firm did, in fact, provide

assistance to Mr. Seabrook's criminal defense counsel which led to the dismissal of the indictment against Mr. Seabrook, or whether it merely cooperated with the criminal defense attorney. Mere cooperation does not establish that Wills, O'Neill and Mellk represented the petitioner in the criminal matter.

In this matter, I have the undisputed testimony of petitioner, Benjamin R. Seabrook that the Wills, O'Neill and Mellk law firm assisted him in the defense of the criminal charges brought against him and that he was also represented by another law firm. He indicated that there was never any question that Wills, O'Neill and Mellk was retained to assist him in his criminal defense. He believes he signed something to retain Wills, O'Neill and Mellk, but is not sure what.

I have also been provided with the Certification of Mr. Seabrook which indicates that under the auspices of his union, the NJEA, he was provided with the services of Wills, O'Neill and Mellk to assist him in his defense in both the criminal and tenure charges. He refers to a legal services plan form and he asserts that the work relating to the criminal charge took precedence over anything to be done on the tenure charges. Mr. Seabrook also indicates that both Patricia L. Ratner, Esq., and G. Robert Wills, Esq., assisted him in the defense of the criminal charges beginning in June 1996 and concluding in December 1997, and they cooperated with the Hartman firm in this effort. There is no doubt in his mind that the law firm of Wills, O'Neill and Mellk assisted significantly in the preparation of his defense against the criminal charges. They interviewed witnesses, oversaw the work of investigator Kim Steiner-Out, arranged and supervised his taking of polygraph examinations that related only to the criminal charges, met with him numerous times concerning the criminal case, and kept him informed of progress with respect to the case.

Mr. Wills relied upon the documentation provided to respondent in discovery as demonstrating that his law firm cooperated extensively with the Hartman firm in preparing the criminal case for trial (P-1, Exhibit C). He testified that his firm was to handle certain aspects of the criminal case and that Ms. Ratner, and he performed this work.

Ms. Ratner testified that she was employed by Wills, O'Neill and Mellk in order to represent teachers who have been accused of crimes and that she provided that representation on behalf of Mr. Seabrook in this matter. She testified that none of the bills submitted to respondent in this matter relate to the tenure charges. Mr. Seabrook did not want the Wills, O'Neill and Mellk law firm to try his criminal case but he requested that she provide as much assistance as she could through the private investigator, and she did so. It was Ms. Ratner who stumbled upon a DYFS witness and obtained a release of this DYFS information and went to part of a *Michaels* hearing. All witness information was provided to Katherine D. Hartman, Esq. She disputes Ms. Hartman's certification of January 28, 1999 (R-1) in which she indicates that she did not instruct or request anyone from Wills, O'Neill and Mellk to perform any work in preparation for Mr. Seabrook's criminal defense. She asserted that it is absolutely impossible to say that she and the law firm were not involved in the criminal matter. The DYFS worker turned out to be a critical witness in Mr. Seabrook's successful criminal defense.

Ms. Steiner-Out testified that she was an investigator for the Wills, O'Neill and Mellk firm and was a polygraphist in connection with Mr. Seabrook's criminal matter. She worked with Ms. Ratner and with Mr. Wills and located and interviewed witnesses and issued reports. These interviews were to determine what the witnesses would say in the criminal trial. She has worked with Wills, O'Neill and Mellk in criminal defense investigations in the past. She was not even aware that there was a teacher tenure matter also pending.

The only testimony disputing the foregoing was that of Katherine D. Hartman, Esq., the attorney of record in the criminal proceeding. Her testimony was to the effect that it was her understanding that Wills, O'Neal and Mellk represented Seabrook only in the tenure matter and with respect to problems with his employment arising out of the tenure charge and indictment. She further indicated that during the criminal proceedings she was the attorney of record and all court notices came to her and she appeared at the trial by herself. She had no co-counsel of record in the criminal matter and no one at the Wills law firm ever told her that they considered themselves co-counsel. They never consulted with her or instructed her concerning the criminal proceeding. She also indicated that Mr. Seabrook never told her that the Wills firm was a criminal defense attorney on his behalf. She admitted that she was in touch with the Wills law firm and that she never gave much thought to who was paying the Wills law firm.

However, the facts in this matter clearly show that the assistance of the Wills, O'Neill and Mellk law firm and, in particular, the investigation directed by Ms. Ratner and undertaken by the private investigator retained by the Wills law firm was a significant and substantial reason for Mr. Seabrook's successfully defending the criminal case. The undisputed testimony of Patricia Ratner, Esq. was that Mr. Seabrook requested and she provided as much assistance as she could in the criminal matter through the private investigator. Ms. Ratner arranged polygraphs of Mr. Seabrook and it was she who stumbled upon a DYFS witness and obtained the release of information which was essential in the criminal defense. The DYFS worker found by the Wills law firm turned out to be a critical witness in Mr. Seabrook's successful criminal defense.

Based upon the foregoing, I **FIND** that the Wills, O'Neill and Mellk law firm was retained by Benjamin Seabrook to act as an attorney for Mr. Seabrook in the criminal matter. I **FIND** that the Wills, O'Neill and Mellk law firm did not merely cooperate with the criminal defense attorney, but was of significant and critical assistance to Mr. Seabrook's criminal defense counsel which led to the dismissal of the indictment against Mr. Seabrook. Based on these findings, I **FIND** that the Wills, O'Neill and Mellk law firm participated in Mr. Seabrook's criminal defense action and, therefore, I **CONCLUDE** that the Board of Education is responsible for reimbursing petitioner Benjamin Seabrook for the legal fees and disbursements incurred by Wills, O'Neill and Mellk for the cost of defending such proceeding, including reasonable counsel fees and expenses of the law firm.

It is noted, and it was in fact admitted by Mr. Wills and Mr. Mellk that certain entries in the bill of March 27, 1998 relate to a pending civil proceeding. I **FIND** that the billing entries for the following dates relate to an anticipated civil suit: July 31, 1996, 0.50 hours and 1 hour (2 entries); August 1, 1996, 0.25 hours; August 2, 1996, 0.30 hours; August 7, 1996, 0.25 hours; August 16, 1996, 0.25 hours; August 23, 1996, 0.25 hours; September 6, 1996, 0.60 hours; October 30, 1996, 1.25 hours; February 4, 1997, 0.40 hours; and December 11, 1997, 1.50 hours; totaling 6.55 hours. Accordingly, I **FIND** that these entries and the billing for this time should be deducted from the total bill, and that the total bill should be reduced by $1,606.00 to $8,043.45.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that the respondent Board of Education of the City of Trenton is responsible for reimbursing petitioner Benjamin Seabrook for the legal fees and disbursements incurred by Wills, O'Neill and Mellk for the cost of defending such proceeding, including reasonable counsel fees and expenses of the law firm totaling $8043.45.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 2000
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/17/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 18 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF EXHIBITS

For petitioner:

P-1 Certification of G. Robert Wills, Esq., dated February 8, 1999

P-2 Certification of Kim Steiner-Out, dated February 22, 1999

P-3 Certification of Patricia L. Ratner, Esq., dated February 22, 1999

P-4 Certification of Benjamin Seabrook, dated February 25, 1999

P-5 Certification of G. Robert Wills, Esq., dated February 22, 1999

For respondent:

R-1 Affidavit of Katherine D. Hartman, Esq.

R-2 Thomas W. Sumners, Jr., Esq., letter of February 22, 1999

R-3 NEA Educators Employment Liability Claim Form dated August 16, 1996

OAL DKT. NO. EDU 6701-98
AGENCY DKT. NO. 345-7/98

BENJAMIN SEABROOK AND WILLS, O'NEILL & MELLK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

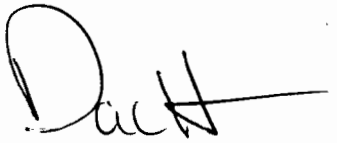
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions, timely filed pursuant to *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination herein.

Upon his independent consideration and review, the Commissioner concurs with the Administrative Law Judge's (ALJ) findings that Benjamin Seabrook retained the law firm of Wills, O'Neill and Mellk to assist in the defense of the criminal charges lodged against him, and that, in particular, the pre-trial investigative work undertaken by the firm "was of significant and critical assistance" to the successful defense of the criminal action. (Initial Decision at 17) Consequently, the Commissioner affirms the ALJ's conclusion that, pursuant to *N.J.S.A.* 18A:16-6.1, the Board is obligated to reimburse Mr. Seabrook for the legal fees and costs incurred by Wills, O'Neill and Mellk for work performed in connection with the defense of these charges. Finally, the Commissioner is also in accord with the ALJ that Wills, O'Neill and Mellk's

$9,649.45 invoice to the Board, dated March 27, 1998, for services rendered on behalf of Mr. Seabrook, must be reduced by $1,606, representing billing entries attributable to services rendered with respect to a pending civil action, since these charges are not recoverable in this proceeding.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The Board of Education of the City of Trenton is hereby directed to reimburse Petitioner Benjamin Seabrook $8,043.45, representing counsel fees and costs incurred by the law firm of Wills, O'Neill and Mellk for efforts it expended in defense of the favorably resolved criminal charges against him.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: AUG 31 2000

Date of Mailing: AUG 31 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#281-00

281-00

S.L.S., on behalf of minor child, T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

August 31, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 750-00

AGENCY DKT. NO. 372-12/99

S.L.S.. & T.P.,

Petitioners,

v.

BORDENTOWN TOWNSHIP REGIONAL BOARD OF EDUCATION,

Respondent.

Renee LaMarre-Sumners, Esq., for petitioners (Staub & Sumners, attorneys)

Stephen J. Mushinski, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: July 12, 2000 Decided: July 13, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case involves whether petitioners were "domiciled" in the district served by the respondent Bordentown Township Regional Board of Education (BOE), T.P.'s right to attend the BOE's high school and the BOE's claim for tuition for T.P.'s attendance. N.J.S.A. 18A:38-1 et seq. As shown by the attached Stipulation of Settlement, the parties have settled the case.

PROCEDURAL HISTORY

Consistent with N.J.S.A. 18A:38-1, the BOE held a hearing during which it considered whether petitioners were domiciled in the district; petitioners were afforded an opportunity to be heard, etc.; and the BOE determined that petitioners were not so domiciled. The BOE then notified petitioners of its determination and that it would exclude T.P. from its schools. N.J.S.A. 18A:38-1(b)(2). By letter filed with the Department on December 5, 1999, petitioners appealed from the BOE's determination. By letter dated December 9, 1999, the Department, citing N.J.S.A.18A:38-1 et seq. and N.J.A.C. 6:24-1.1 et seq., notified petitioners that their letter required a verification and proof of service to go forward as an appeal. On January 31, 2000, the petition, verification, etc., were filed with the Department. On February 8, 2000, the BOE's answer was filed with the Department of Education and the Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on June 2, 1999. N.J.S.A. 18A:6-9; N.J.S.A. 52:14B-2(b). The case scheduled for a hearing beginning on May 2, 2000 in the OAL, Trenton and, on that day was subject to a settlement conference. On the record closed date, I received the attached Stipulation of Settlement.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This case involves complicated factual, legal and policy issues: Petitioner S.B. and her husband own a home in the school district served by the BOE. Petitioners resided there and T.P. was a student in the BOE's school system. However, S.B. alleges that, as a result of domestic violence perpetrated by her husband, she and T.P., a tenth grade student, were forced to flee from their home and temporarily reside with S.B.'s parents in a neighboring district, intending to return to the home, i.e., to the district. As noted above, the BOE disputed petitioners' domicile, etc.

The parties have settled this case, as shown by the attached Stipulation of Settlement.

The parties have voluntarily and intelligently entered into the settlement and thereby avoided potentially protracted and expensive litigation and the settlement fully disposes of all issues in controversy and is consistent with law, meeting the requirements of N.J.A.C. 1:1-19.1 and I approve it.

ORDERS

I **ORDER** the parties to comply with the Stipulation of Settlement and **ORDER** this case transmitted back to the Department of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 13, 2000
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7/17/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 18 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

File No. 09061-0016

Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, NJ 08053
(856) 596-8900
Attorneys for Board of Education of Bordentown Township Regional School District, Burlington County

	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
	Agency Docket No. 372-12/99 OAL Docket No. EDUOS-00750-00S
S.L.S., ON BEHALF OF MINOR CHILD, T.P. Petitioner, vs. BOARD OF EDUCATION OF SCHOOL BORDENTOWN TOWNSHIP REGIONAL DISTRICT, Respondent.	Civil Action STIPULATION OF SETTLEMENT

LAW OFFICE
Parker, McCay & Criscuolo, P.A.

This matter having been opened to the Court upon the filing of a Petition of Appeal with the Commissioner of Education by the Petitioner, S.L.S. o/b/o T.P., and the Petitioner having become subsequently represented by Renee LaMarre-Sumners, Esq.; and the Board of

Education of the Bordentown Regional School District ("Board") having been represented by Stephen J. Mushinski, Esq. of the law firm of Parker, McCay & Criscuolo, PC; and the parties having appeared on May 2, 2000 for a hearing, which hearing was adjourned to allow for the Petitioner to obtain counsel; and the parties having reached an agreement with respect to T.P.'s educational placement for the 2000-2001 school year and having resolved all issues with regard to payment of tuition to the Board and the parties having agreed upon settlement of all matters set forth in the Petition, the parties hereby stipulate and agree to resolve the outstanding matter as follows:

1. T.P. shall withdraw from the Bordentown Regional High School District as of the end of the 1999-2000 school year. T.P. will be permitted to return to the Bordentown Regional High School District, should she establish a bona fide residence in any constituent municipality of the Bordentown Regional School District, some time in the future.

2. Bordentown waives tuition reimbursement for the period, November, 1999 to June, 2000 so long as T.P.'s withdrawal is effective as of the end of the 1999-2000 school year.

3. The parties waive any other claims that each may have against the other with regard to any matters raised in the Petition of Appeal and in the Answer to the Petition.

4. Petitioner and Respondent have both been represented by counsel during these proceedings and have received the advice of counsel with respect to the terms of this Stipulation of Settlement and request the Court and the Commissioner to approve the

Stipulation of Settlement as an Order of the Court and a final decision of the Commissioner of Education.

Renee LaMarre-Sumners, Esq.
Attorney for Petitioner

Stephen J. Mushinski, Esq.
Attorney for Respondent

Dated: June 9, 2000

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

OAL DKT. NO. EDU 750-00
AGENCY DKT. NO. 372-12/99

S.L.S., on behalf of minor child, T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 31 2000

Date of Mailing: AUG 31 2000

#282-00E

282-00

M.D. & E.D. on behalf of minor child, J.D., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY RESPONDENT.	:	DECISION ON MOTION
	:	

September 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR EMERGENT RELIEF

OAL DKT. NO. EDU 6455-00

AGENCY REF. NO. 289-8/00

M.D. AND E.D., PARENTS, ON BEHALF OF J. D., A MINOR CHILD,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY,

Respondent.

M. D., petitioner of J.D., petitioner, appearing *pro se*

Michael D. Capizola, Esq., for respondent

Record Closed: August 28, 2000 Decided: August 28, 2000

BEFORE **LILLARD E. LAW,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

M.D., the parent and legal guardian of J.D., a minor child appeals from an action by the Board of Education of the Borough of Buena (Board) to exclude J.D. from all school

extracurricular activities for the 2000-2001 school year. M.D. filed a Petition of Appeal before the Commissioner of Education (Commissioner) seeking emergent relief of his claims against the Board. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Oral argument on the Emergent Petition of Appeal and the Board's defenses was heard on August 28, 2000, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on August 28, 2000.

Petitioner brings this matter before the Commissioner and, thus, the OAL under the provisions for emergent relief found at *N.J.A.C.* 1:1-12.6. Oral argument was heard by the undersigned and finds relevant facts giving rise to the instant matter are not in dispute.

During the 1999-2000 school year J.D. was a 9th grade student at Buena Regional High School. In or about April 2000, J.D., along with three other students, constructed a web site on the internet in which they published threatening, profane and derogatory material concerning a high school mathematics teacher. A plenary hearing was held on May 4, 2000, before the Board and a court reporter. The transcript of the proceedings show that J.D. contributed a number of the line drawings which commented on daily happenings in the teacher's class. Many of the drawings were innocuous, however, several of the drawings contained obscene language and were derogatory to the teacher. One drawing depicted a student in the air conditioning ducts with a rifle. (R-1, p. 36). The web site was linked to another web site which contained very abusive language and interactive "games" which permitted visitors to the web site to shoot at or hit scanned photos of the teacher resulting in graphic injury to the teacher's photograph. J.D. admitted on the record before the Board that he made the line drawings of the teacher and classroom events and contributed to the web sites. He later pleaded guilty to a juvenile delinquency charge of harassment in municipal court.

The Board, after deliberation, adopted the resolution, which suspended J.D. for the remainder of the 1999-2000 school year and barred him from sports and extracurricular activities for the 2000-2001 school year. He was also required to sign an agreement governing his behavior before being readmitted.

The teacher depicted on the web site was so upset that she was unable to return to teaching for the balance of the school year. The student was given home instruction, which ended on or about August 1, 2000.

ARGUMENTS OF THE PARTIES

Petitioner's Argument

Petitioner argues, among other things, that it is ridiculous to punish a child in the manner the Board has imposed upon J.D. Petitioner argues that any professional would deem the punishment of excluding J.D. from extracurricular activities to be counter productive. He asserts that the extracurricular programs keep children out of trouble.

Petitioner admits, however, that the testimony of J.D. and others at the Board's plenary hearing was true and accurate. He challenges the penalty of J.D.'s exclusion from participating in any school extracurricular activity for the whole of the 2000-2001 school year.

Petitioner argues that such an exclusion, including sports, will do irreparable harm for J.D.'s future education.

The Board's Argument

When an administrative agency, such as a local board of education, acts within its authority, its decision is "entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious, or unreasonable." *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), affirmed 46 *N.J.* 581 (1966); *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294, (*App. Div.* 1960). Moreover, a reviewing Court or agency will not substitute its independent judgment for that of a Board, where the Board's findings are supported by substantial evidence, *i.e.,* evidence which a reasonable mind might accept as adequate to support the Board's conclusion. *Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super.* 40, 46

(*App. Div.* 1962). The Board's decision to suspend J.D. from the Buena Regional High School and bar him from extracurricular activities was not arbitrary, capricious, or unreasonable. Accordingly, the Petition and Motion to Stay filed by petitioner should be dismissed. In the present matter, the Board made the decision to exclude J.D. from extracurricular activities after taking of testimony. The testimony included implied threats to the teachers, profanity and a general disregard for the rules and policies of the Buena Regional High School. Based upon the testimony of the graphic record, the Board was within its discretion to impose the penalty it did.

In *F. McB. v. Board of Education of the Township of Washington,* 96 *N.J.A.R.* 2*d.* (EDU) 298, the court upheld a local school board suspension of a student from school activities as a reasonable exercise of the Board's authority. The court held that, "The actions of the Board and its agents were reasonable in that the application of discipline in this matter was directly related to the good order and best interests of the school and school activities." *Id.* at 306. The Commissioner adopted the court's decision and stated that "The Board's application of discipline was rationally related to the good order and best interests of the school and to the particular conduct exhibited by [the suspended student]." *Id.* Furthermore, in *Barna v. Irvington Board of Education,* 97 *N.J.A.R.* 2*d.* (EDU) 345, the Commissioner held that, "It is axiomatic that when a local Board of Education acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable." *Id.* at 347.

In the present case, petitioner has failed to allege that respondent's conduct was arbitrary, capricious or unreasonable. J.D. has failed to refute to any of the evidence which was placed before the Board and has not denied that J.D. engaged in all of the conduct which was testified to before the Board.

In order to prevail on an application for a preliminary injunction, an applicant must establish that: (1) he will suffer irreparable injury if the relief sought is denied; (2) his claim is based upon a settled legal right; (3) the material facts are substantially undisputed; and (4) the harm to him if the injunction is denied will be greater than the harm to the resisting party if the injunction is granted. *Crowe v. DeGioia,* 90 *N.J.* 126 (1982); *Ispahani v. Allied Domecq Retail;*

320 *N.J. Super.* 494 (*App. Div.* 1999). Petitioner has failed to meet the four prongs of *Crowe* and *Ispahani* and is therefore not entitled to injunctive relief in this matter.

As to the first of the four prong test, J.D. will not suffer irreparable harm if the requested relief if not granted. Petitioner cannot argue that J.D. will be denied a public education. J.D. will receive a public education by returning to school in September. Extracurricular activities are not a necessary part of the educational process.

As to the second prong of the test, petitioner cannot argue that the legal right underlying J.D.'s claim is settled because entitlement to a public education is settled as a matter of law. Again, respondent must clarify that J.D. will be receiving an education. J.D. is not being removed from school. J.D. merely appears to be dissatisfied with not being involved with the extracurricular activities and executing an agreement. This is not sufficient to meet the test for issuance of preliminary injunction.

For the third prong articulated in *Crowe* and *Ispahani,* petitioner must show a likelihood of prevailing on the merits of the underlying claim. Petitioner has failed to argue that the Board's actions were arbitrary, capricious, or unreasonable. As articulated above, the decision of the Board cannot be disturbed unless it was arbitrary, capricious or unreasonable. As the moving party, the burden is upon petitioner to show why the Board's actions should be disturbed. Petitioner has failed to even make such an argument. Accordingly, petitioner has failed to meet the third prong of *Crowe* and *Ispahani.*

Lastly, the Court must consider whether the harm to J.D. would be greater if the injunction is denied than the harm would be to the Buena Regional High School if the injunction were granted. A cursory review of the testimony presented before the Board proves that respondent may suffer greater harm if J.D. is returned to the Buena Regional High School without restriction. J.D. has harassed a teacher and has engaged in derogatory, threatening and abusive conduct with other students. All of these actions pose a great risk of harm to the Buena Regional High School staff and students should J.D. be permitted to return to the high school without restriction pending a decision by the Commissioner. To the contrary, there is no risk of harm to petitioner. There are no Certifications, Statement of Facts, Verifications or Affidavits to

support the allegations. It must again be stressed that petitioner, as the moving parties, have the burden of proving to this Honorable Court why injunctive relief should be granted. Petitioner have failed to make the showing required under *Crowe* and *Ispahani* and, therefore, has failed to meet their burden.

Accordingly, for all of the reasons contained herein, it is respectfully requested that petitioner Petition and Motion for stay be denied and that this matter be dismissed.

CONCLUSIONS AND ORDER

Having carefully reviewed and considered the entire record before me, I **CONCLUDE** that petitioner has failed to carry his burden of proof that the Board's disciplinary action against J.D. will cause irreparable harm to J.D., *Crowe, supra.*; *Ispahani, supra.* Too the contrary, irreparable harm was visited upon the teacher who was the subject and target of J.D.'s drawings. As the Honorable Bruce Campbell, ALJ observed in the matter of *F. McB., supra.*:

> Pupils must submit to the authority of teaching staff members and must comply with the rules that have been established by law for the governance of their schools. *N.J.S.A.* 18A:37-1. Each district board of education is empowered by *N.J.S.A.* 18A:11-1 to make, amend, and repeal rules for the management of the schools in the district. The same statute authorizes boards of education to perform all acts and to do all things, consistent with the law, necessary to proper conduct of the schools of the district. It is not possible to reduce to writing every possible situation that might subject a pupil to punishment. However, any act may subject a pupil to punishment where the act is detrimental to good order and to the best interest of the school or where it adversely affects school discipline. 79 *C.J.S. Schools and School Districts* §496 at 455. *Id.* at 306.

The acts by J.D. subject him to sever disciplinary penalties. In the instant matter, J.D.'s exclusion from extracurricular activities for one school year. J.D. must be accountable for his behavior and actions. The penalty imposed by the Board is, in the judgment of this tribunal, fair and just under the circumstances.

Accordingly, it is **ORDERED** that the herein Petition of Appeal for Emergent Relief is hereby **DENIED** and the Petition is **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **THE COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

22 August 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

lmh

WITNESSES

For Petitioner:

J.D.

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

(Exhibits Attached to the Petition of Appeal – not marked into Evidence)

For Respondent:

R-1 "To My" (17 pages)
(Exhibits attached to the Board's Brief – not marked into Evidence)

OAL DKT. NO. EDU 6455-00
AGENCY DKT NO. 289-8/00

M.D. AND E.D., on behalf of minor child, J.D., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY, RESPONDENT.	:	DECISION ON MOTION

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on August 28, 2000, the Initial Decision and the Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief as he concurs with the ALJ's hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 01 2000

Date of Mailing: SEP 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#283-00

283-00

JOHN ELIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher sought reinstatement of his salary increment for the 1998-1999 school year. The increment was withheld based on the "less than satisfactory performance" of petitioner.

After conducting a hearing, the ALJ determined that petitioner failed to properly assess the needs and evaluate the progress of his pupils, failed to exhibit effective instructional techniques expected of an experienced special education teacher and failed to employ effective organization and planning. Based on this determination, the ALJ concluded that the District properly acted within its discretionary authority in withholding petitioner's salary increment and recommended dismissal of the petition.

The Commissioner found no cause to disturb the findings of fact, credibility determinations and conclusions of the ALJ, and concurred with the ALJ's determination that petitioner failed to meet his burden. Petition was dismissed.

September 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3819-99
AGENCY DKT. NO. 399-9/98

JOHN ELIK,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: June 15, 2000 Decided: July 13, 2000

BEFORE **ELINOR R. REINER**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold his salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

Initially this matter was one of thirty-one consolidated cases filed with the Commissioner of Education ("Commissioner") on August 31, 1998. Count 9 of the multi-count petition alleged the wrongful withholding of the increment of petitioner, John Elik. On September 21, 1998, the District filed its answer. On October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Elik case, designated OAL Dkt. No. EDU 3819-99, on March 21, 2000. Witnesses and exhibits are listed in the attached appendix.

FINDINGS OF FACT

Background Information

Most of the relevant background information is undisputed. John Elik has been a special education teacher in the Jersey City public schools for thirteen years. He has been a special education teacher at P.S. 15 for eight years. He holds art education and teacher of the handicapped certificates. During the 1997-98 school year he taught a self-contained special education class of students classified as neurologically impaired at P.S. 15. There were approximately ten, ten-year-old students in his class, who functioned between grades one and two. A teacher's aide was assigned to him.

During the 1997-98 school year, Elik was formally observed on at least four separate occasions. Roxanne M. Johnson, supervisor of special education, visited the classroom for 45 minutes on September 25, 1997. Annie Graham, principal, spent 45 minutes in Elik's classroom on October 3, 1997, and 50 minutes on November 5, 1997. In addition, evaluator Ronnie Bassman observed Elik's classroom for one hour on April 8, 1998. As a result of these observations, and other less formal contacts throughout

the year, the District determined to withhold Elik's 1998-99 employment and adjustment increments for a "less than satisfactory performance." Although during at least one observation (October 3, 1997) by Annie Graham, she was critical of all of the performance factors, the majority of the observations remained dominantly critical of Elik's assessment of the needs of and evaluation of the progress of his pupils, as well as his lack of effective organization and planning. In addition, his ability to utilize effective instructional techniques was criticized by two separate administrators. These perceived deficiencies will be discussed under separate headings.

(1) Assesses Needs and Evaluates Progress of Pupils

Roxanne M. Johnson has been employed as a supervisor of special education since 1992-93. Previously, she was the school psychologist for the child study team. She has a doctorate in psychology from Rutgers University. On September 25, 1997, Dr. Johnson found petitioner to be in need of improvement in the area of assessing the needs and evaluating the progress of the pupils. Of import, she indicated that although his plan book was current, it did not indicate the homework for the date. Although the majority of the entries had a "SWAT" and method, there was no reference to the text to be used. She further indicated that a variety of thinking levels were not indicated, such as the levels in Bloom's Taxonomy. She further indicated that the lessons in the various content areas all followed a similar pattern and there was not much diversity in teaching styles. She therefore concluded that Elik was in need of improvement in this area. Dr. Johnson opined that the students' needs were not being met because petitioner was not using a variety of teaching strategies.

Annie Graham, who is currently the principal of P.S. 12 and was the principal of P.S. 15 during the 1997-98 school year, has been employed by the District for twenty-one years. She has served in various capacities with the District and is certified as a teacher of the handicapped. On October 3, 1997, she found Elik to be unsatisfactory in the area of assessing needs and evaluating progress of pupils. She indicated that this was basically due to poor planning. Since he did not properly plan out each activity for his students, he could not meet their individual needs. She opined that Elik should plan

activities and sequential steps to assist the students. She believed that some of the discipline problems he had with his students were due in part to his poor planning. Since he did not monitor the students, he was not able to properly assess their strengths and weaknesses.

Ms. Graham conducted another evaluation on November 5, 1997, and concluded that the area of assessing students' needs and evaluating their progress still needed improvement. More time should have been spent on vocabulary words, and the homework assignment was missing. Although she opined that Elik could plan a lesson thoroughly, she believed that his problem was consistency. The activities should have been in the plans.

Although evaluator Ronnie Bassman did not testify at the hearing, her observation report of Mr. Elik's performance on April 8, 1998, indicated that he was still in need of improvement in the area of assessing needs and evaluating progress.

Elik, who testified on his own behalf, contended that he wrote the homework assignment in his plan book in the upper left-hand corner and utilized learning centers. He admitted that on certain days he forgot to list the homework. Elik indicated that he assessed the students' tests, watched the students go through the problems and kept informal assessments separately in packets at his desk.

I **FIND** that Elik failed to properly assess the needs and evaluate the progress of his pupils, essentially by failing to properly plan activities for his students that would meet their individual needs.

(2) Utilizes Effective Instructional Techniques

Dr. Johnson concluded that petitioner failed to utilize effective instructional techniques and was in need of improvement in that area. More particularly, on September 25, 1997, he did not utilize a variety of teaching techniques. His presentation was on a factual level and then the students had to give the information

back to the teacher. Dr. Johnson wanted him to use other teaching strategies. Also, she wanted him to incorporate learning centers to enhance the educational experience of the students, which she contended he did not do. She opined that special education students do better with project-based tasks than with a traditional approach.

On redirect examination, Johnson referred to petitioner's failure to assess the needs and evaluate the progress of the students. She indicated that if petitioner had assessed the needs of each student there would have been a wider variety of instructional techniques employed.

Annie Graham agreed with this assessment when she observed petitioner on October 3, 1997. She indicated that his instructional technique needed improvement because basically petitioner failed to plan and prepare what he would teach. He "winged it," and should have established extra activities for the students. However, it is to be noted that following her next evaluation of petitioner, on November 5, 1997, she concluded that his utilization of effective instructional techniques was satisfactory. It was also satisfactory when he was evaluated by Ronnie Bassman on April 8, 1998.

Elik contended that the lessons he taught were consistent with his plan for the day. Noting the importance of planning, he indicated that throughout the year he added more and more detail to his plan book. Moreover, Elik indicated that he was not aware until the end of the year that his increment was in jeopardy. He contended that he was evaluated by a Mr. Smith after November 5 (after Christmas or early spring). Although it was a formal evaluation, he never received the results of it. He thought it was a good lesson. He could not recall being evaluated by Ms. Bassman. The District found no additional evaluations from a Mr. Smith.

I **FIND**, based on the evaluations of petitioner, that petitioner failed to exhibit effective instructional techniques expected from an experienced special education teacher. Due to his failure to plan, he did not utilize the requisite instructional techniques; he failed to utilize a sufficient variety of teaching techniques, including learning centers.

(3) Failure to Employ Effective Organization and Planning

Roxanne Johnson found the area of employing effecting organization and planning to be satisfactory when she observed Elik on September 25, 1997. However, Annie Graham found petitioner to be unsatisfactory in this area when she observed him on October 3, 1997, and in need of improvement in this area when she observed him on November 5, 1997. Further, Ronnie Bassman found petitioner to be in need of improvement in this area when she observed him on April 8, 1998.

Specifically, Annie Graham opined that Elik was clearly unsatisfactory in this area. Her basic objection to his teaching was that petitioner was not organized and did not properly plan. Thus, petitioner looked for things to do with his students and there was a lot of time "off task." She wanted petitioner to write detailed lesson plans and to prepare the materials in advance to avoid wasting time. Following her second observation, on November 5, 1997, she concluded that he continued to need improvement in this area. His plan book did not identify homework or specific details about the reading lessons. The lesson completed by Elik had not been recorded in his plan book as taught. Graham reiterated that Elik must write detailed plans. Due to his inconsistency in planning, he wasted a lot of time and, as a result, his ability to discipline suffered. Ronnie Bassman, who observed Elik on April 8, 1998, also concluded that Elik was in need of improvement in this area.

I **FIND** that Elik failed to employ effective organization and planning. He failed to write the requisite details in his plan book and thus could not effectively teach the students.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Elik's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of providing unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Petitioner argued that there was a serious question as to the motives and credibility of at least one of the evaluators, Ms. Graham. Petitioner contended that much of her testimony was questionable as to its veracity and that it was her unsupported subjective view that led to the denial of petitioner's increment. He claimed that the evaluators created their own standards. Petitioner further alleged that the criteria and requirements were not made clear to him and also were not clear to Ms. Graham. Graham critiqued him based not upon an objective district-wide criteria, but

upon her own personal views of what an art teacher should do. Petitioner further claimed that he was not advised or properly trained on how to maintain plan books.

I have considered petitioner's arguments and **CONCLUDE** that the evidence simply does not substantiate his contentions. I cannot agree that Ms. Graham's motive was questionable and that her testimony was insincere. Rather, I **FOUND** Ms. Graham's testimony to be credible and worthy of belief. Moreover, I cannot conclude that the teaching requirements were not made clear to him and were not clear to his evaluators. Rather, petitioner was advised as to what was required of him. If he had any questions, he could have utilized the help of his evaluators or supervisors. The alleged deficiencies in his teaching skills were not the result of the District's failure to properly train or prepare him for his assignment. Moreover, his experience as a teacher should have allowed him to properly prepare to teach the class to which he was assigned. Clearly, he should have possessed the requisite expertise to rectify the situation.

Here the underlying facts were substantiated by the testimony of two qualified educational experts. Elik failed to meet District standards in at least three important measures of teaching performance: assessing needs and evaluating progress of pupils, employing effective organization and planning, and utilizing effective instructional techniques. Under the circumstances, petitioner has not succeeded in showing that the Board's decision to withhold his salary increment was arbitrary, capricious or unreasonable.

ORDER

It is **ORDERED** that the relief requested by petitioner is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 13, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/18/00
DATE

Debbie Antonitis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 20 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al/pb

APPENDIX

List of Witnesses

For Petitioner:

John Elik

For Respondent:

Roxanne M. Johnson
Annie Graham

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Instructional Observation Report for John Elik, dated September 25, 1997
R-2 Instructional Staff Observation Report, dated October 3, 1997
R-3 Instructional Staff Observation Report, dated November 5, 1997
R-4 Instructional Annual Written Performance Report, dated May 11, 1998
R-5 Letter to John Elik from Judi Granick, dated June 1, 1998
R-6 Instructional Staff Observation Report for John Elik, dated April 8, 1998

OAL DKT. NO. EDU 3819-99
AGENCY DKT. NO. 399-9/98

JOHN ELIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, which included a transcript of the hearing conducted at the OAL on March 21, 2000, the Commissioner determines to affirm the Initial Decision. As noted therein, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. *See, Kopera, supra.* Finding no cause to disturb the findings of fact, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet his burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 01 2000

Date of Mailing: SEP 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#284-00

284-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ELAUGH BUTLER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

SYNOPSIS

Petitioning District filed tenure charges against respondent teaching staff member alleging conduct unbecoming a teaching staff member, and sought termination of her employment. The charges were based on respondent's participation in a scheme to defraud the State Health Benefits Program. Prior to the hearing of this matter, respondent was convicted of crimes of the second and third degree which involved dishonesty. As part of her sentence, respondent's public employment with the State-operated School District of the City of Newark was forfeited.

Based on the forfeiture of respondent's public employment, the ALJ concluded that this matter was moot and entered an Initial Decision dismissing the case as moot.

The Commissioner concurred with the ALJ's determination that this matter was rendered moot when respondent's public employment was forfeited. Petition was dismissed.

September 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ENTERING JUDGMENT OF DISMISSAL AS MOOT

OAL DKT. NO. EDU 7959-97
AGENCY DKT. NO. 224-6/97

IN THE MATTER OF THE TENURE HEARING OF ELAUGH BUTLER, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

---

Philip E. Stern, Esq., for Petitioner School District (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Dwayne D. Warren, Esq., for Respondent Butler (Warren & Tosi, attorneys)

Record Closed: July 7, 2000 Decided: July 14, 2000

BEFORE **THOMAS R. VENA,** ALJ:

Petitioner, State Operated School District of the of the City of Newark, brought tenure charges against Respondent, Elaugh Butler, alleging conduct unbecoming a teacher so as to require that her employment be terminated. The charges were predicated upon Respondent's intentional participation in a scheme to defraud the State Health Benefits Program (SHBP) by conspiring with Dr. Carl H. Lichtman (Lichtman) to submit claims for psychological services reportedly rendered. According to Petitioner, Respondent allegedly provided information required and utilized to submit fraudulent claims to the insurance carrier for payment for psychological services. Respondent, it is alleged, received a share of the fees collected.

The charges were promulgated and served on Respondent on October 30, 1996. Respondent was duly notified of her right to submit a statement of position and

evidence within fifteen days. The charges were certified on June 20, 1997. An answer was filed on August 11, 1997 and the case was transmitted to the Office of Administrative Law (OAL) on September 2, 1997. The matter was assigned to then Administrative Law Judge and now Superior Court Judge Sebastian Gaeta and scheduled for hearing in October 1997.

Respondent's pay was apparently either reinstated pursuant to *N.J.S.A.* 18A:6-14 or about to be reinstated when the attorney for the Respondent requested an adjournment in order to at first deal with a scheduling conflict and subsequently requested that the matter be placed on the inactive list for six months pursuant to *N.J.A.C.* 1:1-9.7. Due to the then unresolved criminal charges related to the proceedings, the requested stay was granted by Order of Judge Gaeta dated October 27, 1997. As a result of the request of her attorney, Respondent agreed to waive her right to be paid during the period that the matter was on the inactive list.

Following Judge Gaeta's ascension to the Superior Court bench, the within matter was reassigned to the undersigned on June 14, 1999. A pre-hearing conference took place on August 18, 1999 and a pre-hearing order was entered that date setting a December 1999 hearing date. Shortly before the scheduled hearing date, a request to adjourn those dates was made and granted due to the continuing pendency of the criminal proceedings. Hearing dates in May 2000 were scheduled.

On May 5, 2000, Respondent was convicted of crimes of the second and third degree which involved dishonesty. Those convictions occurring before the scheduled hearing date, but with sentencing scheduled subsequent to the May hearing dates, the parties once again requested an adjournment which was granted. A July 19, 2000 hearing date was scheduled.

On June 23, 2000, Respondent was sentenced by the Hon. Donald R. Venezia, J.S.C. As part of that sentence, Judge Venezia entered an Order dated June 23, 2000 forfeiting the employment of Respondent with the School District of the City of Newark. Under cover of letter dated July 5, 2000, the foregoing forfeiture Order was forwarded to the undersigned by the attorney for the Petitioner for appropriate action. No response has been received from the Respondent or her attorney.

DISCUSSION AND CONCLUSION

N.J.S.A. 2C:51-2, governing forfeiture of employment for public employees, states in pertinent part:

> A person holding any public office, position, or employment, elective or appointed, under the government of the State or any agency or any political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> He is convicted under the laws of the State of an offense involving dishonesty or of a crime of the third degree or above . . .
>
> A court of this State shall enter an order of forfeiture . . . immediately upon of finding of guilt by the trier of fact or a plea of guilty entered in any court of this State . . . .

As directed by the provisions of *N.J.S.A.* 2C:51-2B(1), Judge Venezia entered the Order forfeiting Respondent's employment pursuant to *N.J.S.A.* 2C:51-2a(1) and (2). That Order is binding upon this tribunal and can only be reversed via the order of the Superior Court of New Jersey, Appellate Division, or thereafter the Supreme Court of New Jersey. In light of the determination of Judge Venezia, the continuation of this litigation can have no meaningful outcome and is therefore **DISMISSED AS MOOT.** *Oxfeld v. Bd. of Ed.*, 68 *N.J.* 301 (1975).

ORDER

Accordingly, it is hereby **ORDERED** that the within petition be **DISMISSED AS MOOT** in light of the Order of the Hon. Donald R. Venezia, J.S.C. for forfeiting the employment of the Respondent Elaugh Butler with the Respondent State Operated School District of the City of Newark, Essex County.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

7/18/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 20 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 7959-97
AGENCY DKT. NO. 224-6/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ELAUGH BUTLER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review, the Commissioner affirms the conclusion of the Administrative Law Judge that, because respondent forfeited her public employment pursuant to *N.J.S.A.* 2C:51-2a(1) and (2), as a consequence of an Order entered by the Honorable Donald R. Venezia, J.S.C. on June 23, 2000, the tenure charges instituted against her by the State-operated School District of the City of Newark have been rendered moot.

Accordingly, the within Petition of Appeal is hereby dismissed as moot.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 01 2000

Date of Mailing: SEP 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#285-00

285-00

CLIFFORD MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

September 1, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9128-99

CLIFFORD MANNING,

Petitioner,

v.

BOARD OF EDUCATION OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

John L. Schettino, Esq., for respondent
(Giblin and Giblin, attorneys)

Record Closed: June 26, 2000 Decided: July 14, 2000

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on August 11, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into a settlement and have prepared an agreement which is attached and fully incorporated herein.

I have reviewed the record and the agreement and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 14, 2000
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

7/18/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 20 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

GIBLIN & GIBLIN, ESQS.
Two Forest Avenue
Oradell, New Jersey 07649
(201) 262-9500
Attorneys for Respondent

CLIFFORD MANNING,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	DOCKET NO. EDUOR-09128-99N AGENCY DOCKET NO. 189-7/99
vs.	AGREEMENT
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON,	
Respondent.	

WHEREAS, the School District of the Borough of Emerson (hereinafter the "District") and Clifford Manning (hereinafter "Petitioner") wish to resolve the differences between them, it is hereby stipulated and agreed as follows:

1. On or about June 29, 1999, the Board of Education voted to withhold the Petitioner's salary increment for the 1999-2000 school year for unsatisfactory performance pursuant to N.J.S.A. 18A:29-14.

2. On July 6, 1999, the Petitioner filed a Petition of Appeal with the Commissioner of Education contesting the action to withhold his salary increment as arbitrary, capricious and unreasonable, and therefore, void.

3. On or about July 21, 1999, the District filed an Answer with the Commissioner defending the increment denial.

4. The District agrees to place the Petitioner on the appropriate step/level as prescribed by the Collective

Bargaining Agreement with the Emerson Teachers' Union for the 2000-2001 academic school year.

5. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other, known and unknown, arising out of the action captioned, Clifford Manning v. Board of Education of the Borough of Emerson, OAL Docket No. 189-7/99, Agency Reference No. EDUOR-09128-99N.

6. All parties agree that nothing in this Agreement shall constitute an admission of wrongdoing by any party. This Agreement shall not create any rights as to any employee, now or in the future, except Petitioner.

7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and the each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

8. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by their respective parties to sign this Agreement and bind their principals to its terms.

9. In the event that the District is prevented from, unable, or unwilling to fulfill the terms of this Agreement, for any reason, the parties will be returned to the status quo existing prior to the execution of this Agreement.

10. This Agreement shall become final upon approval by the State District Superintendent and Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR THE EMPLOYEE

Clifford Manning

WITNESS:

Michele Berman

DATED: 6/12/00

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE BOROUGH OF EMERSON

Mimi Bari

WITNESS

Helena Moezelaar

DATED: June 14, 2000

HELENA MOEZELAAR
Notary Public, State of New Jersey
I.D. # 2163741
My Commission Expires March 23, 2004

OAL DKT. NO. EDU 9128-99
AGENCY DKT. NO. 189-7/99

CLIFFORD MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 01 2000

Date of Mailing: SEP 01 2000

* The Commissioner notes with respect to page three of the Agreement that the parties' reference to the "State District Superintendent," rather than "Superintendent" and to the "State-Operated School District of the Borough of Emerson," rather than the "Board of Education of the Borough of Emerson," is in error. In this connection, the Commissioner notes that the Board's approval of the agreement is evidenced by the signature of its president.

#286-00

286-00

M.V.B. & L.V.B., on behalf of minor child, C.C., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, RESPONDENT.	:	DECISION

September 5, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 5751-99
AGENCY DKT NO. 93-4/99

M.V.B. & L.V.B. on behalf of minor child, C.V.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, Passaic County,

Respondent.

M.V.B. & L.V.B. parents of C.V.B, *pro se*, petitioners

Maria A. Giammona, Esq., represented respondent
(Fogarty & Hara, attorneys)

Record Closed: July 5, 2000 Decided: July 19, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 10, 1999, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the Settlement Agreement, I **FIND:** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **dismissed**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

7/19/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 24 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

THIS AGREEMENT, made on the 18th day of May, 2000 by and between Martin S. Van Boerum and LuAnn Van Boerum, who currently reside at 595 Alps Road, in the Township of Wayne, County of Passaic and State of New Jersey (hereinafter referred to as the "PARENTS"), and the BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, which has offices located at 50 Nellis Drive in the Township of Wayne, County of Passaic, and State of New Jersey (hereinafter referred to as the "BOARD").

WITNESSETH:

WHEREAS, the BOARD operates a kindergarten through twelfth grade school district for students who reside in the Township of Wayne; and

WHEREAS, C.C. is the daughter of PARENTS and PARENTS are legally responsible for the care, support and protection of said minor child; and

WHEREAS, C.C. is currently attending eleventh grade in the Wayne Township School District; and

WHEREAS, when C.C. was registered in the school district by PARENTS in August 1997 PARENTS and C.C. lived in Haledon in a residence owned by PARENTS; and

WHEREAS, PARENTS represented to the BOARD at that time that they were building a house in Wayne and they would be living in Wayne by December 31, 1997; and

WHEREAS, C.C. was admitted as a student in the school district based upon that representation and with the understanding that PARENTS would be liable to pay tuition to the BOARD for every day after December 31, 1997 that PARENTS did not live in Wayne; and

WHEREAS, PARENTS did not live in Wayne prior to June 18, 1999; and

WHEREAS, the PARENTS acknowledge that in accordance with Board Policy 5118, they owe tuition to the BOARD; and

WHEREAS, the parties wish to settle this matter amicably rather than through litigation; and

WHEREAS, PARENTS have represented that they are unable to pay any of the tuition at this point but that they anticipate that they will be selling the property they own in Haledon within a couple of years;

NOW, WHEREFORE, based on the foregoing premises and mutual promises and covenants herein, the parties agree as follows:

1. The PARENTS shall, jointly , severally and individually, be responsible for reimbursing the BOARD in the amount of Twelve Thousand Two Hundred Fifty Two and 40/100 Dollars ($12,252.40) which represents tuition for 60% of the 1997-1998 school year and the entire 1998-1999 school year minus the approximate amount of taxes paid by PARENTS to the Township of Wayne which were directed to the school budget.

2. In order to secure this debt to the BOARD, the PARENTS hereby agree to execute a Note and five year Mortgage on both the Wayne property and on the Haledon property in favor of the

BOARD. Said Notes and Mortgages shall be executed contemporaneously with this Agreement and filed with the Passaic County Clerk's Office. The debt amount shall not bear interest during the five year term of the mortgage. A copy of said Notes and Mortgages shall be attached hereto and the terms and conditions incorporated herein.

3. PARENTS shall also be responsible to pay the costs of recording both mortgages and for a title search on both the Haledon and Wayne properties.

4. Upon the sale of either of the premises and satisfaction of the lien of $12,252.40, the BOARD shall discharge both Notes and Mortgages.

5. If neither property is sold during the five-year term of the mortgages, the BOARD shall foreclose on both properties. PARENTS shall be responsible for the BOARD's attorneys fees and litigation costs to foreclose on the mortgages.

6. The parties recognize that each has been represented by legal counsel of his, her or its own choosing and that they sign this Agreement as their own voluntary acts and deeds, and that they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

7. The undersigned representatives of the BOARD hereby acknowledge that they have been duly authorized by the BOARD to sign this Agreement and bind the BOARD to its terms.

8. All terms of this Agreement are considered material. This document may not altered, amended, modified or revoked, except by instrument execute in writing by all parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Dated: 5-3-00

MARTIN S. VAN BOERUM

Dated: 5/3/00

WITNESS:

Dated: 5-3-00

LUANN VAN BOERUM

Dated: 5/3/00

WITNESS:

JEANETTE MAKUS
Board Secretary/Business Administrator

Dated: 5/3/00

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE

LAWRENCE KATZ
Board President

Dated: 5/3/00

OAL DKT. NO. EDU 5751-99
AGENCY DKT. NO. 93-4/99

M.V.B. & L.V.B., on behalf of minor child, C.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 05 2000

Date of Mailing: SEP 05 2000

287-00

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In consolidated matter, Petitioning Boards, West Windsor-Plainsboro and Nutley, sought to compel Respondent Board Delran to pay transportation costs for two children classified as autistic, K.H. and S.M., who were placed by the Division of Youth and Family Services (DYFS) and the Division of Developmental Disabilities (DDD), respectively, in a group home in respondent's District. (DYFS was responsible for placing K.H. in a group home in 1987, but in 1990, DDD assumed responsibility for these students.)

The ALJ concluded that, under the general legislative and regulatory scheme for the payment of costs of education of special education pupils, it is the district where the child's legal guardian is domiciled/resides which is responsible for the cost of a free appropriate education, including related services, one of which is transportation. (Chapter 207 of the Laws of 1979; *N.J.S.A.* 30:4C-26; *N.J.S.A.* 18A:7b-12) Furthermore, the ALJ noted that for special education students who are residing in the district in which they are domiciled, the costs of transportation are part of

the educational services required to be funded by the local district which in turn receives State aid for such transportation pursuant to *N.J.S.A.* 18A:7F-25 and 18A:46-23. The ALJ noted that there was no logical explanation for placing the financial burden of transportation costs upon a district where a group home happens to be located, except to rely on the 1984 Attorney General's Opinion that advised the Commissioner of Education that the word "tuition" in Chapter 207 of the Laws of 1979 did not include transportation costs. Petitions were dismissed and petitioners were directed to continue funding transportation costs for the students in question as long as such students remain domiciled in their districts and eligible for special education services.

Having considered the Initial Decision, the parties' arguments, and the legal opinions provided by the Attorney General's Office, the Commissioner rejected the ALJ's conclusions of law. The Commissioner determined that *N.J.S.A.* 30:4C-26, which authorizes group home placements by the State and delineates the obligations of school districts, was the statute central to the resolution of who is responsible for transportation costs for these students. Commissioner noted that the child's district of residence is responsible for paying tuition to the school where the child is placed. However, given the absence of any reference to transportation in the provisions of Chapter 207 of the Laws of 1979, the Commissioner concluded that the term "tuition" does not encompass transportation. Further, the Commissioner found that the express language of *N.J.S.A.* 30:4C-26c, stating that children placed in group homes are to be accorded all of the "educational benefits" of the school district in which the group home sits, includes pupil transportation. The Commissioner also found that the school district where the group home is located is responsible for providing child study team services (paid for by the resident district) to children placed in group homes within its borders for reasons expressed in the 1984 Attorney General's Opinion. Therefore, the group home school district determines the child's educational program and placement, which, in turn, dictates the child's transportation needs and the district's transportation costs. The Commissioner granted petitioners' motions for summary judgment and directed that respondent reimburse petitioners for the cost of transportation for the students in question. Since K.H. aged out of West Windsor-Plainsboro, the Board sought reimbursement solely for past expenditures. Moreover, the Commissioner directed respondent to continue the funding of transportation costs for S.M., as long as the student remains in the group home and is eligible for special education services.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
CONSOLIDATED CASES

BOARD OF EDUCATION OF WEST WINDSOR-PLAINSBORO,
Petitioner,
v.
BOARD OF EDUCATION OF DELRAN,
Respondent,

OAL DKT. NO. EDU 665-99
AGENCY DKT. NO. 458-10-98

and

BOARD OF EDUCATION OF TOWNSHIP OF NUTLEY,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF DELRAN,
Respondent.

OAL DKT. NO. EDU 3130-99
AGENCY DKT. NO. 446-9-98

James F. Schwerin, Esq., for petitioner BOE of West Windsor-Plainsboro (Carroll, Weiss and Josephson, attorneys)

Elizabeth A. Daly, Esq., and **J. Frank Vespa-Papaleo,** Esq., for petitioner BOE of Township of Nutley (Genova, Burns and Vernoia, attorneys)

John T. Barbour, Esq., for respondent

Record Closed: October 27, 1999 Decided: March 23, 2000*

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

These matters commenced on October 7, 1998 and September 29, 1998, when the Board of Education of West Windsor-Plainsboro and the Board of Education of the Township of Nutley, respectively, each filed petitions of appeal with the Commissioner of Education seeking to compel the Board of Education of the Township of Delran (hereinafter respondent) to pay transportation costs of a child placed by a State agency in a group home in respondent's district. Answers on behalf of respondent were filed on November 5, 1998 and October 23, 1998. Thereafter, the Department of Education, Bureau of Controversies and Disputes, advised the parties that the issues appeared to be primarily questions of law and established briefing schedules for the parties. Following the receipt of written submissions from the parties, the Commissioner determined to transmit the matters to the matter to the Office of Administrative Law for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to –13.

The West Windsor-Plainsboro file was transmitted to the Office of Administrative Law on February 24, 1999 and was assigned docket number EDU 665-99. The Township of Nutley file was transmitted to the Office of Administrative Law on March 16, 1999 and was assigned docket number EDU 3130-99. Thereafter the parties submitted written positions concerning consolidation of the two matters. On June 10, 1999, the undersigned issued a letter order consolidating the matters for disposition. A copy of that order is attached hereto and made a part hereof as if set forth herein at length. Pursuant to the schedule established, the parties provided a number of other written submissions and documents relevant to cross-motions for summary decision. Oral argument on the cross-motions was conducted by telephone conference call on September 30, 1999, during which the undersigned requested additional information. Thereafter, the parties submitted several other letter memoranda and documents pursuant to said request. The final letter memorandum was received from counsel for West Windsor-Plainsboro on October 27, 1999, whereupon the record closed.

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* Extensions of time for issuing the decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

FINDINGS OF FACT

The facts relevant to a determination of these matters are not in dispute, and accordingly I **FIND** the following as uncontested facts.

Prior to June 30, 1995, K.H. and S.M. were enrolled in the program at the Center for Autistic Children located in Willingboro and operated by the Department of Human Services, Office of Education. K.H.'s date of birth is December 7, 1977 and his parent and legal guardian Mr. J.H. resides at a Princeton address within the West Windsor-Plainsboro school district. S.M.'s date of birth is July 30, 1982, and his parent and legal guardian Ms. A.F. resides in Nutley, New Jersey. Both students are eligible for special education services; each is classified as "autistic." In preparation for the anticipated closing of the Center for Autistic Children, the Department of Human Services, Office of Education, wrote to the Director of Special Services in the Delran Township schools on November 4, 1994, as follows:

> On or about December 2, 1994 four pupils residing at Durand Academy Group Home in East Windsor will be relocating to Delran Township. Outlined for you below is a description of the plan for the provision of education services for these students.
>
> During the 1995-95 school year, the Office of Education will continue to fund the education tuition through June 30, 1995 for the four pupils residing at Durand Academy. As discussed, the Delran Township District, where the group home will shortly be located, is responsible for providing required child study team services for these pupils. The Office of Education will reimburse Delran Township for these services for the remainder of this school year. Delran Township will also be responsible for the provision of transportation services. Reimbursement for these services can be sought from transportation state aid.
>
> During your recent conversation with Ms. Coniglio of this office, it was also noted that we are currently seeking alternate educational placement for these pupils. We are willing to assist you in identifying appropriate program options apart from their current placement within a state facility, *i.e.*, Burlington County Special Services School District. We would like to transfer these pupils to another program as soon as can be appropriately arranged, but no later than June 30, 1995.

> For the 1995-96 school year, the Office of Education will transfer to the Delran Township School District the funds generated by these pupils for education services. Beginning October 1995 and thereafter, the resident school districts should count each of these pupils on their ASSA count. The resident school districts should be contacted to establish future reimbursement mechanisms for these educational costs.
>
> Please apprise this office when a child study team casemanager from your district has been assigned to the Durand Academy pupils in order that we may transfer pupil records and establish an opportunity for our education staff to meet with Delran Township personnel. Debra Coniglio, who will be your primary contact person regarding this matter, can be reached at 609-588-3195. The information you requested regarding group homes is enclosed. Thank you for your attention and cooperation with this matter.

Although the students were relocated to Delran as indicated would happen in the November 1994 letter*, respondent did not become responsible for the provision of educational services to these students at the conclusion of the 1994-95 school year. Instead the parents of the students and school superintendents were advised by letter dated March 27, 1995 as follows:

> As you are aware, the Center for Autistic Children, located in Willingboro and operated by the Department of Human Services' Office of Education, will be closing as of June 30, 1995. My previous correspondence regarding this closure directed the school district to explore program options and determine an alternate program placement for each pupil. This will no longer be necessary. The Office of Education is actively identifying program options within public and private school settings for these pupils for the upcoming school year and will maintain responsibility for educational placement and funding.
>
> In order to assure the provision of an appropriate educational program for these pupils and provide ongoing technical assistance to the educational providers, while at the same time, not create an unexpected financial burden on resident school districts, the Office

* Although the Division of Youth and Family Services (DYFS) was responsible for placing K.H. in a Teaching Family Home in 1987, the Division of Developmental Disabilities (DDD) assumed responsibility for these students in or about 1990 and the residential placements in Delran in 1994 were made and are funded by the DDD. DYFS is not now, and has never been, the legal guardian of either child.

> of Education will continue to administer programs to the pupils currently enrolled in the Center for Autistic Children.
>
> Each parent will receive notice of the change in program with the options considered and rationale for the placement decision. We will also apprise each school district of the placement decisions.
>
> Over the next few years we will work toward the transfer of responsibility for these pupils from the current state facility funding and oversight to that of the school districts. At that point in time the program options for children with autism will be well established and plans can be made to facilitate funding.

Thereafter the Office of Education arranged for K.H. to attend the Eden Institute located in Princeton, New Jersey, and for S.M. to attend the Search Day Program located in Ocean, New Jersey. The Office of Education continued to provide and fund child study team services and transportation through the end of the 1997-98 school year.

By letter dated June 15, 1998, the Department of Human Services, Office of Education, wrote to the West Windsor-Plainsboro school district as follows:

> I am writing to follow-up on my earlier correspondence regarding K.H. K. resides at the Durand Academy Fox Chase Group Home, 111 Fox Chase Driver, Delran, New Jersey and attends the Eden Institute in Princeton.
>
> Effective June 30, 1998, the Department of Human Services, Office of Education will cease responsibility for this pupil in accordance with the phase down process implemented with the closing of the Center for Autistic Children in June 1995. Therefore, effective July 1, 1998, the Delran School District, the district in which the group home is located, will provide child study services and transportation. The district where the parent resides, West Windsor-Plainsboro, will assume responsibility for the costs of child study team services and for the educational tuition expenses at the Eden Institute.
>
> The Office of Education will continue to provide for all services and costs associated with K.'s placement until June 30, 1998. My September 17, 1997 correspondence indicated that your district was entitled to count this student for state aid purposes.

> If my office can be of further assistance, please contact Dianne L. Cole, Manager, Northern Region Child Study Services. She may be reached at (609) 588-4638.

An identical letter, with the exception of the personally identifiable information, was sent to the Nutley school district concerning S.M. Respondent prepared and forwarded to each of the petitioners proposed contracts for the provision of child study team services and transportation. The proposed contracts provided for reimbursement to respondent by petitioners of all costs, including transportation. Each petitioner declined to sign the contract. On or about July 1, 1998, respondent, upon the advice of counsel, advised each of the petitioner's school districts that it would not pay for transportation costs for the students. This advice was subsequently confirmed in writing. Contrary to the instructions in the June 15, 1998 letters to the districts, each of the petitioners performed their own child study team services for the students in question, with each team continuing the educational placement which had been made by the Office of Education. Because respondent refused to fund transportation for the students to Eden and to Search, respectively, each of the petitioners arranged independent transportation contracts and paid for the costs.

Petitioner Nutley subsequently contacted the Office of Pupil Transportation of the New Jersey Department of Education for assistance in resolving the issue of financial responsibility for transportation in this matter. By letter dated August 4, 1998, the Burlington County Superintendent of Schools advised respondent as follows:

> It is the responsibility of the district board of education in which a group home is located to provide transportation services to the students living in that home at the district's expense. It has been brought to my attention that you are refusing to provide services to the students living in the Durand Academy Fox Chase Group Home located at 111 Fox Chase Driver based upon your board attorney's opinion that you are prohibited from providing these services under CEIFA. Please provide me with the citation on which this opinion is based.
>
> Thank you for your cooperation. Please call if you have any questions.

The basis for the advice rendered by the Burlington County Superintendent of Schools in this regard was an April 10, 1987 memorandum written by Jeffrey V. Osowski, Ph.D., Director of Special Education for the State of New Jersey, to all county supervisors of child study teams. That memorandum concerned "Placement of Pupils in Alternative Living Arrangements" and provided:

> The purpose of this memo is to summarize information regarding the educational and financial responsibilities for handicapped and non-handicapped pupils placed in group homes or foster care by a state agency or a local school district.
>
> I. Pupils Residing in Group Homes (includes teaching family homes, respite care and transitional living homes)
>
> The district in which the group home is located is responsible for:
>
> - provision of child study team services
> - all educational placements and tuition including but not limited to, special education in public and private school placements
> - transportation costs which are then submitted for state transportation aide.
>
> The resident district of parent or legal guardian is responsible for:
>
> - reimbursement to the district where the group home is located for all tuition costs for both regular and special education placements (Tuition costs shall include child study team services when applicable.)
> - reimbursement of private school tuition to the district where the group home is located (Reimbursement shall also include child study team services.)
> - resident district reports pupil on A.S.S.A.
>
> II. Pupils Placed in Foster Care (includes skill development homes and alternative care homes)
>
> The district in which the foster home is located is the legal residency of the pupil and is therefore responsible for all educational services and costs. This pertains to educational services for handicapped and non-handicapped pupils. Educational services include:

- tuition costs (public and private school placements)
- child study team services
- transportation

The district in which the foster home is located claims the pupil on the A.S.S.A. report and includes transportation costs in their request for state transportation aide.

Attached find the following documents which pertain to this topic:

(memo) Winkler/Richardson – March 17, 1980
(memo) Burke – January 23, 1981
(letter) Scott – September 3, 1981
(memo) Scott – March 22, 1982
(Attorney General Opinion (LaVecchia – March 13, 1984
(Informal Opinion) Ramey – September 17, 1984
(memo) Osowski – June 10, 1986

Of those memos, letters and documents listed at the conclusion of Dr. Osowski's memo, only the March 13, 1984 opinion letter directly addresses the issue of transportation costs in situations similar to the one herein. That 4-page opinion letter is attached hereto for easy reference.

Both petitioners have continued to provide and pay for transportation to and from the educational placements for the students who reside at the Durand Academy Fox Chase Group Home in Delran. Petitioner West Windsor-Plainsboro has received State transportation aid in this regard and petitioner Nutley has not yet requested State transportation aid for transportation of S.M., having been told by the New Jersey Department of Education that such State aid could be paid retroactively to either petitioner or respondent depending upon which district is determined to be responsible for transportation costs herein.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.*

4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter although it appeared originally that some facts might be in dispute, diligent efforts on behalf of all three parties have resulted in discovery of an accurate procedural history and have disclosed the source for the directives issued by the Department of Human Services, Office of Education, and confirmed by the county superintendent of schools in Burlington. Accordingly, there are no material facts in dispute and these matters are ripe for summary decision.

Initially, although respondent challenges the subject matter jurisdiction of the Commissioner to determine the issues presented in these matters, the jurisdictional issue must be resolved in petitioners' favor. In addressing the jurisdictional question in a somewhat similar

context, the Appellate Division in *Roxbury Bd. of Ed. v. Milford Bd. of Ed.*, 283 *N.J. Super.* 505, 521 (App. Div. 1995), the court explained:

> We do not disagree with the Commissioner's statement in his brief that he has both jurisdiction and the responsibility to determine which school district has the responsibility to bear the expense of the free, appropriate education granted for disabled children. However, it he wishes to obtain primary jurisdiction, some mechanism must be adopted to assure the parents of otherwise qualified children that both payment and services under the IDEA will continue uninterrupted where the only question is who is ultimately responsible for payment. We doubt that such a remedy can be implemented on a case-by-case basis, and, thus, a remand to the Commissioner would accomplish nothing with respect of the funding issue. *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 328-337, 478 *A.*2d 742 (1984).

Accordingly, although the Commissioner's jurisdiction to determine which school district has the responsibility to bear which expenses may not be exclusive, he most certainly has the authority to make such determinations.

I likewise reject respondent's other procedural argument, *i.e.* that the petitions herein should be dismissed as untimely filed pursuant to *N.J.A.C.* 6:24-1.2(c). That regulation provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Respondent asserts that the latest date from which the 90-day regulatory period of limitations should begin to run is July 1, 1998, the date on which both petitioners acknowledge they were verbally informed by respondent that it would not fund the costs of transportation. July 1, 1998 was also the date specified in the letters from the Department of Human Services, Office of Education, for respondent to assume responsibility for providing and funding transportation for the students. The Nutley petition was filed on September 29, 1998, the 90th day following respondent's unequivocal pronouncement, confirmed by its actions, that it would not pay. Respondent argues that the 90-day period should begin to run from the petitioner's

receipt of respondent's June 22, 1998 letter enclosing the proposed contract which included a provision for payment by petitioners of transportation costs. Calculating the commencement of the regulatory period of limitations from the date of receipt of the proposed contract, however, would require petitioners to come to the conclusion, based upon the proposal, that respondent would not pay; however, another legitimate conclusion from the proposed contract might be that respondent was unaware of the directions of the Department of Human Services, Office of Education, or that respondent was merely attempting to negotiate with petitioners. By July 1, 1998, however, when respondent did not assume responsibility for transportation and announced that it would not, petitioners were on notice of all the facts necessary to file the within actions. Petitioner West Windsor-Plainsboro did not file its petition until October 7, 1998, at which time it was advised by the Commissioner's office that proof of service and notarized verification were required to be provided on or before October 19, 1998; those documents perfecting the appeal were not filed until October 20, 1998. Both dates are outside of the 90-day period of limitations. Since the Nutley petition was timely filed, however, and both petitions raise the same legal issues, issues concerning which many local boards of education may require guidance and clarification, I **CONCLUDE** that this case falls within the purview of *N.J.A.C.* 6:24-1.15 authorizing the Commissioner to relax the rules in his discretion, "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice."

With respect to the substantive issues in this matter, both the law and the equities weigh in favor of respondent. Examination of the legal requirements for funding the cost of public education must begin with the New Jersey Constitution, *N.J. Const.* (1947), Article VIII, § 4, par. 1, which provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

Pursuant to this directive, the Legislature adopted *N.J.S.A.* 18A:38-1 which places the primary burden for funding educational expenses upon the school district in which a person is domiciled. A child's domicile is the domicile of his parents/legal guardians or the domicile of the custodial parent with whom he or she lives. *Roxbury Bd. of Ed. v. Milford Bd. of Ed., supra.*

The Individuals With Disabilities Education Act (IDEA), 20 *U.S.C.* § 1400(c) also assures that all children with disabilities are to be afforded a free and appropriate public education. This has been held to mean personalized instruction and related services to permit the child to benefit educationally from the instruction. *Hendrick Hudson District Board of Education v. Rowley*, 458 *U.S.*. 176 (1982); *Lascari v. Board of Educ.*, 116 *N.J.* 30 (1989). 20 *U.S.C.* § 1401(18) defines the term "free appropriate public education" to mean "special education and related services. . . ." The federal regulations define transportation as a related service, where that transportation is required to assist a child with a disability to benefit from education. 30 *C.F.R.* 300.16(b)(4).

"Transportation" includes:

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

Ibid. The IDEA, however, does not base its determination of a handicap child's rights on domicile; how the free appropriate public education funded is a matter of State law. The New Jersey Administrative Code, at *N.J.A.C.* 6A:14-3.9, also includes transportation within the parameters of "related services". *N.J.A.C.* 6A:14-3.9(a)7 further provides that:

Transportation shall be provided in the following manner:

i. The district board of education shall provide transportation as required in the individualized education program or as prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school;

ii. When out-of-district placement for educational reasons is made by a district board of education, transportation shall be provided consistent with the school calendar of the receiving school. . . .

N.J.A.C. 6A:14-3.9(a)7. "Thus it is clear that the law provides for transportation to a handicapped child as a related service." *L.M. v. Atlantic City Board of Education*, 95 *N.J.A.R.* 2d (EDS) 251, 253.

Another statutory provision that is relevant to this case is *N.J.S.A.* 18A:46-23, which encompasses the transportation of handicapped pupils as well as state aid for transportation costs. According to that section:

> The board of education shall furnish transportation to all children being sent by local boards of education to an approved 12-month program. . . during the entire time the child is attending the program.

Accordingly, for special education students who are residing in the district in which they are domiciled, the costs of transportation are part of the educational services required to be funded by the local district which in turn receives State aid for such transportation pursuant to *N.J.S.A.* 18A:7F-25 and 18A:46-23.

In 1979 the Legislature enacted "The State Facilities Education Act of 1979." Chapter 207 of the Session Laws of 1979 describes the enactment as "(a)n Act concerning State aid for the education of children in State facilities, assigning responsibility for such education, establishing criteria for determining the school district of residence for certain children, revising parts of the statutory law and repealing P. L. 1972, c. 187." The State Facilities Education Act of 1979, P. L. 1979, c. 207, amended the provisions of 18A:46-14 to include the following:

> Whenever any child shall be confined to a hospital, convalescent home, or other institution in New Jersey or in any other state in the United States and is enrolled in an education program approved under this article, or shall be placed in any other State facility as defined in section three of P. L. 1975, c. 212 (C. 18A:7A-3), the board of education of the district in which the child resides shall pay the tuition of said child.

"State facility" was defined by the Act as meaning:

> A State residential facility for the retarded; a day training center which is operated by or under contract with the State and in which all the children have been placed by the State; a State residential youth center; a State training school or correctional youth center; a State training school or correctional facility; a State child treatment center or psychiatric hospital.

With respect to children "eligible for day training,"* the Act amended *N.J.S.A.* 18A:46-18.1 to read as follows:

> It shall be the duty of the Department of Human Services to provide suitable facilities and programs for all the children who are classified as eligible for day training, and to provide transportation for all such children who attend day training centers.
>
> The school district of residence shall pay tuition for each child in a State facility classified as eligible for day training, but shall not pay the cost of transportation for any such child.

Obviously none of the foregoing three amended sections relate directly to the issue here in question since neither student is placed in a "State facility" and neither is classified as "eligible for day training." (In fact, that provision of the statutes was repealed by the Public Laws of 1992, effective July 1, 1993.) These provisions are quoted and are discussed hereinafter, however, because they are relied upon in the attached legal opinion providing administrative agency advice to the Department of Education. Chapter 207 of the laws of 1979 also amended *N.J.S.A.* 30:4C-26, the following portions of which are relevant to a determination of the within matter:

> a. Whenever the circumstances of a child are such that his needs cannot be adequately met in his own home, the Division of Youth and Family Services may effect his placement in a foster home, with or without payment of board, in a group home, or in an appropriate institution if such care is deemed essential for him. The Division of Youth and Family Services shall make every reasonable effort to select a foster home, a group home or an institution of the same religious faith as the parent or parents of such child.

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* For a discussion of education of children who were classified as "eligible for day training" see *Levine v. Institutions and Agencies Dept. of N.J.*, 84 N.J. 234 (1980).

b. Whenever, the Division of Youth and Family Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county *for all purposes except school funding*, and he shall be entitled to the use and benefit of all health, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county. (emphasis added)

c. Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any school district, the child shall be entitled to the educational benefits of such district; provided, however, that the district of residence, as determined by the Commissioner of Education pursuant to law, shall be responsible for paying tuition for such child to the district in which he is placed.

. . .

Directly following the amendment of *N.J.S.A.* 30:4C-26 in Chapter 207 of the Laws of 1979, was the following new section (*N.J.S.A.* 18A:7B-12) which provides in pertinent part:

For school funding purposes, the Commissioner of Education shall determine district of residence as follows:

. . .

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

If neither can be determined, the district of residence shall be the district in which the child has been placed or the district in which the State facility is located.

. . .

Also enacted the same day as Chapter 207 of the Laws of 1979, were the following provisions in Chapter 208 of the Laws of 1979 which amended *N.J.S.A.* 30:4C-2 to read as follows:

> (a) The title "Division of Youth and Family Services" successor to the "Bureau of Children's Services" means the State agency for the care, custody, guardianship, maintenance and protection of children, as more specifically described by the provisions of this act, and succeeding the agency heretofore variously designated by the laws of this State as the State Board of Child Welfare or the State Board of Children's Guardians.

At the time these statutory provisions were enacted, the Division of Developmental Disabilities did not exist, not having been statutorily created until 1985, six years later. Accordingly, prior to 1985, the agency which would have been responsible for placing children such as those in the within case in group homes would have been the Division of Youth and Family Services. Notwithstanding the fact that *N.J.S.A.* 30:4C-26 was not amended after 1985 to include placements made by the Division of Developmental Disabilities, I **CONCLUDE** that the entire statutory scheme set forth in Chapter 207 of the Laws of 1979 is applicable to determinations for school funding purposes to children placed in group homes by the Division of Developmental Disabilities.

In the present matters, pursuant to Chapter 207 of the Laws of 1979, each child shall be deemed a resident of Delran for "all purposes except school funding." In accordance with the Act "for school funding purposes" the "district of residence" shall be the present district of residence of the parent or guardian with whom the child lived prior to his placement by a State agency. Clearly the districts of residence involved in the present matters are Nutley and West Windsor-Plainsboro. Although there is not one statutory or regulatory reference which would place upon Delran the financial burden for transportation of these children from their group home in Delran to their respective educational day placements, the Office of Education and the county superintendent of schools have directed Delran to assume this burden. I can think of no logical or reasonable explanation for placing such a financial burden upon a district where a group home happens to be located. Undoubtedly, if there were a group home or other facility that could

properly care for the students in question located in their respective home districts, they would have been placed in such facilities rather than the one in Delran which is quite a distance from their homes. Furthermore, both Nutley and West Windsor were the districts who assumed responsibility for performing child study team services and selected the educational placements in question. Both educational placements are quite some distance from the location of the Delran group home, and accordingly, transportation costs on a daily basis are expensive. It seems inequitable to assess such costs to a district which played no part in incurring the expenses. The sole reason for assigning financial responsibility for transportation costs to Delran appears to be the 1984 legal opinion rendered by a deputy attorney general in response to an administrative agency request for advice.* The 1984 legal opinion advised the Commissioner of Education that the word "tuition" in Chapter 207 of the Laws of 1979 did not include transportation costs based upon an analysis of that section of Chapter 207 of the Laws of 1979 which specified how funds received pursuant to the Act by the Department of Human Services or the Department of Corrections could be used. Because that section (*N.J.S.A.* 18A:7B-4) permitted the funds to be used, *inter alia*, for child study team personnel, but omits any mention of "transportation," the legal opinion advised, "It is our opinion that the term tuition encompasses costs for child study team services but does not include transportation costs." The opinion recognized that *N.J.S.A.* 18A:7B-4 did not apply to the costs of education of children in group homes, but concluded that it nevertheless provided "guidance" in interpreting the term "tuition." What the opinion failed to recognize, however, was that children in a "State facility" run by the Department of Human Services or the Department of Corrections were all, with the exception of those covered by the separate provisions of *N.J.S.A.* 18A:46-18.1, residents in the State facility where they received their education, and, of course, "transportation" would therefore not be an issue. Concerning those children who were "eligible for day training" and attended day training centers, the Legislature specifically *shifted* the costs of transportation from the district of residence to the State Department of Human Services. *N.J.S.A.* 18A:46-18.1.

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* This sort of legal advice is referred to at the Division of Law as an AAA. It differs from a formal attorney general's opinion which is published and available to the public. Such informal legal opinions are, in fact, protected by the attorney-client privilege, a privilege which the client, the Department of Education, obviously waived when it distributed the opinion to county child study team supervisors.

Based upon all of the foregoing, I **CONCLUDE** that the more logical interpretation of legislative silence in Chapter 207 of the Laws of 1979 regarding transportation costs is that there was no intention to shift financial responsibility for such costs away from the district of residence to the district where the group home happens to be located. In the one instance where the Legislature determined to shift the responsibility for transportation away from the district of residence, it specifically said so (18A:46-18.1). Under the general legislative and regulatory scheme for the payment of costs of education of special education pupils, it is the district where the child's legal guardian is domiciled/resides which is responsible for the cost of a free appropriate education, including related services, one of which is transportation. The statutory provisions also provide a mechanism for such districts to be reimbursed through State transportation aid. No statutory or regulatory provision has been cited which would authorize payment of transportation State aid to a district which is not the district of residence, but which merely houses the group home where the child has been placed by the Division of Developmental Disabilities. Presumably the State Board of Education could adopt a regulation assigning responsibility for such transportation costs to the district where the group home is located, but it has not done so. and such responsibility cannot be delegated by a memorandum from the Department of Education. See *Metromedia, Inc. v. Director, Division of Taxation*, 97 *N.J.* 313, 328-337 (1984).

For all of the foregoing reasons, I **CONCLUDE** that respondent is entitled to summary decision as a matter of law dismissing the within petitions of appeal. It is hereby **ORDERED** that the petitions of appeal are **DISMISSED** and petitioners are directed to continue funding transportation costs for the students in question as long as such students remain domiciled in their districts and eligible for special education services.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/24/00
DATE

Deborah Gottesman
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 28 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633

M. Kathleen Duncan
Administrative Law Judge

June 10, 1999

Frank Vespa, Esquire
Genova, Burns & Vernoia
Eisenhower Plaza II, Suite 2575
354 Eisenhower Parkway
Livingston, New Jersey 07039-1023

LETTER ORDER

James F. Schwerin, Esquire
Carroll, Weiss & Josephson
3131 Princeton Pike, Building 1B
Lawrenceville, New Jersey 08648

John T. Barbour, Esquire
P. O. Box 345
10 North Chestnut Avenue
Maple Shade, New Jersey 08052

RE: BOE of West Windsor-Plainsboro v. BOE of Twp. of Delran
OAL DKT. NO. EDU 665-99
BOE of Twp. of Nutley v. BOE of Twp. of Delran
OAL DKT. NO. EDU 3130-99

Dear Counsel:

I have reviewed your respective positions with respect to West Windsor-Plainsboro BOE's motion to consolidate. Since the only factual issue in the West Windsor case appears to relate to which agency placed the child, DDD or DYFS, I am confident that the issue can be resolved without a hearing. The remaining legal issues (although perhaps not counsel's arguments with respect thereto) are identical. Accordingly, pursuant to N.J.A.C. 1:1-17.3, I **CONCLUDE** that consolidation is appropriate to avoid duplication of judicial efforts and the possibility of inconsistent decisions. Accordingly, I hereby **ORDER** the above-captioned matters consolidated for disposition. I have scheduled a telephone conference call on June 30, 1999 at 4 p.m. so we may discuss a schedule for the filing of any additional motion papers.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

6-10-99
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

G-3 Chapter 207
G-3 CST
G-3 Group Homes
G-3 Transportation

State of New Jersey

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

MICHAEL R. COLE
FIRST ASSISTANT ATTORNEY GENERAL
DIRECTOR

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
HEALTH, EDUCATION, PUBLIC EMPLOYMENT
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SECTION CHIEF

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DEPUTY ATTORNEY GENERAL
ASSISTANT SECTION CHIEF

609 292-9246

March 13, 1984

Dr. Seymour Weiss
Deputy Assistant Commissioner
Department of Education
225 West State Street
Trenton, New Jersey 08625

RE: M81-5044 - In accordance with L. 1978, c. 207, which school district is responsible for the costs of transportation and child study team services for a child placed in a group home, the district where the group home is located or the district where the parent or guardian resides?

Dear Dr. Weiss:

You have asked for advice as to which school district is responsible under L. 1978, c. 207 for the costs of transportation and child study team services for a child placed in a group home, the district in which the group home is located or the district in which the parent or guardian of the child resides. For the reasons which follow, you are advised that the district in which the group home is located is responsible for the costs of transportation and that the child's district of residence is responsible for the costs of the child study team services for children placed in a group home.

With passage of L. 1978, c. 207, the Legislature set forth the responsibilities imposed upon state and local educational agencies for the education of children in State facilities or children placed by State agencies. Among the children encompassed by L. 1978, c. 207 are children placed in group homes by the Division of Youth and Family Services, Department of Human Services (DYFS). L. 1978, c. 297, sec. 18(b) and (c) provide:

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> Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county for all purposes except school funding, and he shall be entitled to the use and benefit of all health, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county.
>
> Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any school district, the child shall be entitled to the educational benefits of such district; provided, however, that the district of residence, as determined by the Commissioner of Education pursuant to law, shall be responsible for paying tuition for such child to the district in which he is placed [N.J.S.A 30:4C-26(b) and (c)].

Pursuant to this statute, a child placed in a group home by DYFS is entitled to receive the educational benefits of the district in which the group home is located. However, while the duty to provide educational benefits lies with the district in which the group home is located, certain financial responsibilities for the child's education remain with the child's district of residence. Specifically, the district of residence is responsible for paying tuition to the district in which the group home is located. N.J.S.A. 30:4C-26(c). It is our opinion that the term tuition encompasses costs for child study team services but does not include transportation costs.

The term "tuition" is not expressly defined in L. 1978, c. 207 or elsewhere in Title 18A. However, a fair reading of L. 1978, c. 207 reveals that the term tuition is intended to include the costs generated by child study team services. L. 1978, c. 207, sec. 8 provides in pertinent part:

> Funds received pursuant to this act by the Department of Human Services or by the Department of Corrections shall be used only for the salaries of teachers, educational administrators at the program level, child study team personnel and paraprofessionals assigned to educational programs in State facilities, and for the costs of educational materials and supplies for these programs [N.J.S.A. 18A:7B-4 (emphasis added)].

DEC 05 1999 11:32 [illegible]JUDE-OSEP 609 984 8422 TO 9896902 P.14/20

Although the funds referred to above in N.J.S.A. 18A:7B-4 encompass tuition paid to the Department of Human Services or Corrections via deductions in the state aid of the district of residence of individual pupils in State facilities, N.J.S.A. 18A:7B-2, the working definition provides guidance for the instant inquiry. The term "tuition" is used to refer both to payments from districts of residence to the Departments of Human Services or Corrections, N.J.S.A. 18A:7B-2, and to payments made from a district of residence to a district in which a group home is located, N.J.S.A. 30:4C-26(c). Thus, it is reasonable to conclude that the Legislature's use of the term "tuition" to refer to both types of payments which a district of residence may be required to make reveals an intention that the same types of costs be included for each. Since it is plain that child study team services were intended to be a legitimate cost of tuition for pupils in State facilities run by the Departments of Human Services or Corrections, then such costs should be included in the cost of tuition for pupils placed in group homes by DYFS.

As for transportation costs, analysis of L. 1978, c. 207 reveals that transportation expenses are considered a separate expense from tuition. As a rule, the Legislature generally segregated transportation costs from tuition in allocating financial costs under L. 1978, c. 207. See L. 1978, c. 207, Sec. 16 (for children classified as eligible for day training, the district of residence shall pay tuition for each child in a State facility but shall not pay the cost of transportation; codified as N.J.S.A. 18A:46-18.1).

L. 1978, c. 207 is silent as to which district is responsible for transportation costs for children in group homes. The statute speaks only to responsibility for tuition, which does not encompass transportation costs. Because the statute only imposes responsibility for tuition upon the district of residence, transportation costs may not be rightfully charged to the district of residence. The obligation to provide transportation to pupils in a group home lies with the district in which the group home is located. This cost may not be charged to the child's district of residence and therefore must remain with the district in which the group home is located. It should be noted that the district providing pupil transportation is entitled to receive 90% reimbursement of pupil transportation costs in state aid. See N.J.S.A. 18A:58-7. Thus, absent clear legislative direction to the contrary, transportation costs remain the responsibility of the district providing the transportation pursuant to N.J.S.A. 30:4C-26(b), that is the district in which the group home is located. For transportation costs to be imposed upon the district of residence, legislative change would be necessary.

In summary, you are advised that the costs of child study team services are to be considered part of tuition and are chargeable to the district of residence of children placed in group homes

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by DYFS. Transportation costs, on the other hand, are distinct from tuition costs. Since the Legislature requires the district in which a group home is located to provide transportation services to children placed in a group home within it geographic parameters but does not authorize the charging of this cost to the district of residence, transportation costs must remain the responsibility of the district in which the group home is located.

Very truly yours,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

By: Jaynee LaVecchia
Jaynee LaVecchia
Deputy Attorney General

P.16/20 609 984 8422 TO 9896902323 JUL-03-1999 11:34 FR NJDOE-OSEP

OAL DKT. NOS. EDU 665-99 AND EDU 3130-99 (CONSOLIDATED)
AGENCY DKT. NOS. 458-10/98 AND 446-10/98

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4[1] and were duly considered by the Commissioner in reaching his determination herein.[2]

[1] Petitioner Nutley timely requested and was granted a four-day extension for submission of its exceptions.
[2] Petitioner West Windsor-Plainsboro filed a response to respondent's reply on April 25, 2000. Since *N.J.S.A.* 1:1-18.4 does not provide for submission of a response to reply exceptions, West Windsor-Plainsboro's additional submission was not considered.

In its exceptions, Petitioner West Windsor-Plainsboro (WWP) urges the Commissioner to reject the analysis of the Administrative Law Judge (ALJ). WWP avers that the ALJ's conclusion that the term "tuition" in *N.J.S.A.* 30:4C-26c includes transportation contradicts the plain language of the statute as previously interpreted by the Office of the New Jersey Attorney General[3] and enforced by both the Department of Education and the Department of Human Services. (WWP Exceptions at 10)

WWP further argues that the ALJ's opinion was based on an analysis of *N.J.S.A.* 18A:7B-12 and *N.J.S.A.* 18A:46-18.1, despite the ALJ's acknowledgment that those statutes are not directly relevant. The ALJ's reasoning in support of her reading of *N.J.S.A.* 30:4C-26c, WWP concludes, appears to be that, since a district of residence generally must provide transportation for classified students, it can be inferred, based on the Legislature's silence in Chapter 207 of the Laws of 1979 as to transportation costs, that the Legislature's intent was that the district of residence was to be responsible for such costs. WWP avers that this analysis is in error because, although it is true that the transportation of classified students would normally be provided by the district of residence, *N.J.S.A.* 30:4C-26c transfers that responsibility to the district where the group home is located by providing that a child so placed shall be entitled to the educational benefits of such district. (*Id.* at 4-5)

WWP further contends that the prime indicator of legislative intent is the plain language of the statute, *State v. Sutton*, 132 *N.J.* 471, 479 (1993). Therefore, since the Legislature carefully distinguished between tuition which is to be paid by the district of residence and all other educational benefits in *N.J.S.A.* 30:4C-26c, the reading of transportation costs into the obligation to pay tuition is tantamount to legislating by the ALJ. (*Id.* at 6)

[3] WWP notes that the March 13, 1984 Attorney General's Opinion was authored by then Deputy Attorney General LaVecchia, who is now Supreme Court Justice LaVecchia.

Citing *State v. Wallach*, 296 *N.J. Super.* 93, 98 (Law Div. 1996) and *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55 (1978), WWP maintains that the informal opinion of the Attorney General and the interpretation given a statute by the agency charged with its enforcement based on that opinion should be accorded deference. Further, it is argued that the ALJ's inference that the Attorney General's Opinion (Opinion) would have been given more deference if it was a formal opinion is flawed since the opinions relied upon in *Wallach, supra*, were informal. (*Id.* at 6-8)

In its exceptions, Petitioner Nutley (Nutley) agrees with WWP that although Chapter 207 of the Laws of 1979 may have been silent on the issue of who pays transportation costs of individuals placed in group homes, two separate administrative agencies and the Attorney General's Office were not silent, and the ALJ failed to appropriately defer to the Opinion and the subsequent agency decisions relying on that Opinion. (Petitioner Nutley's Exceptions at 5)

Nutley also argues that the ALJ's determination that the Legislature's silence in Chapter 207 of the Laws of 1979 demonstrates that there was no intention to shift transportation costs from the district of residence is flawed, because it is clear from prior decisions on this issue that the Legislature left a vacuum which was subsequently filled by administrative interpretations of the Department of Education and the Department of Human Services. Nutley avers that there can be no shifting of costs that were never designated, and that it is appropriate to rely on the interpretation by the agencies responsible for providing for the delivery of services because those agencies are best able to apply the Legislature's intent to maximize services to children. (*Id.* at 9)

Nutley also maintains that the ALJ improperly relied upon an erroneous equitable determination in reaching her conclusion that it is responsible for transportation and, therefore, the ALJ's ultimate conclusion of law is flawed. Arguing that it was the Department of Human Services which made both the group home placement and the educational placement, and not petitioner as inferred by the ALJ, Nutley concludes that both Nutley and respondent are victims of circumstances created by the State. Contrary to the ALJ's finding, Nutley argues, since neither district played a role in incurring the expenses, neither district is more unfairly treated in being assessed those expenses. (*Id.* at 12, 13) Therefore, Nutley urges the Commissioner to reverse the ALJ, find respondent responsible for the transportation costs of the student in question, and order that respondent reimburse Nutley for the costs of transportation it has assumed since July 1, 1998.

In its reply exceptions, respondent argues with respect to WWP's exceptions that the Opinion of March 13, 1984 is no longer relevant to the question of which district has responsibility for the payment of transportation costs for the times at issue herein. Respondent notes that in her analysis, the Deputy Attorney General relied on *N.J.S.A.* 18A:46-18.1, which was repealed by *P.L.* 1992, *c.* 129, § 2, effective July 1, 1993, and thus has no relevance to this matter, which arose in 1998. (Respondent's Reply Exceptions at 2) Respondent further avers that when the Opinion was issued, the Deputy Attorney General could find no special authorization for a charge back of transportation costs to the school district of residence, and thus, she concluded that those costs must be born by the district in which the group home was located. Respondent argues that this is no longer an accurate conclusion based on current statutes and rules. (*Id.* at 3) Respondent claims that the relevant statutes and rules for determination of responsibility for transportation services are the following:

[1. N.J.S.A. 18A:46-23. Transportation of pupils; handicapped children; state aid.]

The board of education shall furnish transportation to all children found under this chapter to be handicapped who shall qualify therefor pursuant to law and it shall furnish the transportation for a lesser distance also to a handicapped child, if it finds upon the advice of the examiner, the handicap to be as to make transportation necessary or advisable.

The board of education shall furnish transportation to all children being sent by local boards of education to an approved 12-month program pursuant to N.J.S. 18A:46-14 [, or any other program approved pursuant to *N.J.S.* 18A:46-14] and who qualify therefor pursuant to law, during the entire time the child is attending the program. The board shall furnish transportation for a lesser distance also to a handicapped child if it finds upon the advice of the examiner, [his] handicap to be [such] as to make transportation necessary or advisable.

The school district shall be entitled to State aid for the transportation pursuant to section 25 of P.L. 1996, c.138 (C.*18A:7F-25*) when the necessity for the transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the cost of the transportation is situated. (emphasis in text) (*Id.* at 3-4)

***

[2. *N.J.S.A.* 18A:7B-12. Determination of residence for funding purposes.]

For school funding purposes the [C]ommissioner of education shall determine district of residence as follows:

***

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent... (emphasis in text) (*Id.* at 4)

***

[3. *N.J.A.C.*. 6A:14-1.3 Definitions]

*"Related services" means transportation...*services as are required to assist a student with a disability to benefit from special education as specified in the student's IEP...

-and-

"District board of education" means the school district of residence... (emphasis in text) (*Id.* at 5)
***
[4. *N.J.A.C.*. 6A:14-3.9 Related services]

(a) *Related services*...shall be provided to a student with a disability when required for the student to benefit from the educational program.
***
7. *Transportation shall be provided as follows:*
   i. *The district board of education shall provide transportation as required in the IEP. ...*
   ii. When out-of-district placement for educational reasons is made by the district board of education, transportation shall be provided consistent with the school calendar of the receiving school. (emphasis in text) (*Ibid.*)

[5. *N.J.A.C.*. 6A:14-4.1 General requirements]***

(a) *Each district board of education shall provide* educational programs and *related services for students* with disabilities required by the individualized educational programs of those *students for whom the district board of education is responsible.* (emphasis in text) (*Id.* at 6)
***
[6. *N.J.S.A.*. 18A:7F-3. Definitions.]***

"Resident [e]nrollment" means the number of pupils ... who, on the last school day prior to October 16 of the current school year, are residents of the district and are enrolled in:...(2)...a...private school to which the district of residence pays tuition... . ...In addition *resident enrollment shall include the number of pupils who,* on the last school day prior to October 16 of the prebudget year, *are residents of the district and are in a state facility in which they were placed by the state. ...* (emphasis in text) (*Ibid.*)

[7. *N.J.S.A.* 18A:7F-25. Calculation of State aid for transportation.]***

P2 is the total number of special education pupils eligible for transportation pursuant to *N.J.S.A.* 18A:46-23 with special transportation requirements *who are resident in the district* as of the last school day prior to October 16 of the prebudget year. (emphasis in text) (*Id.* at 7)

Respondent further argues that the Commissioner should not focus exclusively upon *N.J.S.A.* 30:4C-26c, and should consider principles of statutory construction in making his determination. Respondent avers that the entire statute, including *N.J.S.A.* 30:4C-26(b), should be read *in pari materia* with other relevant statutes in determining responsibility for the transportation costs of these special education students. (*Id.* at 7-8) Respondent concludes that *N.J.S.A.*18A:7F-25 specifically provides for transportation costs for special education students who are resident in the district pursuant to *N.J.S.* 18A:46-23. (*Id.* at 10) Further, respondent submits that the transportation costs in dispute are included in tuition liability pursuant to *N.J.A.C.* 6:20-3.1 and *N.J.A.C* . 6:30-3.1(d)4.vii. (*sic*) "'[c]ontracted transportation...which are part of the instructional program' is expressly included in that sum, while in §5.i '[t}ransportation to and from school [***] is paid by the resident district'***." Respondent, therefore, concludes that these provisions clearly impose liability on WWP for the cost of transportation either as a component of tuition or as a stand alone cost. (*Id.* at 10)

Finally, with respect to WWP's exceptions, respondent avers that WWP's reliance on recent administrative decisions which determined that transportation costs to a county vocational school are the responsibility of the local school district is misplaced since respondent has no "sending" responsibility to the students at issue. (*Id.* at 10-12)

In its reply exceptions with respect to Nutley, respondent states that Nutley's exceptions essentially mirror WWP's exceptions, noting that Nutley's assertion that Nutley is no more responsible for the incursion of the transportation costs at issue than is respondent completely misses the issues involved herein. (*Id.* at 14)

In the course of the review of the above-titled matter, the Director of the Bureau of Controversies and Disputes, on behalf of the Commissioner, sought guidance from the

Attorney General's Office as to the continued validity of the 1984 Opinion concerning school district liability for transportation for students in group homes. By letter of June 21, 2000, the Deputy Attorney General advised the Commissioner that the analysis and conclusions in the 1984 Opinion remain valid.

The parties were noticed of the above communication from the Attorney General's Office, and provided an opportunity to respond.

In its response, respondent argues, *inter alia*, that the Deputy Attorney General's reliance on *N.J.S.A.* 30:4C-26 is misplaced and erroneous because that statute has no relevancy whatsoever to Division of Developmental Disabilities (DDD) group home placements. The express terms of *N.J.S.A.* 30:4C-26, respondent avers, are specifically applicable to placements made by DYFS, and by its plain language, cannot be expanded to include placements by State entities other than DYFS. (Respondent's Memorandum of Law, July 8, 2000 at 2) Respondent further argues that both "[t]he Attorney General *and the ALJ* erred in believing that an expansion of the coverage of *N.J.S.A.* 30:4C-26 to placements by the DDD was warranted." (emphasis added) (*Id.* at 3) Respondent submits that prior to 1985, the Division of Mental Retardation (DMR) was the agency having jurisdiction over those who are autistic, such as the children at issue herein. When DDD came into being in 1985, respondent states that the functions of DMR were transferred to the new entity. (*Id.* at 4) Respondent asserts that before and at the time of the creation of DDD in 1985, the State divided responsibility for certain populations between DYFS and DMR. With respect to the DMR/DDD population, respondent argues, *N.J.S.A.* 30:6D-3a(5) expressly defines those included in the service population as persons with "'severe disabilities attributable to'...'autism.'" (*Id.* at 6) Accordingly, respondents aver, separate statutory jurisdictions are established for DYFS (*N.J.S.A.* 30:4C) and DMR/DDD

(*N.J.S.A.* 30:6D), such that the distinct population for which DMR/DDD is responsible is not somehow transferred to DYFS by a group home setting. (*Id.* at 6-7)

Additionally, respondent repeats its arguments advanced below and in its exceptions to the Initial Decision, urging the Commissioner to adopt the conclusions of the ALJ, dismissing the Petitions of Appeal and determining that the contested transportation costs are the responsibility of petitioners.[4]

In their responses, Petitioners WWP and Nutley essentially reiterate arguments advanced in their exceptions, urging the Commissioner to accept the legal opinions provided by the Attorney General's Office, and to reject the ALJ's analysis which determined that petitioners are responsible for the transportation costs for the students at issue.[5]

Upon consideration of the Initial Decision, the arguments advanced by the parties, the March 13, 1984 Attorney General's Opinion and the June 20, 2000 advice from the Attorney General's Office, the Commissioner determines to reject the ALJ's conclusions of law for the reasons set forth below.

Initially, the Commissioner agrees that the statute central to the resolution of the question as to who is responsible for the cost of transportation services for students placed in group homes is *N.J.S.A.* 30:4C-26, which authorizes group home placements by the State and delineates the obligations of school districts involved in such placements. Further, the statute explicitly states that, for all purposes except school funding, the placed child is to be deemed a resident of the municipality and county where the group home is situated and, as such, is entitled

[4] Although respondent objects to the Commissioner's consideration of the Deputy Attorney General's letter of June 20, 2000, arguing that it serves to supplant the Commissioner's authority to make a decision with respect to this matter, the Commissioner notes the appropriateness of his consideration of advice of counsel upon taking judicial notice of such advice.

[5] The parties were provided with an opportunity to concurrently submit a letter brief or memorandum of law *in response to the communication by Deputy Attorney General Thomas Russo.* To the extent that both WWP and Nutley included reply arguments *to respondent's submission* in their briefs, these arguments were not considered.

to the use of all health, recreational, vocational and other facilities of said municipality and county. Section "c" goes on to specify that the child is also entitled to the education benefits of that district with the exception that the child's "district of residence," as determined by the Commissioner of Education pursuant to law, shall be responsible for paying "tuition" to the district in which the child is placed.

Although this statute specifically refers to placements made by DYFS, the Commissioner agrees with the ALJ that it should be construed as also covering placements made by DDD. Both DYFS and DDD are divisions within the Department of Human Services which have been entrusted by the Legislature with the responsibility of delivering services to children with disabilities which will enable them to lead as normal and productive lives, as possible. *See N.J.S.A.* 30:6D *et seq.* and *N.J.S.A.* 30:4C *et seq.* Although *N.J.S.A.* 30:4C-26c makes no reference to placements by DDD, it is clear from the June 15, 1998 letter from Human Services Deputy Director, Debra Coniglio, informing Delran that "[b]oth the West Windsor School District for (K.H.) and the Nutley School District for (S.M.) have been reminded of their responsibility to assume educational expenses for their respective pupils, beginning July 1, 1998," that DHS, *the Department overseeing these two divisions, has read N.J.S.A. 30:4C-26c as applying to residential placements by DDD.*

Additionally, except for the matter of tuition, *N.J.S.A.* 30:4C-26 fixes liability for the cost and provision of all governmental services available to children placed in group homes. As stated above, the child's district of residence is responsible for paying tuition to the school where the child is placed. Pursuant to *N.J.S.A.* 18A:7B-12b the "district of residence" is "the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." In the pending

matters, it is undisputed that the respective districts of residence, which are responsible for paying the cost of tuition, are, therefore, West Windsor-Plainsboro and Nutley.

Given the absence of any reference to transportation in the provisions of *P.L.* 1979, *c.* 207, the Commissioner concludes that the term "tuition" does not encompass transportation. At the time of the enactment of *P.L.* 1979, *c.* 207, the Legislature was aware of the matter of pupil transportation as evidenced by a separate provision dealing with "day training," in which it specifically allocated this cost to the State of New Jersey. *N.J.S.A.* 18A:46-18.1 (repealed *see now N.J.S.A.* 18A:46-13). The existence of this provision shows that if it had desired to impose transportation costs upon the "district of residence," in the case of a group home placement, the Legislature could have easily drafted *N.J.S.A.* 30:4C-26c in such a way that included this cost.[6]

The Commissioner further finds that the express language of *N.J.S.A.* 30:4C-26c, stating that children placed in group homes are to be accorded all of the "educational benefits" of the school district in which the group home sits, includes pupil transportation. In this regard, the ALJ properly noted that a special education pupil may qualify for transportation as a "related service" within the meaning of the special education laws. It must be noted, however, that nothing in those laws alters the Commissioner's conclusion regarding cost allocation. Since *N.J.A.C.* 6A:14-3.9 only references the "district board of education" as bearing these costs and there is no specific provision for group home placements, the regulation must, therefore, be viewed in light of, and subject to, the cost allocation set forth in *N.J.S.A.* 30:4C-26c.

The Commissioner also finds that the school district where the group home is located is responsible for providing child study team services (paid for by the resident district) to

[6] To the extent that the parties seek further clarification of this statute, the Commissioner notes that the appropriate remedy is legislative.

children placed in group homes within its borders for reasons expressed in the 1984 Opinion. Therefore, the current scheme provides that the group home school district will determine the child's educational program and placement, which, in turn, will dictate the child's transportation needs and the district's transportation costs. [7]

Accordingly, for the reasons set forth above, the Commissioner grants petitioners' motions for summary judgment and directs that respondent reimburse Petitioners WWP and Nutley for the cost of transportation for the students in question. Respondent is further directed to continue the funding of transportation costs for S.M., as long as the student remains in the group home and is eligible for special education services. [8]

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 05 2000

Date of Mailing: SEP 05 2000

[7] It is noted that, pursuant to the Comprehensive Educational Improvement and Financing Act, transportation aid is provided to school districts. *N.J.S.A.* 18A:7F-25.

[8] K.H. has aged out of WWP, so that the only relief sought by WWP is the reimbursement for past expenditures.

[9] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

288-00

R.H. AND A.H., on behalf of minor child, A.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND ROY J. CORSO, SCHOOL SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

September 5, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 7880-99
Agency Ref. No: 158-6/99

R.H. and A.H. on behalf of minor child, A.H.,

Petitioners,

v.

BOARD OF EDUCATION OF BOGOTA and ROY J. CORSO, School Superintendent, Bergen County,

Respondent.

Jason D. Roth, Esq., represented petitioners
(Murano & Roth, LLC, attorneys)

Richard Brovarone, Esq., represented respondent

Record Closed: July 11, 2000 Decided: July 18, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 29, 1999, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the Stipulation of Settlement, I **FIND:** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **dismissed**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2000

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/g

MURANO & ROTH, LLC.
690 Kinderkamack Road
Oradell, New Jersey 07649
201-265-3400

Attorney for Petitioner,
Alexander Hammond

A.H., a child by his parents, ROBERT HAMMOND and ALISON HAMMOND *Petitioners* *vs.* **BOGOTA BOARD OF EDUCATION BOGOTA HIGH SCHOOL and ROY J. CORSO, Superintendent of Bogota Public Schools** *Respondents*	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY ADMINISTRATIVE LAW *OAL DOCKET NO.:EDUOS-07880-99N* *AGENCY REF NO. 158-6/99* **STIPULATION OF SETTLEMENT**

The Petitioner, A.H., a child by his parents, ROBERT HAMMOND and ALISON HAMMOND and the Respondents, BOGOTA BOARD OF EDUCATION, BOGOTA HIGH SCHOOL and ROY J. CORSO, Superintendent of Bogota Public Schools, having amicably adjusted and resolved their differences, do hereby stipulate and decree as follows:

1. Respondents agree to permanently remove any and all references to any alleged violence, school disruption, threats, suspension, or reason for said suspension, shall be removed from the file of A.H., and said materials shall be sealed and placed

into Escrow with Richard Brovarone, Esq., for a period of time, ending on August 15, 2000.

2. On August 15, 2000, said file and materials shall be forwarded to the office of Murano & Roth, LLC., to be disposed of as A.H. and the parents of A.H. see fit.

3. At any time after August 15, 2000, Petitioners shall be entitled to periodically review said file of A.H. to insure that compliance with this agreement has been effectuated.

4. There shall be no notation on any record of A.H. relative to this matter within the file of A.H., and it shall be construed as if the alleged incident never occurred.

5. Upon receipt of said file, materials and verification that the file of A.H. has been purged, Petitioners shall dismiss their petition against Respondents with prejudice.

6. Respondents and Petitioner shall also waive any and all rights that may be available under the prayers for relief, including but not limited to attorney fees, costs of suit and damages of any kind.

7. Both parties shall provide any requested documentation by the other party to effectuate the purpose of this agreement.

8. In the event that either party does not comply with the terms of this agreement, the non-breaching party may proceed to enforce this agreement, by application to the clerk of this court for the appropriate remedy and shall be entitled to reasonable attorney fees. Such application for attorney fees may be made supported only by certification of counsel.

9. Petitioner and Respondent hereby acknowledge that this agreement was the product of extensive discussions and negotiations. Its terms shall not be construed more favorable to any party, irrespective of the actual author of this agreement.

10. Upon receipt of said file and materials from the Escrow of Richard Brovarone, Esq., Respondent shall be entitled to file a Stipulation of Dismissal will be filed with this Court, which shall be held in escrow by the office of Murano & Roth, LLC.

Dated:

JASON D. ROTH, ESQ.
COUNSEL FOR PETITIONERS

A.H.

ROBERT HAMMOND,
a parent of A.H.

ALISON HAMMOND
a parent of A.H.

RICHARD BROVARONE, ESQ.
COUNSEL FOR RESPONDENTS

OAL DKT. NO. EDU 7880-99
AGENCY DKT. NO. 158-6/99

R.H. AND A.H., on behalf of minor child, A.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND ROY J. CORSO, SCHOOL SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 05 2000

Date of Mailing: SEP 08 2000

[1] For clarity, the Commissioner notes that application for enforcement of this agreement, and for attorneys' fees, must be made to the New Jersey Superior Court.

[2] Page two of the agreement indicates that during the pendency of the Commissioner's review, respondents were to forward A.H.'s "file and materials" relating to the underlying controversy herein to the office of petitioners' counsel. (Stipulation of Settlement at 2) Thereafter, petitioners agreed to dismiss their petition against the Board, with prejudice. (*Ibid.*) In that the record includes confirmation that these terms were, in fact, effectuated, this matter may be deemed settled.

#289-00E

289-00

T.C.-M. ON BEHALF OF MINOR CHILDREN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

September 6, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 6526-00

AGENCY DKT. NO. 297-8/00

T.C.–M. ON BEHALF OF HER MINOR CHILDREN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD,

Respondent.

T.C. – M., petitioner, *pro se*

Marc H. Zitomer, Esq., on behalf of the respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed with the Commissioner of Education (Commissioner) on August 30, 2000. The petitioner is appealing the determination of the respondent that she and her children are not domiciled in the South Plainfield School District. Also, the petitioner is asking for emergent relief to stay the proposed transfer of her children back to the Plainfield School District and asking that her children be allowed to attend school in the South Plainfield School District.

The matter was transmitted on August 30, 2000, to the Office of Administrative Law, pursuant to *N.J.S.A.*52:14B-1 to –15 and *N.J.S.A.*52:14F-1 to –13, prior to the filing of any papers by the respondent, since the petitioner is requesting emergency relief. I received a written brief from the respondent on August 31, 2000.

The oral argument as to the motion for emergency relief took place on September 1, 2000.

This order deals only with the motion for emergency relief.

Emergency relief is an extraordinary remedy and the burden of proof is on the petitioner to show that (1) there is a threat of immediate and irreparable harm to the petitioner; (2) there is a probability that the petitioner will eventually succeed on the merits; (3) the legal rights are settled; and (4) that the inconvenience or loss to the Board will be nominal. *Crowe v. DeGioia*, 90 *N.J.*126 (1982); *New Jersey Bar Association v. Northern New Jersey Mortgage Associates*, 22 *N.J.* 184 (1956); *N.J.A.C.* 1:1-12.6; *N.J.A.C.* 6:24-1.5.

Based on the petition and the oral arguments, I **FIND** that the facts pertinent to this motion are not in dispute.

Petitioner enrolled her children in the South Plainfield School District in November 1999, and sometime thereafter the respondent had reason to believe that the petitioner and her children still were domiciled in Plainfield. In March 2000, an investigation as to domicile was conducted by Kenneth Van Kleef, on behalf of the respondent. Mr. Van Kleef concluded that petitioner and her children were still domiciled in Plainfield. A hearing before the respondent was held on July 17, 2000.

At the hearing, the petitioner and her mother presented testimony and documentary evidence in support of petitioner's position that she and her children reside with her parents in South Plainfield. The respondent determined that the petitioner and her children are not domiciled in South Plainfield.

By letter dated July 18, 2000, the respondent notified the petitioner of its determination. The letter stated that the petitioner had 21 days to appeal the decision, and if she did not appeal within that time, her children would be removed from the South Plainfield School. Also in the letter, the petitioner was told that the appeal had to be filed with the Commissioner of Education and she was given the name and address of the person to whom she had to send the appeal. The petitioner did not file an appeal within 21 days.

By letter dated August 10, 2000, the respondent informed the petitioner that since she did not file an appeal, her children could not attend school in South Plainfield and the respondent would initiate the transfer of her children to the Plainfield School District.

On August 30, 2000, the petitioner filed this appeal with the Commissioner.

The petitioner argued that she and her children reside with her parents in South Plainfield as she represented at the respondent's hearing. The petitioner had contacted an attorney before the respondent's hearing but did not engage the attorney to appear at the respondent's hearing. After the respondent's decision, the petitioner again contracted this attorney and asked him to handle the appeal. There was a conversation regarding the attorney's fee and petitioner was concerned about her ability to pay the fee. The petitioner has filed for bankruptcy. After the appeal period lapsed, the petitioner and the attorney agreed that the petitioner could not afford to hire an attorney. The petitioner then spoke to Legal Aide and the Rutger's Clinic regarding representation, without success.

The petitioner is concerned about whether her children will be allowed to attend school in Plainfield and also about making arrangements to transport her children to the Plainfield Schools. The petitioner reiterated that she and her children live in South Plainfield.

Mr. Zitomer argued that the petitioner has not shown irreparable harm since her children are not being deprived of an education, and will be educated in the Plainfield School District during the pendency of the appeal. Since the petitioner's children formerly attended school in Plainfield, Mr. Zitomer argued that they are familiar with the facilities, staff and students.

Mr. Zitomer argued that the legal right underlying petitioner's claim is not settled. He stated that by statute a student can only go to school in the district where he/she is domiciled, *N.J.S.A.* 18A:38-1 *et seq.*

Mr. Zitomer argued that the petitioner has not demonstrated a substantial likelihood of success on the merits. The petitioner was notified of the respondent's determination and was notified of the time constraints for filing an appeal as well as the address where the appeal was to be filed. He argued that the petitioner has offered no persuasive argument as to why her appeal was not filed within the time limit. Mr. Zitomer argued that the evidence presented to the respondent at its hearing amply demonstrates that the petitioner and her children are living in Plainfield and that the petitioner has offered little, if any, new evidence to refute the respondent's determination as to domicile.

Lastly, Mr. Zitomer argued that the respondent would suffer a hardship if the petitioner's request is granted since the respondent would have to pay the cost of educating the children.

I am persuaded by Mr. Zitomer's arguments that the petitioner has failed to meet the standards for emergent relief. Therefore, I **CONCLUDE** and **ORDER** that the petitioner's motion for emergent relief be denied.

This order as to the motion for emergency relief may be adopted, modified or rejected by the **COMMISISONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorize to make a final decision in this matter. The final decision shall be issued without due delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or rejected this order within forty-five days, this recommended order shall become a final decision on the issue of emergency relief in accordance with *N.J.S.A.* 52:14B-10.

September 1, 2000
DATE

BEATRICE S. TYLUTKI, ALJ

/cad

OAL DKT. NO. 6526-00
AGENCY DKT. NO. 297-8/00

T.C.-M. ON BEHALF OF MINOR CHILDREN, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

The Administrative Law Judge's (ALJ) Order, which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law (OAL) on September 1, 2000, has been reviewed. Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. This matter shall continue at the OAL for further proceedings as deemed necessary.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 06 2000

Date of Mailing: SEP 06 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

290-00

M.G.L., on behalf of herself and minor children, B.S., D.J. AND V.J.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent contested the Board's policies and procedures that resulted in a delay in enrolling her children in the District's schools. Petitioner and her three children arrived from Haiti at the end of October 1998 and they appeared on November 3, 1998 at the Board's administrative offices; yet, the children were not enrolled until December 2, 1998. Enrollment had been delayed pending completion of forms and applications containing pre-enrollment requirements, including a Certificate of Inhabitancy (CI) to be completed and issued by a municipal zoning and housing official, which form petitioner charged was improper and illegal.

The ALJ concluded that the action of the Board's personnel was not unreasonable, arbitrary or capricious, even though registration was delayed for a number of days. The ALJ found that petitioner contributed to the delay by the language difficulties in this case and by not satisfactorily furnishing proof of residency in a timely fashion. The ALJ found that the children were enrolled the day that the completed proof of residency was submitted and one day after the Board was served with the petition. Petition was dismissed. The ALJ noted that the Board voluntarily agreed to remove the municipal CI from its school admission application packet. The ALJ ordered that said certificate be totally eliminated from the Board's application procedures.

Having reviewed the record, including the transcript of the OAL hearing, the Commissioner agreed with and adopted the ALJ's order that the CI be totally omitted from the Board's application procedures. The Commissioner, however, determined that while the ALJ was absolutely correct in determining that it was improper for the Board to require that a CI be completed as part of its registration process, the CI contributed more substantially to the delay in enrollment than conveyed by the ALJ or the Board. The issue of residing in a dwelling in violation of local housing ordinances is not an issue that a board of education may consider in determining enrollment eligibility. Moreover, the Commissioner found that it was not appropriate for enrollment to be delayed, even in part, on the basis of incomplete transcripts since student transcripts go to the issue of a student's educational placement, not to eligibility to enroll or be admitted to school. The Commissioner also found that incomplete immunization records may not interfere with the *enrollment*, notwithstanding that it may, by law, be a basis for delaying actual *admission* to school. (*N.J.S.A.* 26:1A-9, *N.J.A.C.* 8:57-4.1 *et seq.*) The Commissioner determined that the enrollment of the children occurred only due to the filing of a petition. The Commissioner determined that, in addition to the ALJ's order that the District discontinue inclusion of a CI in its registration packet, the District is ordered not to allow the absence or incompleteness of transcripts and immunization records to interfere with the enrollment of a new student. Commissioner directed the county superintendent to review the District's enrollment policies and procedures.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1418-99
AGENCY DKT. NO. 540-12/98

M.G.L. ON BEHALF OF HERSELF AND HER MINOR CHILDREN, B.S., D.J. AND V.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent

Ellen M. Boylan, Esq., for petitioner
(Education Law Center)

Stephen J. Christiano, Esq., for respondent

Record Closed: February 10, 2000 Decided: July 21, 2000

BEFORE **ARNOLD SAMUELS**, ALJ:

This is an appeal by the petitioner, M.G.L., on behalf of her three children, B.S., D.J. and V.J., contesting the respondent's (Board) policies and procedures that resulted in a delay in enrolling petitioner's children in the district's schools.

PROCEDURAL HISTORY

The verified petition was filed with the Commissioner of Education on December 2, 1998. An amended petition, to correct inaccuracies and to add an count, was filed on December 7, 1998. The respondent filed an answer on December 24, 1998.

On January 26, 1999 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

The hearing was originally scheduled for August 3, 1999. However, petitioner's attorney requested and was granted an adjournment, due to a planned vacation. The hearing was rescheduled and held on December 1, 1999 at the OAL in Newark, New Jersey. Two witnesses, the petitioner M.G.L. and her sister, M.C.L., testified for the petitioner; and one witness, Josefa Lopez, testified for the respondent. Documentary exhibits were marked in evidence by both parties, an itemized list of which is contained in the Appendix attached hereto. Posthearing briefs were filed by the parties; and the record was closed on February 10, 2000. Three Orders of Extension for the filing of this decision were entered.

ISSUES AND DEMANDS FOR RELIEF

This dispute arose because the Board did not enroll petitioner's children in its school immediately upon M.G.L.'s appearance on November 3, 1998 at the Board's Administrative offices, but delayed enrollment pending completion of forms and applications containing certain pre-enrollment requirements. (The family had arrived from Haiti three or four days earlier, at the end of October 1998.)

The amended petition stated that the registration packet for each child, given to M.G.L. on November 3, 1998, contained a variety of forms to be completed and

returned at an appointment made to register the children on November 16, 1998. These forms included, among other things, a certificate of inhabitancy (C.I.) to be completed and issued by the municipal zoning and housing official and to be returned with the other documents. Petitioner charges that the completion and submission of this form as a prerequisite for enrollment of the children in school is improper and illegal.

In addition, petitioner charges that she never received a written notice from the Board denying school admission to the children; and that the Board never advised her of her right to appeal the denial of school admission to the Commissioner of Education.

The petitioner further charges that the foregoing actions by the Board violated the children's rights to a thorough and efficient education under the New Jersey Constitution; violated their right to procedural due process, as guaranteed by the United States Constitution, and violated the notice requirements of *N.J.S.A.* 18A:38-1 *et seq.*

The petitioner demands the following relief:

> a declaratory ruling that the Board's policy and practice of requiring the CI violates *N.J.S.A.* 18A:38-1 *et seq*;
>
> a declaratory ruling that the Board's policy and practice violates a student's fundamental right to a thorough and efficient education under the New Jersey Constitution;
>
> a declaratory ruling that the Board's policy and practice refusing to immediately process applications for school admission, and instead scheduling appointments to accept and process applications two weeks later, violates *N.J.S.A.* 18A:38-1;
>
> a declaratory ruling that the Board's failure to provide petitioner with written notice specifying the grounds for denying admission and failure to provide notice of the right to appeal a denial to the Commissioner of Education also violates petitioner's right to procedural due process under *N.J.S.A.* 18A:38-1 *et seq.* and the United States Constitution;

> a declaratory ruling noting and preserving petitioner's claim against the Board under 42 *U.S.C.* §1983, including claims for compensatory damages, punitive damages, attorneys fees and costs, against the municipality as well as against the Board.

Additionally, petitioner demands

> a permanent injunction barring the Board from requiring an applicant for school admission to obtain a C.I.;
>
> a permanent injunction barring the Board from failing to immediately accept and process an application for school admission;
>
> a declaratory ruling that the three children meet the eligibility criteria of *N.J.S.A.* 18A:38-1;
>
> an order requiring the Board to admit the three children to its schools;
>
> an order requiring the Board to assess the instruction and education denied the children during the period of unlawful exclusion from school, and to provide compensatory education for the period of exclusion.

In its answer, the Board generally denied the substantive allegations of the petition and left the petitioner to her proofs. Respondent also stated, as an affirmative defense, that the petitioner has failed to state cause of action upon which relief could be granted, and that the petitioner's children had been enrolled in the district's school.

TESTIMONY AND EVIDENCE

The petitioner, M.G.L., speaking in Haitian/Creole, testified (through an interpreter) that she arrived in the United States from Haiti, with her three children, ages 19, 14 and 12, on October 31, 1998. She went directly to her sister's apartment in West Orange, New Jersey, where she and the children took up residence together with

her sister, her mother and her nephew. The petitioner said that she intends to remain living in that apartment, as her only residence.

The petitioner further testified that she had a group of documents that she had obtained from authorities in Haiti, consisting of grade reports, transfer forms and vaccination reports, Copies of these documents were marked in evidence as Exhibits P-1 through P-10. The Exhibits are mostly written and printed in the Haitian language.

Petitioner stated that she went to the Board offices on November 3, 1998 (three days after her arrival in the United States) to register the children in school. She brought the P-1 through P-10 documents with her, and her sister accompanied her in order to translate and assist.

M.G.L. testified that she spoke to a receptionist at the Board offices, who gave her packets of forms for each child, to be completed and returned. An appointment was made for the petitioner to return on November 16 (nine school days later) to meet with the Board secretary. According to the petitioner's testimony she was given a choice of November 16 or November 22, and she chose the 16th because it was closer in time. She said that no other dates were offered to her. M.G.L. took the packets and returned on November 16th.

M.C.L., the petitioner's sister, testified that she had lived in the West Orange apartment for 5 ½ years, and that she assisted M.G.L. in attempting to enroll her newly arrived children. M.C.L. speaks English and was able to translate for the petitioner during their contacts with the Board staff. This witness stated that she and her sister took the applications and the forms home on November 3, together with the documents they had brought with them. They did not leave any of the documents with the receptionist. M.C.L. testified that she was available to return before the 16th of the month, but that it was the first day offered. In her opinion, she could have completed the forms in a day or two. (She later testified that it took longer.)

Speaking about some of the forms in the packets, M.C.L. said that one of them was a Certificate of Residency to be completed by her landlord, and another was a Certificate of Inhabitancy (C.I.), which she brought to the Township offices on November 9 and again on November 11 to be signed by the Code Enforcement Officer. This form, the C.I., asked for a list of all the people who lived with her in the dwelling unit, and also those who were expected to be registered in school. M.G.L. stated that, after reviewing her answers on the forms, the code enforcement official did not approve the Certificate because too many people were living in the one dwelling unit. M.C.L. was told that one family would have to move. On November 12, someone came to the apartment and checked the rooms, the fire alarms, the utility systems and the space generally.

M.C.L. further testified that she returned to the housing department again on November 16th, after first going to the Board of Education, where it was noted that one signature was missing. The denial of the C.I. was affirmed by the code enforcement official, and M.C.L. was given the same advice as stated above.

M.C.L. stated that when she met with the woman who was responsible for registering the children in school, Ms. Lopez, she was told that the registrations would not be processed because the C.I. was not signed, and the packet of forms was otherwise not completed.

At that point, M.C.L. and her sister sought the assistance of counsel and returned again to the Board's offices, where, according to M.C.L., Ms. Lopez told her that Township of West Orange would not recognize their residence in the town without the Certificate of Inhabitancy being signed. M.C.L. said that counsel intervened immediately and obtained an Order from the Department of Education, whereupon the children were enrolled on December 2, 1998. They began attending classes on the following Monday, December 7, after receiving orientation before the weekend.

When cross-examined, M.C.L. admitted that it took her longer that two days to have all of the admission forms completed and signed. The Certificate of Inhabitancy was still not approved. She said that the landlord first signed the Certificate of Residency on November 13th, the work day that immediately preceded the appointment with the Registrar of the Board on November 16.

M.C.L. also acknowledged that no one at the Board of Education said that enrollment was denied, only that the applications for registration could not be processed without the signed Certificate of Inhabitancy.

When cross-examined further about the completion of the Certificate of Residency, Exhibit R-1, M.C.L. verified that the landlord signed it on November 13, 1998, and that she signed it as tenant on November 14th, as indicated by the notary's acknowledgement. The Certificate states that 7 family members reside in the apartment, three adults and four children.

Finally, when asked her opinion of when they thought the children should have been registered in the district, M.C.L. testified that the children should have been enrolled on November 16 or soon thereafter.

Josefa Lopez, Registrar of the West Orange Board of Education, testified about her involvement in this matter. She stated that the first time she met the petitioner and her sister was on November 16, 1998. She knew that the women had previously seen a receptionist, who gave them registration packets for each child.

Ms. Lopez testified that, when she reviewed the forms returned to her by the petitioner on November 16, she found several items to be incomplete, including the immunizations records and a missing transcript for the student to be registered in high school. In addition, most importantly, Ms. Lopez said that it was not clear to her that the petitioner and her children were living in West Orange. The Certificate of Residency form, Exhibit R-1, was incomplete on November 16, and she particularly

noted that the names of the family members, required in the top half of the form, were not filled in, and the mother's (petitioner's) signature was also missing.

Ms. Lopez emphatically stated that the completed document was first brought to her by the petitioner and her sister on December 2, the same date on which she registered the children.

In addition, she said that the record release form, Exhibit R-4, was not given to her on November 16, but was also produced on December 2.

Ms. Lopez testified further that she told the petitioner and her sister, on November 16, that much of the required information was not complete; and that she particularly needed better proof that they resided in West Orange. Ms. Lopez insisted that she never said that enrollment was or would be denied, but did indicate to them that she would like to have the C.I. completed.

Referring to Exhibit R-5, a letter from the landlord dated November 10, 1998, she said that it was not given to her until December 2. She had received the petition filed by counsel on December 1, and she called the petitioner and/or her sister that day and asked them to come to her office the next day, December 2.

Ms. Lopez also indicated that no student has ever been denied enrollment in the District's schools because of an incomplete Certificate of Inhabitancy. She repeated this on cross-examination, when she unequivocally stated that the C.I. is not required in order to register a child. Explaining further, she said that, even though the C.I. is not a Board form, it is used to reinforce the question of residency.

Additionally, on cross-examination, Ms. Lopez stated that the situation in this case was somewhat unusual and confused, because the Certificate of Residency did not clearly indicate that the address in question was the residence of the new family. It

was a rented apartment, but not by the petitioner, and the lease was in the aunt's name (petitioner's sister).

Ms. Lopez repeated and emphasized that the children's names were not filled into the residency form until December 2. She witnessed that addition, when the names were written onto the form in front of her. Furthermore, she testified that the petitioner's signature, seen on the right side of the form (last name first) was also inserted in front of her on December 2. All of this information, the children's names and the petitioner's signature, was inserted on that date. This was all inserted above the acknowledgement by the notary, which is dated November 14, 1998.

Ms. Lopez reiterated that basically, it was the proof of residency that she felt was not complete; and that she did not have sufficient proof that the family lived there, until the she received information that was furnished for the first time on December 2.

An extensive cross-examination of Ms. Lopez by counsel, in an attempt to obtain an admission that the Certificate of Inhabitancy was the only factor that caused the delay, was unsuccessful, as was the attempt to impeach Ms. Lopez' credibility.

FINDINGS OF FACT

Having heard the testimony, observed the witnesses, reviewed the documentary exhibits and considered the argument of counsel, I **FIND** the following **FACTS**, by a preponderance of the believable evidence:

1. The petitioner arrived in the United States with her three children on October 31, 1998. She and the children moved into her sister's rented apartment. There, they joined the petitioner's mother, her sister and her sister's child.

2. Since the petitioner, M.G.L., spoke only Haitian/Creole, and she had little or no facility with the English language, her sister, M.C.L., translated, spoke for her and helped her with all of the transactions and informational needs involved in this matter.

3. Three days after arriving in the United States, the petitioner and her sister went to the Board offices for the purpose of enrolling petitioner's three children in the District's schools. They brought some documents with them, Exhibits P-1 through P-10, which consisted of grade reports, a transfer form and vaccination certificates, all from the Haitian schools or the American Embassy in Haiti. Some of these forms are written in petitioner's native language. The two women saw a receptionist, who gave them packets containing various forms, instructions and other items needed to provide the Board with registration information.

4. The forms and information to be provided at the time of registration included a new student registration form, a family information form, a home language survey form, a record release form, a certificate of residency form (in this case for a renter), a certificate of Inhabitancy form, a request for documentation showing proof of residency, a transfer card from previous schools, birth certificates, recent report cards, standardized test results and immunization record forms itemizing the various diseases for which immunization is required. See Exhibit R-2.

5. The receptionist made an appointment for the petitioner and her sister to return with the completed documentation on November 16, 1998, nine school days later. Two of these nine days, November 12 and 13, were N.J.E.A. Convention dates, and it is not known if the administrative staff was available on those days.

6. The petitioner did not leave the documentation she brought with her on November 3 with the receptionist. Instead, she retained them and brought them back on November 16.

7. One of the documents included in the packets given to the petitioner was a Certificate of Residency form, for a renter. Satisfactory completion of this document was required as proof that the petitioner and her children were bona fide residents of the municipality.

8. Another document to be completed by the petitioner was a Certificate of Inhabitancy form, (C.I.) a document to be completed by the petitioner (or by the petitioner's sister in this case), the Township Tax Assessor and the Township zoning and housing official. The directions on top of the form are as follows:

> This form must be completed before registering children for the West Orange Public Schools. Students may be allowed to enroll and attend school before the completion of the housing investigation and subsequent certification, provided they satisfactory meet all other requirements for school entry. Failure to comply with the housing investigation may result in school exclusion.

The instant petition was filed after the C.I. was not approved. The Township Housing Official, after considering of the number of inhabitants in the apartment, (three adults and four children) denied approval of the "inhabitancy," stating that the dwelling unit was occupied by too many people.

9. The petitioner claims that this action, the refusal of the Municipality to approve of the inhabitancy, was responsible for the Board's failure to register the children on November 16 or shortly thereafter.

10. The above assertion is not true. The Board never denied enrollment or registration of the children, and the registrar never said that enrollment would be denied without approval of the form (despite the sister's testimony to the contrary.) Instead, registration was delayed, pending satisfactory completion of other requirements. In particular, the Certificate of Residency was not satisfactorily completed on or after November 16, until December 2. The occupants' names were not filled in, and petitioner had not signed the form. One transcript was missing, and the immunization records were not complete.

11. Failure of the petitioner to satisfy the Municipality with regard to the C.I. was not the reason why the children were not registered on November 16 or within a few days thereafter. The names of the children and the petitioner's signature were not inserted onto the form until December 2, one day after the petition was served on the respondent. Furthermore, these names and the petitioner's signature were inserted into the form above the acknowledgment, which had been signed by the notary approximately two weeks earlier. The primary factor causing the delay in enrolling the children was the incomplete information required to be submitted as proof that their residence was in the Township of West Orange.

12. A separate letter verification of residence addressed to the Board by the landlord was not furnished to the Board until December 2, on which date satisfactory proof of residency was furnished for the first time, and on which date the children were registered. That was nine school days after November 16, when the registrar informed the petitioner that the returned information was not complete, primarily because satisfactory proof of residency was missing.

13. The registrar never denied enrollment for the children, even though she informed the petitioner that she would like to have the Certificate of

Inhabitancy form completed. However, the failure to obtain approval on that form was not a cause for the delay.

14. The petitioner (through her sister) believes that registration should have been accomplished on November 16 or within a few days thereafter. Satisfactory proof of residence was not furnished until December 2, on which day the registration was accomplished. That was one day after service of the petition. However, no convincing evidence was adduced that the registration would not have taken place on December 2 in any event, even had the petition not been served on December 1.

DISCUSSION

> Public Schools shall be free to the following persons over 5 and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> *N.J.S.A.* 18A:38-1.

Section b. (1) of the above statute refers to a person who is kept in the home of another person who is domiciled within the school district and supported by such other person, as also being qualified to attend the District's schools, but only upon filing of a sworn statement that the guardian or custodian is domiciled within the district and is supporting the child. This must be accompanied by a copy of the lease, if the person is a tenant, or a sworn statement by a landlord acknowledging the tenancy.

This latter section does not strictly apply to the instant situation, because no evidence was adduced to indicate that the sister was supporting the children. However, it illustrates the kind of proofs to be furnished to a Board of Education that indicate bona fide residency on the part of those seeking admission to the schools. This section continues with a statement that, if in the judgment of the Board of Education the

evidence does not support the validity of the claim by the resident, the Board may deny admission to the child. If that happens, then the resident may contest the Board's decision to the Commissioner within twenty-one days of the date of the denial, after which an expedited hearing on the validity of the claim will be ordered by the Commissioner. *N.J.S.A.* 18A:38-1b.(1).

Of course, in the event of such a denial, the Board is obligated to notify the resident in writing of his or her right to contest the decision within twenty-one days. *N.J.S.A.* 18A:38-1b.(1).

The petitioner claims violation of this statute by the Board, arguing that there was such a denial and no conforming notice was given. That did not happen. As indicated in the Findings of Fact, above, which were found by a preponderance of the credible evidence, there was no denial. Rather, registration and enrollment was delayed, primarily pending receipt of satisfactory proof of residency.

In such circumstances, it must be concluded that, in the absence of a denial, the statute was not violated. At most, the Board was dilatory, by not moving with greater dispatch. However, the period of delay, while perhaps excessive by five or six school days (after considering teacher's conference days and the Thanksgiving holiday), was contributed to by the petitioner and her sister, who did not furnish or offer to furnish the reasonably required proof of residency in a shorter period of time.

Any dilatoriness was remedied when the petitioner engaged counsel, who immediately filed a very extensive petition. In fact, the petition was not filed with the Commissioner of Education until December 2, 1998, the same day on which the Board registered the children. It is not known if petitioner's counsel first attempted to obtain satisfaction by calling a Board official or the Board's attorney, or by writing a letter that might have accomplished the petitioner's goal without the exacerbation that took place thereafter.

The petitioner, in her brief, correctly argues that any requirement that a Certificate of Inhabitancy be granted as a condition for admission to school, is improper. That argument is clearly valid, but such a scenario did not take place in this case. The Certificate of Inhabitancy was one of many items involved in the applications for admission, but it was not responsible for the delay in enrolling the children.

In fact, it was later stipulated by the respondent's attorney that the Board would totally discontinue the inclusion of the Certificate of Inhabitancy in its school registration packets. This advice was forwarded in response to earlier advice from this judge that such an approval is a clear function of the Municipality, apart from the question of whether or not children who establish residence should be admitted to the schools. Unfortunately, in response to the Board's agreement to discontinue its inclusion of the C.I., the petitioner (through counsel) sought to intensify and expand the scope of this dispute by filing a motion to further amend the complaint on several grounds and by demanding additional relief that, in this judge's opinion, was designed to further humble the Board. The motion to amend, opposed by the respondent, was denied because it was filed out of time; the hearing having been concluded and briefs having previously been filed.

The petitioner also alleges various violations of State regulations, statutes, and constitutional guarantees based on a claim that the Board required submission of complete immunization records prior to enrollment. *N.J.A.C.* 8:57-4.5(a) states that a child *may* be admitted to a school on a provisional basis if a physician or health department can document that at least one dose of each required age appropriate vaccine(s) or antigen(s) has been administered and that the pupil is in the process of receiving the remaining immunization(s).

In her testimony, Ms. Lopez did indicate that in her initial perusal of the documentation submitted on November 16, she found that the immunization record was incomplete. However, she did not state that enrollment was denied for this reason, only that it was a factor that she preferred to see completed. The immunization records,

Exhibits P-6, P-7, P-8, P-9 and P-10, were completed by a panel physician, presumably in Haiti. Since the children and the records had come from a small foreign country, with some portions of the records written in another language, it is not unreasonable for the registration authorities to seek some verification from a local health authority. In any event, no evidence was elicited to explain or expand upon the immunization records contained in the above exhibits, to determine whether or not they were acceptably complete.

In her brief, petitioner argues that the Board used the lack of complete immunization records as a pretext to deny admission to the schools. Again, the Board did not deny admission, and the proofs do not justify this claim by the petitioner. The petitioner's pretext theory is not supported by the evidence.

A similar argument is submitted by petitioner with regard to possibly incomplete Haitian school records or transcripts. The same comments apply to this claim. Registration was not solely denied for this reason either. As with the proof of residency, the foregoing records and completed forms were not delivered to Ms Lopez until December 2, 1998. The children were enrolled at the same time.

The relief sought by petitioner (or perhaps more accurately, petitioner's attorney) encompasses a series of unusually broad universal remedies, most of them couched in terms of demands for declaratory rulings, as itemized earlier in this decision. The pronouncements she seeks extend far beyond the scope of the initial reason for this litigation; and certainly far beyond any remedy that was needed by the petitioner and her children. The seemingly ferocious quest for punitive measures against the board, particularly after the children were enrolled in the schools, (albeit delayed by several days) is seemingly designed to satisfy the broad ideological goals and desires of counsel, in a manner that lost any connection with the need to obtain enrollment of the children; which was accomplished on the day that the petition was filed.

The respondent's argument is correct, when the Board states that declaratory rulings should apply to the present existence of actual and bona fide controversies. As of December 2, 1998, the children were registered, and the controversy and issue that caused the petition to be filed had been resolved. Furthermore, the Commissioner does not order public declarations.

The only failing on the part of the respondent and/or its staff people was the delay in accomplishing the enrollments. That delay, after deducting school closing time to allow for the Thanksgiving holiday and teacher's conferences, totaled no more than five or six school days after November 16, and was contributed to by the petitioner herself, who did not provide complete or satisfactory proof of residence until December 2.

CONCLUSIONS

It is **CONCLUDED** as follows:

The respondent was dilatory, to some extent, when it delayed the processing of petitioner's applications for enrollment for a period of five or six more school days than was necessary. The delay, albeit excessive, was contributed to by the petitioner, who did not satisfactorily furnish proof of residency in a timely fashion. The fact that the petitioner had arrived from another country, with accompanying language difficulties, also contributed to the delay.

At no time did the Board deny admission or enrollment to the children, and registration was accomplished on December 2, 1998, on the same day that completed proof of residency was submitted together with other records, and one day after the Board was served with the petition. (The testimony of the Registrar, Ms. Lopez, is found to be more accurate and credible than that of petitioner and her sister.)

Incorporation of the Certificate of Inhabitancy in the application documents and instructing the petitioner to obtain its completion was inappropriate and should not have been any part of the registration process. It is not sanctioned by any known law or regulation. Nevertheless, the petitioner's inability to obtain compliance was not the cause of the delayed registration. Furthermore, respondent has furnished assurances that this item, which is solely within the province of the municipal housing officials, not the Board of Education, has been and will be removed as part of the enrollment application.

The authorities cited by both the parties, indicating that the standard of review concerning the policies and practices of the Board of Education is whether their decision was unreasonable, arbitrary or capricious, is correct. *Kopera v. West Orange BOE* 60 *N.J. Super* 283 (App. Div. 1960); *Boyle v. Riti* 175 *N.J. Super* 158 (App. Div. 1980); *Thomas v. Morris Township* BOE 89 *N.J. Super* 327 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966); *Mountain Lakes BOE v. Maas* 56 *N.J. Super* 245 (App. Div. 1959); *Paddock v. Demarest BOE* 1974 *S.L.D.* 435. After considering all the facts and circumstances, it must be **CONCLUDED** that the action of respondent's personnel was not unreasonable or arbitrary or capricious, even though registration was delayed for the number of days discussed herein.

The petitioner has not proved that the children were educationally deprived or harmed by this relatively short delay; hence a claim for compensatory education is not justified.

Even though an award of monetary damages is not cognizable in this forum, petitioner has failed to prove that any harm resulted which might entitle her to damages.

An award of attorneys fees is also not cognizable on account of petitioner's cause of action in this forum. See, *Basley v. North Hunterdon Bd. of Educ.,* 117 *N.J.* 434, 442, 443 (1990); *State Dept. of Environ. Protec. v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983).

The three children were admitted to the District's schools on December 2, 1998, one day after service of the petition, and on the same day that the petition was filed. The Board had never contested their eligibility. Therefore, the petitioner's demands pertaining to their eligibility and admission to school are moot. The controversy was successfully ended in favor of the petitioner on that day.

The reason for the petitioner's filing of the petition, to obtain registration of her children in the District's schools, was accomplished almost immediately after the petition was served on the respondent. In fact, the amended petition was filed with the Commissioner of Education five days after the children were registered. There was no viable or useful reason to expand the scope of the initial controversy beyond the need to obtain the relief sought for the petitioner's children. While not initially frivolous, because it's original purpose was valid, the continued litigation and it's subsequent attempts to magnify it into a broad, universal *cause celebres* might be so characterized.

ORDER

Although the respondent has voluntarily agreed to remove the municipal Certificate of Inhabitancy from its school admission application packet, it is nevertheless **ORDERED** that said certificate be totally eliminated from the Board's application procedures.

It is further **ORDERED** all other demands for relief by petitioner are **DENIED** and the petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2000
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

7/25/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

M.G.L., petitioner

M.C.L.

Josefa Lopez

Exhibits:

P-1 V.J.'s 1997-98 report card from Haiti

P-2 D.J.'s 1997-98 report card from Haiti

P-3 B.S.'s 1997-98 Report Card from Haiti

P-4 Haitian School Transcript for D.J., 10/19/98

P-5 Haitian School Transcript for B.S., 10/19/98

P-6 Visa Applicant's Documentation of Immunization for V.J.

P-7 V.J.'s Vaccination Record

P-8 B.S.'s Vaccination Record

P-9 Visa Applicant's Documentation of Immunization for D.J.

P-10 D.J.'s Vaccination Record

P-11 Certificate of Inhabitancy 11/11/99

P-12 West Orange Public Schools Notice of Immunization Requirements for D.J.

P-13 West Orange Public Schools Notice of Immunization Requirements for V.J.

P-14 West Orange Public Schools Public Health Examination for B.S.

P-15 Certificate of Inhabitancy 11/17/99

R-1 Certificate of Residency

R-2 Instructions for Registration

R-3 1998-99 School Calendar

R-4 Record Release

R-5 Landlord's Letter

OAL DKT. NO. EDU 1418-99
AGENCY DKT. NO. 540-12/98

M.G.L., on behalf of herself and minor children, B.S., D.J. AND V.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the West Orange Board of Education's (Board) reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions urge affirmance of only that part of the Initial Decision which orders the Board to eliminate the Certificate of Inhabitancy (CI) form from its application procedures and rejection of the remainder of the decision denying all other relief. Petitioner further requests reversal of the Administrative Law Judge's (ALJ) January 24, 2000 Order denying her motion to amend the pleadings to conform to the evidence.

Petitioner first contends that the ALJ made numerous mistakes of fact which formed the basis of his legal rulings; *i.e.*, that the CI, incomplete immunization and incomplete school transcripts did not form a basis for the Board's delay/denial of admission in enrolling petitioner's children, each point of which she avers is admitted by the Board's employee for registering students, Ms. Lopez, both in her testimony at hearing and in answer to interrogatories. Petitioner next addresses the ALJ's finding that registration was "delayed" due to petitioner's failure to produce a transcript for one child and complete immunization records for all children

and to "satisfactorily" complete the Certificate of Residency-Renter form until December 2, 1998. (Initial Decision at 12 and 14) Petitioner reiterates her argument that the first two reasons for denying admission are plainly unlawful and urging that the record does not support a finding that failure to properly complete the Certificate of Residency form caused a delay in admission. As to this last point, petitioner states, *inter alia*, that:

> ***Ms. Lopez testified that she took the Certificate of Residency form from petitioner M.G.L. on November 16, 1998, retained it, and never returned it to M.G.L. to correct any deficiency, T127-17. Common sense dictates that Ms. Lopez would have returned the form to petitioner with instructions for proper completion if incompleteness had in fact been a reason for delaying admission.
>
> Further, the record established that M.G.L. was motivated to enroll her children in school, and there is no reason to doubt that she would have properly filled in the form had she been so instructed. M.G.L. kept her appointment with Ms. Lopez on November 16, went to the municipal housing official twice, and even consented to a housing inspection, in an attempt to get the CI. She returned to Ms. Lopez' office in late November after the initial denial on November 16, and after another rejection of the CI by the housing official, in a second attempt to gain admission. M.G.L. also went so far as to retain an attorney and file the petition. As the ALJ acknowledged, all that was required to satisfactorily complete the Certificate of Residency form was filling in the names of the inhabitants of the dwelling unit and M.G.L.'s signature, Initial Decision at p. 12, tasks which could have been accomplished at any time, and certainly on November 16, when petitioners first presented the form to Ms. Lopez. Finally, as discussed below[1], petitioners provided the Board with other proof of residency prior to December 2, 1998, and still were not admitted to the district. The record does not support a finding that M.G.L. was at fault for delaying admission. (Petitioner's Exceptions at 3-4)

Petitioner next avers that the ALJ's conclusion on page 13 of the Initial Decision that no convincing evidence was adduced that the registration would not have taken place on December 2, 1998, even if the petition had not been served on December 1, is in direct contradiction to Ms. Lopez' testimony (Tr. at 90-92), which stated that she telephoned petitioner

[1] Petitioner excepts to the ALJ's finding that she provided the Board with the landlord's "separate letter verification

to schedule an appointment for her to register the children on December 2 in response to receipt of the petition. Petitioner also excepts to the ALJ's finding that there was a delay of only five or six school days in enrolling her children, averring that such a finding is unfounded, since she first applied for admission on November 3, and was not given an appointment to return until November 16, nine school days later, and the children were not admitted until December 2, an additional nine days later.

Petitioner further urges rejection of the ALJ's finding at page 15 of the Initial Decision that the Board stipulated it would "totally discontinue" use of the CI form in the registration packet and the finding at page 18 that the Board "had furnished assurance" that the CI "has been and will be removed as part of the enrollment application." As to this, she maintains that the record is devoid of any such stipulation or assurance by the Board; thus, the ALJ had no factual basis for making this finding.[2]

Petitioner also argues, *inter alia,* that the ALJ did not address her claim that her children were denied admission to school without due process, instead finding that the Board never denied admission and couching the Board's conduct as a "delay" in granting admission. As to this, petitioner maintains that regardless of whether the Board's conduct is characterized as a denial or a delay, the result was that petitioner's children were deprived of their constitutional and statutory right to a public education for an entire month, without ever receiving written notice explaining the basis for the Board's action or inaction. The final point of petitioner's

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of residence" on December 2, 1998, averring that this is incorrect because Ms. Lopez testified at hearing (Tr. at 137-138) and admitted in interrogatories that petitioner provided her with the letter sometime in late November. (Petitioner's Exceptions at 4, 5)

[2] Petitioner conjectures that the ALJ's finding is referring to a letter sent by the Board's attorney to her attorney, after the close of the hearing, proposing to eliminate the CI from the application process in exchange for her dismissing with prejudice all other claims against the Board, a letter which petitioner maintains was provided to the ALJ in contravention of *N.J.A.C.* 1:1-15.10. (Petitioner's Exceptions at 6)

exceptions argues that her motion to amend the pleadings to conform to the evidence should have been granted.[3]

In response, the Board contends that petitioner's exceptions merely rehash arguments previously made to the ALJ which were comprehensively addressed and rejected in the Initial Decision. In support of this position, the Board relies on the arguments set forth in its post-hearing brief. The reply exceptions further aver, *inter alia,* that "[p]etitioner continues to fight a battle where none exists***" and she fails to grasp elemental facts such as the fact that her children could not have been immediately enrolled on November 3, 1998, the date she picked up the registration packet, because "[a] registration process must be followed, and if petitioner fails to comply with that process, it is not the fault of respondent." (Board's Reply Exceptions at 2, 3)

Upon careful and independent review of the record, including the transcript of the hearing before the OAL, the Commissioner agrees with and adopts the ALJ's order that the CI be totally omitted from the Board's application procedures. The Commissioner further finds, however, that the factual circumstances surrounding the issues in this matter are considerably more troubling than characterized by the Board in its reply exceptions and, in certain aspects, as addressed by the ALJ.

Initially, the Commissioner wishes to emphasize that the ALJ was absolutely correct in determining that it was improper for the Board to require that a CI be completed as part of its registration process, a factor which, in the Commissioner's judgment, contributed more substantially to the delay in the children's enrollment in this matter than conveyed by the

[3] Following the hearing in this matter, petitioner filed a motion to amend the petition to conform to the evidence to add legal claims against the Board's policy and practice of denying admission based on incomplete immunizations and lack of school transcripts. The Board opposed the motion, arguing that petitioner had knowledge, through discovery, of the reasons why her children were not admitted to school until December 2, 1998, thus, her latest date of notice was April 7, 1999. Therefore, the Board argued, the motion to amend was untimely filed. On January 24, 2000, the ALJ issued a letter denying the motion because it was far out of time and he would not consider re-opening the hearing. The ALJ offered to keep the record open for petitioner to file responsive briefs which petitioner declined to do.

ALJ or the Board. Petitioner and M.C.L, the sister with whom petitioner and her children were residing, should never have been put in the position of having to make several visits to the West Orange Zoning and Housing Authority and be subject to a housing inspection as part of the registration process, factors which clearly contributed to the inability of petitioner to enroll her children in the District because of the Township's refusal to issue the CI. Nor, in the Commissioner's judgment, should there have been telephone conversations between the housing authority clerk and Ms. Lopez, the District's registrar, about the issue of the CI and the enrollment of petitioner's children. As determined by the Commissioner in *Board of Education of the City of Orange, Essex County v. New Jersey State Department of Education*, 1987 *S.L.D.* 2217 and *Middle Township Board of Education v K.K. and P.K.*, 93 *N.J.A.R.*2d (EDU) 461, residing in a dwelling in violation of local housing ordinances/conditions is not an issue/factor that a board of education may consider in determining enrollment eligibility.

As to other troublesome issues presented in this matter, the Commissioner finds that when petitioner came to the District office on November 3, 1998 to enroll her children, she should have been provided a date for review of the enrollment/registration material far sooner than November 16, 1998.[4] The Commissioner further finds that it was not appropriate for *enrollment* to be delayed in this matter, even in part, on the basis of incomplete transcripts. There is no provision in statute or code which requires a parent or guardian to provide a transcript prior to a child's enrollment in school. Student transcripts go to the issue of a student's *educational placement*, not to eligibility to enroll or be admitted to school.

As to the issue of incomplete immunization records delaying the enrollment of petitioner's children, the Commissioner finds that incomplete immunization records may not interfere with the *enrollment* of a child in a school district, notwithstanding that it may, by law,

[4] The Commissioner finds M.C.L.'s testimony entirely credible that two dates for review of registration material were provided to her and petitioner, November 16 and 22, 1998. (Tr. at 29)

be a basis for delaying actual *admission* to school. (*N.J.S.A.* 26:1A-9, *N.J.A.C.* 8:57-4.1 *et seq.)* However, it must be emphasized that any decision as to whether or not immunization records are complete and what impact there may be on attendance at school once the student is enrolled, is an issue which is solely to be determined by a certificated school nurse or administrator, not by support staff.

The Commissioner, upon review of the full record in this matter, further finds that any delay on petitioner's part in accomplishing enrollment of her children in the District was not intentional. The Commissioner finds that the Certificate of Residency form (R-1) could in fact be confusing, since it does not allow for a situation where a parent, such as petitioner, and her children are residing with a person who is a resident of the District but is not a tenant on a rental/lease agreement. Circumstances were compounded by petitioner's having to run around trying to get a CI, a document which, as previously determined, should not have been required in the first place. Additionally, the record does not satisfactorily establish why the children were not enrolled in the District upon presentation of the landlord's letter of verification in late November. Further, the Commissioner finds that petitioner is correct in her contention that the record establishes that the enrollment of her children in the West Orange School District was only due to the filing of her Petition of Appeal and not due to any action on the part of the registrar or the Board finding petitioner's children eligible for enrollment or attendance in the District.[5]

Moreover, while it is true that the Board itself never denied enrollment of petitioner's children, the Commissioner finds that the enrollment of petitioner's children was thrust into a limbo where no singular piece of "incomplete" registration information was said to be preventing enrollment and where no *actual denial* of enrollment was issued by the Board or

[5] Pursuant to *N.J.S.A.* 18A: 38-1, the District was obligated to enroll the students during the pendency of a residency appeal to the Commissioner.

one of its administrators, but where *no education* was available to the children until petitioner learned through community, not school, sources of how to file an appeal with the Commissioner.

Given the above, the Commissioner determines that, in addition to the ALJ's order that the district discontinue inclusion of a CI in its registration packet, the District is ordered not to allow the absence or incompleteness of transcripts and immunization records to interfere with the enrollment of a new student.[6] The Commissioner further directs that the county superintendent review the District's policies and procedures for enrolling new students to assure that (1) residency forms are easily understood and appropriate to various living arrangements and the requirements of *N.J.S.A.* 18A:38-1; (2) parents are immediately informed of the administrator to contact if they experience delays or difficulties in enrollment; and (3) decisions on enrollment are expeditiously issued and due process/appeal rights are communicated to the parents immediately upon presenting a student/s for purposes of enrollment in the District. All other relief requested by the petitioner is herein denied, including the remedy sought with respect to her motion to amend the petition.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 07 2000

Date of Mailing: SEP 07 2000

[6] In so holding, the Commissioner emphasizes that incomplete immunizations, pursuant to *N.J.A.C.* 8:57-4.1 *et seq.*, may be a basis for delaying *admission* to school.

[7] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#291-00

291-00

J.B., on behalf of minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

September 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR EMERGENT RELIEF

OAL DKT. NO. EDU 4803-00

AGENCY REF. NO. 234-7/00

J.B., PARENT ON BEHALF OF
C.B., A MINOR CHILD

Petitioner,

v.

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

J.B., Mother of C.B., petitioner, *pro se*

Kimberly A. Baldwin, Esq., for respondent (Capizola, Fineman and Lepham, attorneys)

Record Closed: September 1, 2000 Decided: September 1, 2000

BEFORE **LILLARD E. LAW** , ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, J.B., seeks an Order by the Commissioner of Education (Commissioner) to rescind the suspension of her son, C.B., from the school under the direction and control of the

Buena Regional School District (Board). Petitioner also alleges and asserts that the Board failed to provide C.B. with home instruction as required by *N.J.A.C.* 6A:14-4.9.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A Prehearing Conference was held on July 27, 2000, at which, among other things, the issue to be determined by this tribunal were agreed upon and a plenary hearing was scheduled for September 29, 2000.

Subsequently, petitioner, J.B., petitioned the Commissioner for an Oral Argument for Emergent Relief, under *N.J.A.C.* 1:1-12.6. As a consequence, oral argument was heard on September 1, 2000, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on September 1, 2000.

Prior to oral argument, the Board propounded a Motion for Summary Decision, pursuant to *N.J.AC.* 1:1-12.5, together with its statement of facts, legal arguments and exhibits. Petitioner did not respond to the Board's Motion, therefore, it was held in abeyance until the conclusion of the oral arguments.

The Factual Background of the instant matter, as set forth in the Board's brief, is as follows:

This matter involves the discipline imposed upon a Buena Regional High School student, C.B., following his involvement in the creation and design of a computer website. The website was dedicated to the hatred and scorn which four students felt towards a particular mathematics teacher, Patricia Arena. The website included derogatory and crude remarks about the teacher, as well as including interactive computer games and cartoons, which involved shooting at and maiming the teacher. Attached hereto as Exhibit A is a complete printout of the contents of the computer website, which was submitted to the Board at the scheduled hearing.

This matter came before the Board after the officials at the high school learned of the website. The website listed the names of the students involved and their contribution to the

website. C.B. has one of the largest roles in the creation and design of the website. Based upon the contents of the website, terroristic threat charges which were filed by the New Jersey State Police and are still pending.[1] In addition, the four students involved were brought before the Board for an expulsion hearing. There is no dispute that all four students were honors students with no prior disciplinary hearing at the high school.

The matter was referred to the Board for a full hearing. The high school administrators had submitted their recommendation for expulsion of C.B. and the other students involved. When the matter came before the Board, C.B. and his parents were represented by an attorney of their choosing, William Freihoffer, Esquire. The Board was present, as was the Solicitor and all witnesses, to begin the disciplinary hearing. Although the Board had received a preliminary recommendation from the high school administration, no decisions had been made and the hearing was about to proceed. After discussions with their attorney for more than one hour and with the Solicitor for the Board, C.B. and his parents decided to negotiate and accept a settlement rather than proceed with the hearing as scheduled. A Certified Court Reporter was present and a settlement was placed on the record. Attached hereto as Exhibit B is a complete copy of the transcript as it pertains to C.B. There were other students present at the same hearing. One student, through his counsel, accepted a settlement and the remaining student, who appeared *pro se* with his parents, elected to proceed with his hearing that same night. Because those students have not appealed the outcome of their matters, only the portion of the transcript pertaining to C.B. has been attached as Exhibit B.

As a review of the transcript shows, C.B. and his parents elected to enter into a consensual agreement rather than permit the Board to discipline C.B. after a full hearing. Although the hearing was about to commence, C.B. and his parents did not wish to proceed. Both the Solicitor and their own attorney asked C.B. and his parents on the record, whether they understood the Board's offer and accepted the same without proceeding to a full hearing. Both C.B. and his parents indicated that they wished to resolve the matter through an agreement rather than through a hearing. The agreement required that C.B. attend alternative school for one full year before re-admittance to Buena Regional High School. C.B. and his parents agreed.

[1] The Board stipulates that the charge of Terroristic Threats against C.B. was dismissed in Juvenile Court by the Honorable James L. Jackson, SCJ, on August 29, 2000. (P-4)

Following the Board hearing, the Board decided to withdraw the harsh punishment, which C.B. and his parents had agreed to and to issue a more lenient punishment on C.B. and the other students involved. The Board decided to permit C.B. to return to the high school after one semester, rather than after a full school year.[2] A Resolution was drafted and passed which memorialized the Board's more lenient discussion. See Exhibit C. It is from this Resolution which petitioner is now appealing. Petitioner has come before this Court seeking to have the Board's decision vacated and arguing that the disciplinary sentence imposed upon C.B. is unduly harsh. Petitioner has made this argument despite the fact that C.B. consented to a much more severe punishment on the record before the Board.

Petitioner's Argument

J.B. asserts that between April 13, 2000 and the end of the regular school year on June 16, 2000, the Board provided C.B. with only 17 hours of home instruction (P-1). As a consequence of this limited time for home instruction, C.B.'s grades suffered. (P-2)

Petitioner offered into evidence a psychiatric evaluation of C.B. administered by David Krefertz, D.O., in the Department of Psychiatry of the University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine. Therein, Dr. Krefetz observes and states:

Mental Status Examination:

> [C] is a 15 year old white male. He was well groomed. He was pleasant and cooperative throughout the interview. His speech was normal rate, rhythm and tone. His motor behavior was normal without any evidence of tics, dyskinesia or dysmorphic features. He described his mood as being "okay." He did admit to a period of sadness and anxiety after being arrested and states that has been resolving. He is goal directed. There is no evidence of any psychotic thought processes. There is no evidence of any hallucinations or delusions. There is no evidence of any suicidal ideas. There is no evidence of any aggressive ideas. He maintains

[2] The Board further reduced the penalty and shall allow C.B. to return to its regular school scheduled after one marking period.

> that the development of the website was a "joke." He states that since being arrested he does understand now why other people may be upset by the content. He feels that there may be some difficulties for him when he returns to the high school due to teachers knowing about the past incident. He has some concerns that the teachers have worn ribbons in supporting the geometry teacher but feels supported by other students who have worn ribbons in support of him. He self-esteem seems to be relatively intact. There is no marked themes of hopelessness. There are no themes of inappropriate guilt. His cognitive functions were grossly intact to age and grade level. He seems to have fair insight. His judgment at this time seems to be relatively intact. (P-3).

Dr. Krefetz made the following recommendations:

> 1. At this time I see no definitive need for any mental health intervention. [C] does seem to have some reactive anxiety and depression secondary to the events of the last six weeks which is resolving. It would be helpful for [C] and his parents to resolve all issues regarding disciplinary action by the school as soon as possible.
>
> 2. There is no psychiatric indication for any change of academic program.
>
> 3. [C] and his family should understand that they may have some difficulties when he does enter school again and the family should observe for any problems with maladjustment when he returns to school. (P-3)

The Board stipulated, on the hearing record, that there is no need for psychiatric treatment of C.B. at the present time.

Petitioner also offered into evidence, over the Board's objection, a letter of character references for C.B. by Mary F. Caprilotti. The letter was accepted into evidence by this tribunal and marked as Exhibit P-5.

Petitioner also offered into evidence a letter written by the Buena Borough Police Chief, Douglas E. Adams who advised that C.B. had completed his 100 hours of court ordered

community service between July 17, 2000 and August 2, 2000. The Chief asserted that C.B.'s attendance was reliable, prompt and his performance was outstanding. (P-6).

Petitioner argues that the penalty imposed by the Board is too harsh and should be set aside. Petitioner contends that C.B. has suffered depression and his suffering is more than that shown by the teacher.

The Board objected to petitioner's representation arguing that the affected teacher now has a matter before the OAL, appealing the Board's decision not to award the teacher disability payments. In addition, the Board argues, the affected teacher also has a Workers' Compensation matter pending as a result of C.B.'s actions.

The Board's Argument

Point I

Petitioner is Estopped from Appealing the Discipline Imposed by the Board Since the Discipline Was an Agreement Voluntarily Entered into by Petitioners Following Lengthy Negotiations Between Their Counsel and The Board's Solicitor

The New Jersey Courts have long recognized the need to uphold and enforce settlement agreements between parties. Enforcing settlement agreements ensures that litigation has a beginning and an end. In the instant case, C.B. together with his parents waived their right to a full hearing before the Board. Although the Board was prepared to begin the hearing, after consultation with their attorney, William Freihoffer, Esquire and counsel for the Board, C.B. and his parents chose to enter into a disciplinary agreement removing C.B. from school for one full year. C.B. ultimately received a much more lenient discipline from the Board and must remain out of school for one marking period.

"The general rule is that unless an attorney is specifically authorized by the client to settle a case, the consent of the client is necessary." *Amatuzzo v. Kazmiuk,* 305 *N.J. Super.* 469 (*App. Div.* 1997). There is no doubt that C.B. and his parents participated in the decision to waive a

hearing before the Board. (See Exhibit B, Transcript of Board hearing). This is not a matter where an attorney settled a case without his client's knowledge. Rather, this is a case where this child and his parents were fully aware of their rights and made a voluntary decision to waive their rights. The child and parents are actually in a better position than they would have been if the Board had moved to enforce the original agreement entered into by C.B. and his parents.

"[I]n private litigation, where the client by words or conduct communicated to the adverse attorney, engenders a reasonable belief that the attorney possesses authority to conclude a settlement, the settlement may be enforced." *Id.* at 475-76. C.B., his parents, and their attorney all clearly indicated their intention to settle this matter by agreement and that agreement must be upheld as a matter of law. To permit the petitioners to appeal simply because they have changed their minds about settlement undermines the entire settlement process.

Point II

The Decision of the Board Cannot be Considered to be Arbitrary, Capricious or Unreasonable Since This Case Does not Involve a Decision of the Board, but Rather Terms of a Settlement Agreement Negotiated and Entered Into by the Petitioners

When an administrative agency, such as a local board of education, acts within its authority, its decision is "entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such a decision was arbitrary, capricious, or unreasonable." *Thomas v. Board of Morris Township,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), affirmed 46 *N.J.* 581 (1966); *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294 (*App. Div.* 1960). Moreover, a reviewing court or agency will not substitute its independent judgment for that of a Board, where the Board's findings are supported by substantial evidence, *i.e.,* evidence which a reasonable mind might accept as adequate to support the Board's conclusion. *Quinlan v. Board of Education of North BergenTownship,* 73 *N.J. Super.,* 40, 46 (*App. Div.* 1962).

The Board's agreement to permit C.B. to return to school in January 2001 was not arbitrary, capricious, or unreasonable. It was the result of significant settlement discussions and an unwillingness of C.B. and his parents to present their case to the Board. In fact, the Board's only decision was to lessen the severity of the punishment for which C.B. and his parents had negotiated and agreed on the record. The resolution passed by the Board memorialized the Board's decision to permit C.B. to return to school sooner that agreed by the parties. Certainly, the Board is permitted to exercise their discretion to reduce the punishment to which a student has agreed. In fact, the Board could have imposed the original punishment to which C.B. had agreed, but the Board instead chose to be more lenient. Accordingly, the petition filed by petitioners has no merit and should be dismissed.

In *F.McB. v. Board of Education of the Township of Washington,* 96 *N.J.A.R.* 2*d.* (EDU) 298, the court upheld a local school board suspension of a student from school activities as a reasonable exercise of the Board's authority. The court held that, "The actions of the Board and its agents were reasonable in that the application of discipline in this matter was directly related to the good order and best interests of the school and school activities." *Id. at 306.* The Commissioner adopted the court's decision and stated that "The Board's application of discipline was rationally related to the good order and best interests of the school and to the particular conduct exhibited by [the suspended student]." *Id.* Furthermore, in *Barna v. Irvington Board of Education,* 97 *N.J.A.R.* 2*d.* (EDU) 345, the Commissioner held that, "It is axiomatic that when a local Board acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable." *Id.* at 347.

Point III

Respondent is Entitled to Summary Judgment Since There Are No Issues of Material Fact and the Facts Taken in the Light Most Favorable to Petitioner Require that Summary Judgment be Granted in Favor of the Board

According to *Rule* 4:46-2(c), summary judgment is only an appropriate remedy if the evidence shows that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The Supreme Court of New

Jersey recently considered the standard to be applied in determining summary judgment motions in *Brill v. Guardian Life Insurance Company of America,* 142 *N.J.* 520 (1995). Under the standard recently adopted in *Brill,* the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 536 (citing *Anderson v. Liberty Lobby, Inc.,* 477 *U.S.* 317, 106 *S. Ct.* 2548 (1986)). The Supreme Court in *Brill* also stated the following:

> By its plain language, *Rule* 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue to as to any material fact challenged.' That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any facts in dispute. *Id.*

The facts in this case are clear. Petitioners entered into an agreement with the Board rather than take their chances of permitting the Board to administer the appropriate discipline in this case. The transcript of the proceedings, attached as Exhibit B, proves that petitioners were willing participants in the settlement negotiations and waived their right to a hearing. Under any interpretations, the settlement and settlement terms are clear. Since there is no issue as to the parties' willingness to enter into a settlement agreement, and for all of the reasons stated above, there cannot be any dispute as to the material facts before this Honorable Court. Accordingly, respondent respectfully requests that this Honorable Court grant summary judgment in favor of the Board and dismiss the Petition filed by C.B. and his mother, J.B.

CONCLUSIONS

Having carefully reviewed and considered the entire record before me, I **CONCLUDE** that petitioner has failed to carry her burden that emergent relief is warranted in the instant matter. In order for petitioner to prevail in her application for emergent relief, she must show that irreparable harm will be visited upon C.B. in addition to making a preliminary showing of a reasonable probability of ultimate success on the merits. Petitioner shows neither of these elements. *Crowe, supra.* Rather, petitioner's own psychiatric evaluation of C.B. demonstrates that there is no indication of any serious psychiatric disorder or other psychiatric concerns. (P-3).

The harm C.B. and the other students has caused the teacher who was the victim of their acts is yet to be determined. Although C.B. may now regret his participation in the acts against his teacher, the fact remains that he must be accountable for his acts. C.B. must also understand that there are consequences for his actions and the Board's imposition of a one grading period suspension from its schools is, in the judgment of this tribunal, proper and appropriate. *F. McB., supra.*

I **CONCLUDE**, therefore, that under the totality of the facts and circumstances of this matter, Summary Decision should be entered on behalf of the Board and the instant matter be dismissed.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal for Emergent Relief is hereby **DENIED**. It is **FURTHER ORDERED** that **SUMMARY DECISION** is hereby **ENTERED ON BEHALF OF THE BOARD** and the herein Petition is **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

1 September 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

lmh

WITNESSES

For Petitioner:

J.B. mother of C.B.

C.B. father of C.B.

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Record of Individualized Instruction Time (2 pages)

P-2 Report Card for Marking Period

P-3 Psychiatric Evaluation (4 pages)

P-4 Juvenile Court Record

P-5 Letter, June 20, 2000, by Mary F. Capriotti

P-6 Buena Borough Police Dept. August 30, 2000

For Respondent:

Exhibit A - Printout of contents of computer website

Exhibit B - Transcript of proceedings, Thursday, May 4, 2000

Exhibit C - Resolution

OAL DKT. NO. EDU 4803-00
AGENCY DKT NO. 234-7/00

J.B., on behalf of minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, the Initial Decision and the Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief, as he concurs with the Administrative Law Judge's hearing determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 0 8 2000

Date of Mailing: SEP 0 8 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#292-00

292-00

D.C., on behalf of minor child, T.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent brought several claims against respondent Board. Specifically, petitioner sought: removal from T.C.'s pupil records of an entry relating to a theft charge against T.C.; copies of records made and maintained pursuant to the Board's substance abuse prevention program; and, based on the board's expulsion of T.C., an order that the Board provide T.C. an education in an appropriate facility.

The ALJ determined that any entries in the Board's records relative to the theft charge had been removed; that the records of the substance abuse prevention program are confidential and may not be ordered released in this action; and that the Board complied with all laws governing the expulsion process with regard to T.C. and had directed petitioner to several alternative schools and offered to pay the tuition for the same. Based on these determinations, the ALJ recommended dismissal of the petition with prejudice.

The Commissioner concurred with the findings and conclusions of the ALJ and dismissed the petition.

September 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 210-00

AGENCY DKT. NO. 20-1/00

D.C. ON BEHALF OF T.C.,

Petitioners,

v.

STERLING REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

D.C., parent of T.C., for petitioners

William D. Hogan, Esq., for respondent (Cozen & O'Connor, attorneys)

Record Closed: June 13, 2000 Decided: July 20, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioners T.C. and his mother D.C. bring claims against the respondent, Sterling Regional High School Board of Education (BOE).

More particularly, petitioners (1) demand that the BOE remove from T.C.'s pupil record an entry relating to a theft charge; (2) demand that the BOE provide copies of records made and

maintained pursuant to the BOE's substance abuse prevention program; and (3) claim that the BOE, having expelled T.C. for repeated misconduct, must provide to T.C. an education in a "proper . . . facility." See N.J.S.A. 18A:40A-1 et seq.; see also P-1.

(1) The BOE points out that the subject entry has already been deleted from T.C.'s record and that petitioners have received copies of T.C.'s conformed pupil record. See P-21; N.J.A.C. 6:3-6.1 et seq. (2) The BOE points out that, although there was a substance abuse prevention program referral relative to T.C., petitioners acknowledge that no action was found necessary and, in any event, the program's records are confidential and not subject to disclosure by way of this case. (3) The BOE points out the following: Petitioners do not deny that T.C. engaged in the misconduct for which he was expelled. They do not allege that the BOE acted arbitrarily, etc., relative to the expulsion. They admit that the BOE has referred them to several alternative schools and that the BOE has offered to pay for the cost of T.C.'s education there. Given the above, the BOE submits that the petitioners' claims may not be granted and that the petition must be dismissed. N.J.A.C. 6A:3-1.1 et seq.

PROCEDURAL HISTORY

On January 14, 2000, the petition and attached exhibits, "P-1" et seq., were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the petition, etc., to the Office of Administrative Law (OAL), where, on January 19, 2000, the petition was filed as a contested case and scheduled for a February 3, 2000, hearing. N.J.S.A. 52:14B-2(b). On January 31, 2000, the BOE's answer was received in the OAL. Petitioners were deemed to be moving for emergent relief and, on February 3, 2000, the motion was heard in the OAL in Trenton (Hamilton Township); petitioner D.C. testified; and additional exhibits were marked. On February 4, 2000, I entered an order denying emergent relief and on February 15, 2000, the Commissioner entered a decision affirming my order. The parties communicated, but were unable to settle the case, and on June 13, 2000, a plenary hearing was held in the OAL.

FINDINGS OF FACT

T.C.'s date of birth is May 21, 1983. He resides with his parents in the borough of Magnolia, in the BOE's school district.

T.C., who has no siblings, has a history of misconduct (detailed below) for which he has been suspended from elementary school and from the BOE's high school. When asked what caused T.C.'s misconduct, D.C. testified that his grandmother's cancer and death in 1990 might have been a cause.

Relative to the 1997-98 school year, when T.C. was a high school freshman, the BOE's disciplinary records show the following (P-2):

For disruption in class on October 22, 1997, he received administrative detention (ADO) on October 28, 1997.

For disruptive behavior in the media center on November 3, 1997, he received internal detention on November 5, 6 and 10, 1997.

For cutting ADO on November 10, 1997, he received ADO on November 11 and 12, 1997, and school officials conferred with his parents on November 21, 1997.

For cutting teacher's detention on January 28, 1998, he received ADO on February 2, 1998.

For being unprepared for physical education (PE) class on February 26, 1998, he received ADO on March 3, 1998.

For being unprepared for PE class on March 4, 1998, school officials conferred with his parents.

Relative to the 1998-99 school year, when T.C. was a sophomore, the BOE's disciplinary records show the following (P-2):

For misbehaving in class and failure to appear for detention on October 19, 1998, he received ADO on October 22 and 24, 1998.

For cutting English class and PE on October 20, 1998, he received ADO on November 7 and 21, 1998.

For being late for PE class on October 27, 1998, he received ADO on October 29, 1998.

For use of inappropriate language and insubordination on October 28, 1998, he received ADO on November 3 and 4, 1998.

For failure to follow directions on October 28, 1998, he received a sixth-period suspension until a conference with his mother was held on October 30, 1998.

During his years in the BOE's high school, T.C.'s academic record has included many poor and failing grades. BOE-4.

During relevant times, consistent with law and its own policy, the BOE has had a federally funded substance abuse prevention program involving a Student Assistance Program's (SAP) Core Team. See N.J.S.A. 18A:40A-10; 42 U.S.C.A. § 290ee-1 et seq.; 42 C.F.R. §§ 2.12(b)(3)(ii) and 2.12(b)(4). Consistent with the policy and program, when a student's actions indicate he might be at risk, the BOE's staff is to notify the Core Team and the Core Team submits to relevant staff a form for entry of relevant information. The program is dependent upon information that, without confidentiality, persons would be reluctant to provide, and without which the program would be unable to assist students and others in need. Therefore, BOE administrators instructed its staff that the forms and information-gathering process must be confidential. Also, the information may not serve as a basis for discipline. See P-33; P-33b; BOE-5.

In October 1998, T.C. made more visits to the boys' rest room than normal and, consistent with the program, the above-described referral forms were submitted to his teachers. Contrary to the above-described instructions, etc., one of T.C.'s teachers left the referral form on his desk where it could be seen by students, and another teacher advised T.C. of the process and he stated to T.C. that he did not appear to have a substance abuse problem. Naturally, this distressed T.C., who reported it to D.C. and D.C. demanded a copy of the referral form. In response, Lori Leonard, the Core Team's substance abuse coordinator, provided materials, including information on the program and a blank referral form. P-33b. Citing the need for confidentiality, Ms. Leonard declined to provide to petitioners any name or information relative to the action by the program. Superintendent Kasprack verbally reprimanded the two teachers who breached the program's confidentiality and he reiterated to the BOE's staff that the program activities were confidential.

In a letter dated February 4, 1999, D.C. requested that the school system transfer T.C. from one teacher's PE class to another and requested that the school system remove from T.C.'s records disciplinary actions relative to his use of restrooms. In this regard, petitioners submitted to the school system a note from the office of David W. Bradway, M.D., dated October 20, 1998, wherein it is written that T.C. suffered from digestive problems and that, when necessary, he should be excused to go to the rest room. P-6; P-3.

In a letter dated February 10, 1999, school superintendent Gary Kasprack wrote to D.C. that the BOE had transferred T.C. to the PE class requested; he transmitted to her a copy of T.C.'s disciplinary record; and he pointed out that the disciplinary record included no reference to use of the restroom. P-7. Superintendent Kasprack has also advised petitioners and they acknowledge that the Core Team found that no action was necessary relative to T.C.

By letter dated May 4, 1999, Superintendent Kasprack notified T.C.'s parents of the following: Because of T.C.'s "dangerous horseplay" in a locker room on April 29, 1999, "creating a confrontation during 1st period" on May 3, 1999, and abusive language, he had decided to place T.C. on "external suspension" for May 3, 4 and 5, 1999. The suspension would continue until a conference was held between the parents and the superintendent. They should telephone a given number to schedule the conference. Consistent with the BOE's policy and

"Student/Parent Handbook," they had a right to an appeal the decision. P-8. By letter dated May 6, 1999, Superintendent Kasprack notified T.C.'s parents of the following: Confirming their conference, because of T.C.'s repeated disciplinary infractions during the 1998-99 school year, he was placed on homebound instruction pending a psychiatric evaluation. P-9.

D.C. appealed the decision to place T.C. on homebound instruction pending the psychiatric evaluation and requested an opportunity to appear before the BOE. P-10; P-13.

By letters dated May 14, 1999, Superintendent Kasprack confirmed that he had previously sent to D.C. copies of T.C.'s pupil records, disciplinary record, latest report card and permanent record card and he notified D.C. that the BOE would meet with her on May 20, 1999. He also notified petitioners of the following: Consistent with the BOE's policy, they had a right to appeal in writing within ten days and some of what they sought to appeal was out-of-time. On May 20, 1999, the BOE would hold a discipline and appeal hearing; during the hearing evidence and witnesses would be presented by the school system in support of the charges against T.C. Petitioners had a right to be present and the right to an attorney, to cross-examine witnesses and to present evidence. Homebound instruction would continue pending the outcome of the hearing, etc. Transmitted with the May 14, 1999, letters were copies of a notice of suspension and a letter detailing the charges, etc. P-12; P-12a.

In a letter dated May 19, 1999, Superintendent Kasprack wrote to D.C. as follows: As indicated in his May 14, 1999, letter, copies of T.C.'s complete pupil records had already been sent to her. Core Team records are not part of T.C.'s pupil records and, therefore, she could not examine those. It was T.C.'s disciplinary record, and not action by the Core Team, that caused the need for the psychiatric evaluation. The hearing scheduled for May 20, 1999, would go forward and she should attend and participate in it. P-14.

On May 20, 1999, the BOE held a disciplinary hearing relative to T.C. Petitioners appeared and asked about the Core Team records, but offered no defense to the charges. The BOE adopted a resolution relative to the matter. The BOE found T.C. guilty of repeated misconduct, i.e., (a) dangerous horseplay in the locker room, (b) creating a confrontation and (c) using abusive language. The BOE upheld the superintendent's decision to place T.C. on

homebound instruction. The BOE required that T.C. undergo a psychiatric examination as a condition of readmission to the BOE's school system. D.C. represented that T.C. would enter the Camden County Technical School for the 1999-2000 school year and stated that she was not opposed to the psychiatric evaluation. BOE-1. On May 21, 1999, school officials forwarded to petitioners a copy of the written resolution. P-16; P-17.

T.C. enrolled in the Camden County Technical School for the 1999-2000 school year. However, after about two weeks, he dropped out and decided he wanted to return to the BOE's school system, conditioned on his psychiatric evaluation. P-18.

On October 18, 1999, Superintendent Kasprack met with petitioners, and in a letter dated October 19, 1999, he confirmed the subjects of the meeting. T.C. would continue in external suspension pending receipt of the psychiatric evaluation. T.C. had been admitted to school on the condition that he would behave well. However, during October 1999, T.C. engaged in numerous instances of misconduct including use of profanity, horseplay, refusal to cooperate, etc. P-20.

In a psychiatric evaluation dated October 19, 1999, James L. Hewitt, M.D., wrote the following: T.C. stated that, in a high school proficiency test, he performed in a way that would show how bad a grade he could get to see "how the school would react." He demonstrated anxiety and cognitive deficits in terms of awareness and social contexts, but no overt persistent disturbance, depression or suicidal thinking. He tended to blame others. Dr. Hewitt's impressions included adjustment disorder with possible future bipolar disorder, manic type. Dr. Hewitt found no grounds for classification or accommodation through Section 504, 29 U.S.C.A. 794. P-19.

On October 25, 1999, petitioners signed an agreement whereby T.C. agreed to behave consistent with rules of behavior and agreed that, in the event of misconduct, he was subject to expulsion. P-23. In a letter dated October 25, 1999, Superintendent Kasprack confirmed that, effective that day, T.C. was readmitted to the high school on the condition that he comply with those rules of behavior. P-22.

T.C. resumed his misconduct in the BOE's school system and, by letter dated November 22, 1999, Superintendent Kasprack notified petitioners of the following: T.C. was charged with use of profanity, repeated disruptions in and out of class, cutting class and leaving the school building without permission, all in violation of the above-described agreement and rules. He was placed on external suspension for November 22, 23, 24, 29 and 30, 1999. Petitioners had a right to appeal the discipline. Copies of records relative to the misconduct accompanied the letter. P-24.

By letters dated December 1, 1999, Superintendent Kasprack transmitted to petitioners copies of T.C.'s academic, discipline and attendance records. He also notified them that, on December 9, 1999, the BOE would hold a discipline and appeal hearing; during the hearing evidence and witnesses would be presented by the school system in support of the charges against T.C.; and petitioners had a right to be present and the right to an attorney, to cross-examine witnesses and to present evidence. P-25; P-26.

On December 9, 1999, the BOE held the disciplinary hearing. Testimony by BOE employees showed that, as charged, T.C. repeatedly addressed profanity towards them and that he engaged in other wrongful conduct in violation of the BOE's disciplinary code. The petitioners offered no defense to the charges and T.C. left the hearing stating, "This is all bullshit" and directing the middle-finger gesture of contempt towards the BOE. Thereafter, the BOE adopted resolutions wherein it recited that T.C. was proven guilty as charged. The BOE further permanently suspended T.C. The BOE also resolved that, if T.C. were accepted by an alternative high school, it would enroll him in that school in order to allow him to obtain credits sufficient to obtain his high school degree. However, if T.C.'s attendance in that school were below 85%, the BOE would not pay for his education in that school. P-28; P-30.

By letter dated December 23, 1999, the school system provided to D.C. the names, addresses, administrator names and telephone numbers of alternative schools in Camden, Gloucester and Burlington counties, so that she could contact them and make arrangements for T.C.'s application for enrollment. P-31.

D.C. testified that she telephoned the alternative schools. However, because the schools' students are troubled, with substance abuse or other problems, she did not wish T.C. to attend any of those schools. She testified that T.C. attends a school for training for work as an emergency medical technician and she expects him to complete that training in June 2000.

CONCLUSIONS OF LAW

Pupil Records

There is no longer any dispute that the BOE removed from T.C.'s pupil record the entry relative to the theft charge. There is no claim that the BOE failed to properly make, maintain and provide copies of T.C.'s pupil records as defined in N.J.A.C. 6:3-6.1 et seq.

Given the above, as the BOE submits, the petitioners' claim in this regard may not be granted and must be dismissed.

Substance Abuse Prevention Program Records

There is also no dispute that, although there was a referral to the substance abuse prevention program, there was no finding that T.C. had a substance abuse problem and there was no further action in that regard.

Clearly, the above-described substance abuse prevention program is dependent upon information that, without confidentiality, persons would be reluctant to provide, and without such information the program would be unable to assist students and others in need. And under laws including acts creating programs for prevention of alcohol and substance abuse, records maintained as part of such a program are confidential. See N.J.S.A. 18A:40A-1 et seq.; 42 U.S.C.A. § 290ee-1 et seq.; 42 C.F.R. § 2.1 et seq.

T.C.'s teachers wrongfully breached the program's confidentiality. However, petitioners have cited no authority by which, in the OAL, an order may be issued requiring the BOE to

further breach the confidentiality upon which the program depends by providing copies of the subject form, etc.

Patient records maintained by a program may be divulged with a patient's prior written consent or, whether or not the patient consents, upon a showing of good cause as authorized by an "appropriate order of a court of competent jurisdiction." 42 C.F.R. §§ 2.1(a), 2.1(b)(2)(C), 2.3, 2.23. However, the program did not identify T.C. as requiring services as a patient and, in any event, the OAL is an administrative forum and not a court of competent jurisdiction that could grant such relief. 42 C.F.R. § 2.61(a); see also N.J.S.A. 52:14B-2; N.J.A.C. 1:1-2.1.

Given the above, as the BOE submits, the petitioners' claim in this regard also may not be granted and must be dismissed.

Discipline and the Alternative Schools

The State is required to provide a system of free public schools for the education of children between the ages of five and eighteen years and this is accomplished through local school districts operated by boards of education. N.J. Const. art. VIII, § 4, ¶ 1; N.J.S.A. 18A:8-1 et seq.

However, a student's right to a public education is conditioned on his good behavior. State v. Conk, 180 N.J. Super. 140, 145 (App. Div. 1981). A student who engages in, e.g., continued and willful disobedience, or who engages in open defiance of the authority of any teacher or person having authority over him, or who engages in the habitual use of profanity or obscene language, is liable to punishment, suspension or expulsion from school. N.J.S.A. 18A:37-2.

Where a school administrator has a reasonable basis for suspension of a student, he may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. N.J.S.A. 18A:37-5. Consistent with the principles of due process and fundamental fairness, a student subject to suspension or expulsion has a right to notice of the charge on which the proposed suspension or expulsion is based; assistance of counsel; a hearing,

during which the student may confront any witness against him or her; etc. See N.J.S.A. 18A:37-1 to -5; Tibbs v. Franklin Bd. of Educ., 59 N.J. 506 (1971); R.R. v. Shore Reg'l High Sch. Dist. Bd. of Educ., 109 N.J. Super. 337 (Ch. Div. 1970).

Generally, public entities are presumed to act lawfully and in good faith; a reviewing court will not substitute its judgment for that of a public entity that has exercised its lawful discretion; and the party challenging a public entity's action must prove that the action was arbitrary, capricious and unreasonable. Bodies by Lembo, Inc., 286 N.J. Super. 298, 309 (App. Div. 1996); In re On-Line Games Contract, 279 N.J. Super. 566, 590 (App. Div. 1995); Colonnelli Bros., Inc. v. Ridgefield Park, 284 N.J. Super. 538, 541 (App. Div. 1995), certif. denied, 143 N.J. 327 (1996); see also Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966).

There is no evidence that the BOE acted arbitrarily, etc., relative to the expulsion of T.C. To the contrary, on the record here, it appears that the BOE complied with laws governing the expulsion process. Further, the BOE has directed T.C. to several alternative schools through which he can obtain credits to obtain his high school degree and the BOE has offered to pay for such educational services.

Given the above, as the BOE submits, the petitioners' claim in this regard also may not be granted and must be dismissed.

ORDERS

Consistent with the above, I **DISMISS** the petition and petitioners' claims **WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

1/25/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioners' Exhibits:

P-1	Petition, January 14, 2000
P-2	Disciplinary record, 1997-98 school year, portion of 1998-99 school year
P-3	Note from office of David W. Bradway, M.D., October 20, 1998
P-4	Letter from D.C., November 2, 1998
P-5	Cut slip, November 3, 1998
P-6	Letter from D.C., February 4, 1999
P-7	Letter from BOE Superintendent, February 10, 1999
P-8	Letter from BOE Principal, May 4, 1999
P-9	Letter from BOE Superintendent, May 6, 1999
P-10	Letter from D.C., May 6, 1999
P-11	BOE Agenda, May 6, 1999
P-11a	Letter from BOE Superintendent, May 7, 1999
P-11b	Letter from BOE Vice Principal, May 13, 1999
P-11c	Memo from BOE Vice Principal to BOE Superintendent, May 7, 1999
P-12	Letter from BOE Superintendent, May 14, 1999
P-12a	Letter from BOE Superintendent, May 14, 1999
P-12b	Same as P-12
P-12c	Same as P-12a
P-13	Appeal to Superintendent or BOE, by D.C., received May 18, 1999
P-14	Letter from BOE Superintendent, May 19, 1999
P-15	Letter from Governor's South Jersey Office, May 19, 1999
P-16	Letter from BOE Superintendent, May 21, 1999; BOE Resolution, May 20, 1999
P-17	Letter from BOE Superintendent, May 26, 1999; BOE Findings, May 25, 1999; BOE Resolution, May 20, 1999
P-18	D.C.'s permission for psychiatric examination, September 21, 1999
P-19	Report of psychiatric examination by James L. Hewitt, M.D., October 19, 1999
P-20	Letter from BOE Superintendent, October 19, 1999

P-21 Disciplinary record, 1998-99 school year

P-21a Note relative to T.C.'s disciplinary record, undated

P-22 Letter from BOE Superintendent, October 25, 1999

P-23 Rules for behavior, etc., signed by petitioners, October 25, 1999

P-24 Letter from BOE Superintendent, November 22, 1999

P-25 Letter from BOE Superintendent, December 1, 1999

P-26 Letter from BOE Superintendent, December 1, 1999, etc.

P-27 BOE Agenda, December 9, 1999

P-28 Letter from BOE Superintendent, December 10, 1999; BOE Resolution, December 9, 1999

P-29 Letter/request for due process hearing, from D.C., December 10, 1999

P-30 Letter from BOE Superintendent, December 17, 1999; BOE Resolution, December 9, 1999; BOE Findings of Fact, December 16, 1999

P-31 Letter from BOE Superintendent, December 23, 1999

P-32 Letter from D.C., January 14, 2000

P-33 BOE Alcohol/Drugs/Substances policy

P-33a Brochure, High School's Department of Student Services

P-33b Fax transmittal sheet and Student Assistance Program Referral Form

P-34 Letter from BOE, June 9, 2000

P-35 Letter from Burlington County Alternative High School, June 12, 2000

Respondent Board of Education's Exhibits:

BOE-1 Videotape of BOE hearings/meetings, May 20, 1999; December 9, 1999

BOE-2 Transcript of BOE hearing, December 9, 1999

BOE-3 Disciplinary Record of T.C.

BOE-4 Academic record of T.C.

BOE-5 Student-Parent Handbook, 1999-2000

BOE-6 BOE's Joint Resolution: Substance Abuse Coordinator, Grant Program Information

BOE-7 Burlington County Alternative High School brochure; Juvenile Resource Center, Inc., (Camden County) brochure; Gloucester County Alternative High School brochure

WITNESSES

Petitioners' Witnesses:

D.C.

Respondent Board of Education's Witnesses:

Gary Kasprack, Superintendent

Sally James, Guidance Counselor

OAL DKT. NO. EDU 210-00
AGENCY DKT. NO. 20-1/00

D.C., on behalf of minor child, T.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge dismissing petitioner's claims with prejudice.

Accordingly, the recommended decision of the OAL is affirmed for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 0 8 2000

Date of Mailing: SEP 0 8 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#293-00

293-00

IN THE MATTER OF THE TENURE HEARING OF THEODORE BOURELOS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

September 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3208-00
AGENCY DKT. NO. 73-2/00

IN THE MATTER OF THE TENURE HEARING OF THEODORE BOURELOS, STATE OPERATED SCHOOL DISTRICT CITY OF JERSEY CITY, HUDSON COUNTY

Charlotte Kitler, Esq., for petitioner
(State Operated School District of Jersey City, attorney)

Howard Feintuch, Esq., for respondent
(Feintuch, Porwich and Feintuch, attorneys)

Record Closed: May 15, 2000 Decided:July 19, 2000

BEFORE **IRENE JONES**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on March 23,2000 for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were scheduled for August 1 and 2, 2000 but were adjourned because the parties had reached a settlement. A Stipulation of Settlement was signed by the parties and filed in this office on May 15, 2000. A copy is attached hereto.

In accordance with the decision of the *State Board of Education in Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. See *Cardonick* at 850-51.

In this matter, the District filed charges against Bourelos, Social Studies teacher, charging him with chronic and excessive absenteeism. As a result of these charges, Bourelos was suspended without pay for 120 days, pursuant to *N.J.S.A.* 18A:16-14. Prior to the tenure hearing, the parties engaged in settlement discussions and it was agreed that Bourelos would resign from his position, effective June 30, 2000. Further, that Bourelos would return to his position as of March 20, 2000. The District agreed to withdraw with prejudice the tenure charges of chronic and excessive absenteeism.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save legal expenses as well as time. The charges herein do not involve any unbecoming conduct. I further **FIND** that Bourelos had full opportunity to consult with legal counsel prior to entering into the agreement. He is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Bourelos was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

IRENE JONES, ALJ

Receipt Acknowledged:

7/25/00

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 2000

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Jersey City School District

IN THE MATTER OF THE TENURE HEARING OF

THEODORE BOURELOS

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL Dkt. No. EDUTH 3208-00
Agency Dkt. No. 73-2/00

STIPULATION OF SETTLEMENT

WHEREAS, Theodore Bourelos h been employed as a full-time teacher with the Jersey City School District since January 1, 1985, and has taught Social Studies on the high school level for over ten years; and

WHEREAS, tenure charges of ch onic and excessive absenteeism were certified against Mr. Bourelos and filed with the ommissioner on February 28, 2000; and

WHEREAS, Mr. Bourelos was sus ended without pay upon the filing of the tenure charges, which suspension can last for 1) days pursuant to N.J.S.A. 18A:6-14, until June 27, 2000; and

WHEREAS, the parties wish to resolve the within matter and believe that settlement is in the public interest because the tenure charges do not involve any misconduct or danger to students and because settlement will avoid the uncertainties of litigation as well as avoid the waste of financial and human resources entailed with litigation;

NOW, THEREFORE, it is hereby stipulated and agreed as follows:

1. Theodore Bourelos resigns from employment with the District effective June 30, 2000, and the District accepts the resignation of Mr. Bourelos.

2. The District agrees to allow Mr. Bourelos to resume teaching and to earn salary for each day of teaching as of March 20, 2000, until June 30, 2000, provided, however, that Mr. Bourelos will not receive pay for any day that he is absent, and further provided that the District can return Mr. Bourelos to his status on suspension without pay in the event that he is absent during the period from March 20, 2000, until June 30, 2000.

3. The District agrees to withdraw with prejudice the tenure charges of chronic and excessive absenteeism.

4. Pursuant to In re Cardonick, 1990 S.L.D. 842, Mr. Bourelos has been advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of teaching certificate.

5. Mr. Bourelos and the District acknowledge that the terms of this Stipulation are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that the terms of this Stipulation are disapproved, this Stipulation shall be null and void and the parties will return to the positions in the charges and answer which were filed prior to their entering into this Stipulation.

6. Theodore Bourelos acknowledges that he has had the right and opportunity to discuss all aspects of this Stipulation with his attorney prior to signing it, that he has read and fully understands all of the terms of this Stipulation, and that he entered into this Stipulation knowingly and voluntarily, without coercion or duress.

Theodore A. Bourelos

THEODORE BOURELOS

DATED: _____

_____

PHILIP FEINTUCH, Esq.
Attorney for Theodore Bourelos

DATED: _____

Charlotte K. Ie

CHARLOTTE KITLER, Esq.
Attorney for Jersey City School District

DATED: 5/11/00

OAL DKT. NO. EDU 3208-00
AGENCY DKT. NO. 73-2/00

IN THE MATTER OF THE TENURE	:	
HEARING OF THEODORE BOURELOS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF JERSEY CITY, HUDSON	:	DECISION
COUNTY.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board, April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 08 2000

Date of Mailing: SEP 08 2000

#295-00R

295-00

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON REMAND
RESPONDENTS.	:	

SYNOPSIS

Petitioning school district challenged the determination of the Division of Finance that it was responsible for payment of tuition for the 1997-1998 school year for a student placed by DYFS. Petitioner alleged that a now repealed regulation, *N.J.A.C.* 6:28-7.4(b)(5), divested it of responsibility for payment of the student's tuition. The Commissioner remanded this matter to the OAL so that the parties would have an opportunity to present legal arguments with respect to the impact of the repeal on the Board's financial responsibility and the ALJ might have full opportunity to consider in the first instance the legal arguments of the parties as to the applicability to the regulation in dispute of the "time-of-decision" doctrine and the prospectivity rule, in light of the facts of this matter and the Commissioner's decision in *Prospect Park.*

The ALJ determined that the regulation, because it is no longer in effect, was inapplicable in this case and that, as the district of residence, petitioner is statutorily responsible for payment of tuition.

The Commissioner affirmed the conclusion of the ALJ. However, unlike the ALJ, the Commissioner concluded that petitioner is responsible for the student's educational costs under both the repealed regulation and the current regulation, *N.J.A.C.* 6A:14-7.5(a)(4) and, therefore, he declined to undertake an analysis of the applicability of the "time of decision" rule and "prospectivity doctrine." The Commissioner interpreted *N.J.A.C.* 6:28-7.4(b)(5), the repealed regulation, as placing responsibility for payment of tuition on the local school district, and requiring participation in the placement decision, not as a condition precedent to invoking the tuition responsibility, but in order to ensure that the district addresses the student's IEP needs.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 677-00

AGENCY DKT. NO. 347-11/98

BOARD OF EDUCATION
OF THE BOROUGH OF HIGHLANDS,

Petitioner,

v.

BOARD OF EDUCATION
OF THE TOWNSHIP OF MIDDLETOWN
AND THE STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,

Respondents.

Joanne L. Butler, Esq., for petitioner Highlands Board of Education (Schenck, Price, Smith & King, attorneys)

Dina Rocco, Deputy Attorney General, for respondent New Jersey Department of Education, Division of Finance (John Farmer, Jr., Attorney General of New Jersey)

Record Closed: July 3, 2000 Decided: July 27, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case concerns responsibility for the cost of education of M.M.C., a school-age child, during the 1997-98 school year.

In N.J.S.A. 18A:7B-12(b) the Legislature provides the criteria by which to determine the "district of residence" of school-age children and such a district is responsible for the cost of education of such children, including those classified and placed pursuant to the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1401 et seq. During the 1997-98 school year, the Highlands Board of Education (BOE) was the "district of residence" of M.M.C., who is classified for special education services pursuant to the IDEA. During the 1997-98 school year, the Division of Youth and Family Services (DYFS) placed M.M.C. in several institutions where he received educational services and the Department of Education's Division of Finance claims that the Highlands BOE is responsible for payment for such services. However, the Highlands BOE submits that N.J.A.C. 6:28-7.4, now repealed, excepts it from responsibility.

The parties have cross-moved for summary decision and, for the reasons detailed below, I am denying the Highlands BOE's motion, granting the Division of Finance's motion and ordering the Highlands BOE to make payment for the subject services.

PROCEDURAL HISTORY

This case, previously docketed as EDU 425-99, is the subject of my November 3, 1999, initial decision (ID) and the "Procedural History" of the November 3, 1999, ID is adopted.

On December 23, 1999, the Commissioner of the Department of Education issued a decision adopting that part of the November 3, 1999, ID that concluded that the Highlands BOE was M.M.C.'s "district of residence" during the 1997-98 school year and remanding this case to allow the parties additional opportunity to address the effect of N.J.A.C. 6:28-4(b)(5)(ii), its repeal and the new regulations. N.J.S.A. 18A:7B-12. The Department then transmitted the matter to the Office of Administrative Law (OAL), where, on February 14, 2000, it was filed as this contested case, bearing docket number EDU 677-00. N.J.S.A. 52:14B-2(b). On March 27,

2000, the letter briefs of the Division of Finance and the Highlands BOE were filed. (In this remanded case, nothing was filed by the Middletown BOE.) On June 8, 2000, the motions were the subject of a telephone conference with the attorneys. On June 28 and July 3, 2000, the Highlands BOE filed a supplemental letter brief and affidavits which I have marked "P-1" and "P-2."

FINDINGS OF FACT

The "Findings of Fact" of the November 3, 1999, ID are adopted and supplemented as follows:

Barbara Resko, superintendent of the Highlands BOE and formerly director of special education for the Shrewsbury BOE's public school system, alleges the following: During the 1995-96 school year, M.M.C. resided in the borough of Shrewsbury and he was a student in the Shrewsbury BOE's public school system. In the Shrewsbury BOE's school system M.M.C. was classified for special education services, placed in a self-contained neurologically impaired class and made educational progress. After the 1995-96 school year, M.M.C. moved and resided in Middletown Township and, because of M.M.C.'s progress in the Shrewsbury BOE's school system, the Middletown BOE requested that M.M.C. continue in the Shrewsbury BOE's school system as a tuition student. However, the Shrewsbury BOE denied the request and, therefore, during the 1996-97 school year, M.M.C. was placed in a self-contained special education class in the Middletown BOE's public school system. P-1.

As written in the November 3, 1999, ID, in May 1997 a court order placed custody and care of M.M.C. with the DYFS and, beginning in May 1997, the DYFS placed M.M.C. in a series of foster homes and institutions. Responsibility for M.M.C.'s tuition during the 1997-98 school year is in issue here. See RNJ-L; RNJ-J; see also N.J.S.A. 18A:7B-12.

Dr. Resko also alleges that M.M.C.'s history did not demonstrate the need for the residential placement in the institutions whose claims for payment are involved here. P-1. However, for the reasons detailed in the November 3, 1999, ID, M.M.C. had no residence available, e.g., from his parents, and Dr. Resko has identified no other appropriate residence for

M.M.C. Further, in January 1998, i.e., during the 1997-98 school year, the Division of Finance notified the Highlands BOE of the claim for payment for M.M.C.'s placement and the Highlands BOE filed no due process request or other challenge to such placement.

Kathleen C. Jannarone, secretary and business administrator of the Highlands BOE, alleges the following: When the Highlands BOE adopted its budget for the 1997-98 school year, it was unaware of its potential liability for M.M.C.'s educational costs. However, after notification of such potential liability, the Highlands BOE included moneys in its budget to defray such costs. P-2.

CONCLUSIONS OF LAW

The "Conclusions of Law" of the November 3, 1999, ID are adopted and supplemented as set forth below.

In N.J.S.A. 18A:7B-12(b) the Legislature provides the criteria by which to determine the "district of residence" of school-age children and such a district is responsible for the cost of education of such children, including those classified and placed pursuant to the IDEA.

Regulations adopted May 15, 1989, and repealed effective July 6, 1998, governed special education, classification, placement, due process rights, etc. 21 N.J.R. 239. Among these, N.J.A.C. 6:28-7.4(b)(5) stated:

> Placement of a pupil with an educational disability in an approved residential private school by a public agency, other than the district board of education, shall be subject to the rules governing such agencies and to this chapter. The district board of education shall pay the nonresidential special education costs.
>
> i. When the pupil has been placed by a public agency empowered to make such placement, the placement shall meet the individualized education program requirements of the pupil.
>
> ii. The chief school administrator or his or her designee shall participate with the public agency in the placement decision if the

> district board of education is to be responsible for the special education costs.
>
> [Emphasis added.]

In Executive Order No. 22, issued August 5, 1994, the Governor ordered a comprehensive and thorough review of the Department of Education rules and regulations and "[a]ll regulations which are not necessary or which promote inefficiency or are overly prescriptive" were to be identified for further action. In Executive Order No. 27, on November 2, 1994, the Governor ordered all state agencies, when adopting, amending or readopting rules, to state whether federal standards were exceeded.

The Department of Education reviewed its rules and, in 1998, proposed repeal of special education rules including N.J.A.C. 6:28-1.1 et seq. and promulgation of N.J.A.C. 6A:14-1.1 et seq. In this regard, the Commissioner wrote that the review was intended to assure "a balance of flexibility and safeguards" and "to comply with the [IDEA]" and that the proposed rules were "needed to assure consistency in the delivery of special education programs and services." 30 N.J.R. 1219-20. In the rulemaking process, N.J.A.C. 6:28-7.4 was not specifically identified; however, no similar rule was proposed. Effective July 6, 1998, i.e., after the 1997-98 school year, N.J.A.C. 6:28-1.1 et seq. were repealed and replaced by N.J.A.C. 6A:14-1.1 et seq., which "supersede all rules in effect prior to July 6, 1998 pertaining to students with disabilities." N.J.A.C. 6A:14-1.1; see also 30 N.J.R. 1219. No rule similar to N.J.A.C. 6:28-7.4 appears in the new rules, and N.J.A.C. 6A:14-7.5(b)(4) states:

> Placement of a student with a disability in an approved residential private school by a public agency, other than the district board of education, shall be subject to the rules governing such agencies and to this chapter. The district board of education shall pay the nonresidential special education costs. When the student has been placed by a public agency empowered to make such placement, the district board of education shall convene a meeting according to N.J.A.C. 6A:14-2.3(i)2 to revise the IEP as necessary.
>
> [Emphasis added.]

In construing regulations, rules governing construction of statutes are applicable generally. Krupp v. Union County Reg. High Sch. Dist. # 1, 278 N.J. Super. 31, 38 (App. Div. 1994); Department of Health v. Tegnazian, 205 N.J. Super. 160, 175 (App. Div. 1985).

Exceptions to statutes should be strictly construed consistent with the manifest reason and intent of the statute. MSG Assoc. v. DEP, 278 N.J. Super. 108, 120 (App. Div. 1994), citing M. Alfieri Co., Inc. v. State of N.J. Dep't of Envtl. Protection and Energy, 269 N.J. Super. 545, 554 (App. Div.), certif. granted, 136 N.J. 30 (1994), and In re Stemark Assoc., 247 N.J. Super. 13, 18-19 (App. Div. 1991); see also Service Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976).

The Highlands BOE contends that, even if pursuant to N.J.S.A. 18A:7B-12(b) it is the "district of residence," the repealed N.J.A.C. 6:28-7.4 created an exception to the responsibility it would otherwise bear for the cost of M.M.C.'s education.

An administrative rule must be within the fair contemplation of the delegation of the enabling statute. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561-62 (1978). And N.J.S.A. 18A:7B-12 provides for no exception such as that created by N.J.A.C. 6:28-7.4(b)(5). However, presumedly the Commissioner of Education's broad power to equitably administer education laws allowed for promulgation of such a regulation. In Board of Education of the Borough of Prospect Park v. New Jersey Department of Education, 97 N.J.A.R.2d (EDU) 134, remanded as EDU 1512-95, contrary to N.J.A.C. 6:28-7.4(b)(5), the DYFS failed to notify the district before placement and consistent with equitable principles, the Commissioner considered whether the circumstances justified the noncompliance and whether to waive compliance as a condition of responsibility for the district's bearing the cost of the child's education. The Commissioner found no circumstances justifying the noncompliance with N.J.A.C. 6:28-7.4(b)(5), then in effect, and declined to hold the district liable for the cost. However, N.J.A.C. 6:28-7.4(b)(5) has been repealed.

Where a statute is repealed and there is no savings clause or general statute limiting the effect of the repeal, it is as if the repealed statute had never existed, except as to matters and transactions passed and closed, and such a repeal takes away all remedies it gave and/or defeats

all actions and proceedings pending under it at the time of its repeal. Parsippany Hills Assoc. v. Rent Leveling Bd., 194 N.J. Super. 34, 42-43 (App. Div.), certif. denied, 97 N.J. 643 (1984).

Here, the Highlands BOE was not afforded an opportunity to participate in the placement for the 1997-98 school year. On the other hand, by January 1998, i.e., during the 1997-98 school year, the Highlands BOE had notice of M.M.C.'s placement and it did not file a due process request or otherwise challenge the appropriateness of the placement. Further, the Highlands BOE has demonstrated no vested right obtained by way of N.J.A.C. 6:28-7.4 that would require application of the repealed rule and thereby except it from its statutory responsibility as the "district of residence." N.J.S.A. 18A:7B-12. Finally, after notification of M.M.C.'s placement, the Highlands BOE included moneys in its budget for the costs of same. P-2.

Current law, presumedly expressing public policy, is generally applicable in lieu of repealed law. Riggs v. Long Beach Tp., 101 N.J. 515, 521 (1986), on remand, 212 N.J. Super. 69 (App. Div. 1986), rev'd, 109 N.J. 601 (1988).

N.J.A.C. 6:28-7.4(b)(5) involved the kind of "prescriptive" procedure that the Governor ordered identified for further action and such a repealed regulation should not except the Highlands BOE, the "district of residence," from its statutory responsibility for M.M.C.'s 1997-98 education costs. N.J.S.A. 18A:7B-12(b).

ORDER

The Highlands BOE's motion for summary decision dismissing the Division of Finance's claim for tuition is **DENIED**.

The Division of Finance's motion for summary decision granting its claim against the Highlands BOE for M.M.C.'s 1997-98 school year education costs is **GRANTED**.

The Highlands BOE is **ORDERED** to pay M.M.C.'s 1997-98 school year education costs.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

7/28/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and Respondent, State of New Jersey, Department of Education's ("State") reply thereto were timely submitted and considered by the Commissioner.[1]

In its exceptions, the Board disputes the ALJ's finding at page 7 of the Initial Decision that "during the 1997-98 school year, the [Board] had notice of M.M.C.'s placement and did not file a due process request or otherwise challenge the appropriateness of the placement." (Initial Decision at 7) The Board contends that filing a due process petition, pursuant to regulation, would not have been the correct course of action; moreover, it *did* take appropriate action by immediately advising the State that it would not assume responsibility for

[1] By letter dated August 16, 2000, counsel for the State informed the ALJ that she had not yet received a copy of the Initial Decision, and that, upon receipt of same, an extension of time to submit exceptions and/or reply arguments would be required. Thereafter, counsel for the State was granted an extension of time to submit such arguments.

M.M.C. (Board's Exceptions at 2) Following a series of communications with the Department of Education, the Board filed a Petition of Appeal.

Instead, the Board argues, it was DYFS which failed to take the appropriate action, pursuant to its responsibility under the former regulations. Noting that the operative decisions herein were rendered well before July 1998, the date the new regulations went into effect, the Board reasons that the Initial Decision would force "the Highlands taxpayers [to] bear the consequences of a decision to amend a regulation which conferred an affirmative obligation on another arm of the State, an obligation which was ignored." (*Id.* at 3) Moreover, the Board asserts that the ALJ's strict reliance upon *Parsippany Hills, supra*, is wholly improper. Unlike the regulation herein, in *Parsippany Hills*, the disputed ordinance had expired and the Township did not enact a replacement.

Finally, the Board maintains its position that "[i]f the special education regulations were to be applied retroactively, across the board, school districts would be subject to countless claims of violations of special education requirements, merely because the requirements changed." (*Id.* at 4) "Surely", the Board reasons, "that would not be consistent with the State and federal mandate to protect the rights of disabled students." (*Id.* at 5) In this instance, the Board underscores that it was not notified of its responsibility for the educational costs of M.M.C. until January 1998, more than halfway through the 1997-98 school year. Therefore, even if the new regulations were to be applied herein, the Board questions how it could have met its obligation to conduct an IEP meeting under these circumstances, thereby concluding that it "was denied its right to participate in any meaningful decision-making regarding M.C.'s placement." (*Id.* at 7)

In reply, the State contends that the ALJ properly determined that the old rule, *N.J.A.C.* 6:28-7.4(b)(5), is not applicable herein, inasmuch as "petitioner has demonstrated no vested right obtained by way of *N.J.A.C.* 6:28-7.4 that would require application of the repealed rule and thereby [except] it from statutory responsibility as the district of residence." (State's Reply at 2) Further, the State argues that, contrary to the Board's assertions, the ALJ's application of *Parsippany Hills, supra,* to the present matter is entirely proper, since prior case law has established "that the same rules which govern the construction and application of statutes and municipal ordinances also govern the construction and application of administrative regulations." (*Id.* at 3)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's conclusion, for the reasons set forth below, that petitioner, as the "district of residence" for M.M.C. for the 1997-98 school year, is responsible for the costs related thereto.

Subsequent to the Commissioner's remand of this matter, the parties were provided an opportunity to present legal arguments regarding the issue of the applicability of the "time of decision" doctrine and the prospectivity rule vis-à-vis the regulations in dispute, and in light of the facts in this matter. Having the advantage of such legal arguments, the ALJ's recommendation, as well as the parties' responses to the Initial Decision, and given the language of the regulation adopted in 1998 which removes *any* ambiguity regarding a local board's fiscal obligations in those cases where a student with a disability is placed in an approved residential private school by a public agency, the Commissioner now determines that, under *either* a prospectivity analysis[2] *or* a time-of-decision analysis,[3] the Board is responsible for the

[2]The prospectivity doctrine would apply the old rule, *N.J.A.C.* 6:28-7.4(b)5ii, to the instant matter, reserving application of the new rule for those matters arising after July 1998.

educational costs for M.M.C. for the 1997-98 school year. As such, the Commissioner finds it unnecessary to determine which doctrine should be determinative herein.

As the Initial Decision indicates, the Department of Education conducted a review of special education regulations, which, while technically resulting in the repeal of "old" and adoption of "new" regulations in 1998 by the State Board of Education, essentially constituted a comprehensive *revision* to, and recodificaton of, the special education regulations. (See, State's Brief of March 17, 2000, Attachment, Memorandum to State Board of Education from Commissioner Klagholz, August 7, 1996) The newly codified rules, *inter alia*, clarified the responsibilities of district boards of education with respect to student placements. *N.J.A.C.* 6A:14-7.5 *et seq.* Specifically, although the former regulations clearly provided that, where a student with a disability was placed in an approved residential private school by a public agency, "[t]he district board of education *shall* pay the nonresidential special education costs," *N.J.A.C.* 6:28-7.4(b)5 (emphasis supplied), the pertinent rule went on to add:

> The chief school administrator or his or her designee shall participate with the public agency in the placement decision if the district board of education is to be responsible for the special education costs.
>
> *N.J.A.C.* 6:28-7.4(b)5ii

This language could reasonably be construed, and, indeed, was previously construed by the Commissioner, as placing *a condition* upon the local district's fiscal obligations, notwithstanding an otherwise unambiguous directive. The revised regulation, however, while likewise requiring that, where a student with a disability is placed in an approved residential private school by a public agency, "[t]he district board of education *shall* pay the nonresidential special education costs," *N.J.A.C.* 6A:14-7.5(a)4 (emphasis supplied), replaces the prior language with the

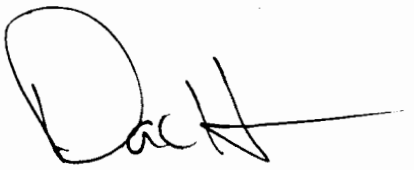
[3] The time-of-decision doctrine would apply the more recently-adopted rule, *N.J.A.C.* 6A:14-7.5(a)4, to the instant

directive: "the district board of education shall convene a meeting according to *N.J.A.C.* 6A:14-2.3(i)2 to revise the IEP as necessary."

Consequently, in light of the clarification provided by the amended rule, the Commissioner finds that *N.J.A.C.* 6:28-7.4(b)5ii should not be read to have established a condition precedent to a district's liability for education costs, but, rather, to have mandated that the chief school administrator, or designee, of the district *participate in the placement decision for the purpose of addressing the student's individualized educational program planning needs.* The Commissioner now so interprets *N.J.A.C.* 6:28-7.4(b)5ii, and, finds that, to the extent prior decisions construed the regulations differently, they do not control the outcome in this matter, or in future matters which may invoke *N.J.A.C.* 6:28-7.4(b)5ii.

Accordingly, the Commissioner concurs with the ALJ, for the reasons set forth above, that petitioner is liable for payment of M.M.C.'s educational costs for the 1997-98 school year.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 13 2000

matter, since it is operative when this matter is decided.

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

296-00

#296-00

J.C. AND S.C., on behalf of minor child, D.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning aunt and uncle challenged the Board's residency determination that their nephew, D.C., was not entitled to a free education in the District.

The ALJ determined that Petitioner S.C. and a friend who testified were credible witnesses. In light of the record and the testimony of the witnesses, the ALJ found that petitioners were domiciled within the District and were supporting their nephew *gratis* because D.C.'s parent was not capable of providing parental support due to substance abuse. Moreover, the ALJ concluded that D.C. was not residing with petitioners solely for the purpose of receiving a free public education in the District. Therefore, the ALJ concluded that petitioners were not liable for tuition to the District during the period that D.C. attended its schools. The ALJ dismissed the District's claim for payment of tuition.

The Commissioner concurred with the ALJ that petitioners demonstrated that D.C. was entitled to a free education in the District pursuant to *N.J.S.A.* 18A:1b(1). The Commissioner ordered the Board to continue to admit D.C. into its public school system free of charge.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11816-99
AGENCY DKT. NO. 301-1099

IN THE MATTER OF J.C AND S.C
ON BEHALF OF MINOR CHILD D.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,
Respondent.

J.C. and **S.C.,** Petitioners *Pro Se*

Stephen J. Christiano, Esq., for respondent

Record Closed: May 23, 2000 Decided: July 21, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In August 1999, Petitioners J.C. and S.C. applied to enroll their nephew, D.C. in the West Orange School District (District). The District denied D.C. free admission to its schools because the parent did not demonstrate a family or

economic hardship, which would render the parent unable to care for the child. On October 5, 1999, respondent permitted D.C. to enroll in the District and seeks reimbursement of tuition costs. Petitioners appeal the residency determination of respondent with regard to D.C.

On November 18, 1999, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on May 5, 2000. The parties submitted post hearing briefs and the record closed on May 23, 2000.

ISSUE

Whether D.C. is eligible to attend the Township of West Orange School District free of charge in accordance with *N.J.S.A.* 18A:38-1(b).

SUMMARY OF EVIDENCE

S.C. testified that he and his wife, J.C. have been married for two years and recently moved to West Orange. In July 1999, J.C. 's brother C. and his two children visited petitioners' home. Shortly thereafter, C. asked petitioners to take care of his son D.C. The other child was sent to live with a relative in Atlanta. C. went to the home of another relative in Orange, N.J. In August 1999, C agreed to give petitioners temporary guardianship and custody of D.C. R-2. Thereafter, petitioners applied to enroll D.C. in school. C provided an affidavit that he is the parent of D.C. and resides in Orange. (R-3). Further, the affidavit provides in part:

> The specific reason(s) I am not capable of supporting or providing care for him/her is/are:
>
> *We have just move to Jersey and I am staying with my brother and there is not enuf* [sic] *room for us all so my sister willing to have my son stay with her until I fine* [sic] *a big enuf* [sic] *place.*
>
> [R-3].

Based on family discussions and his interaction with C., S.C. believes that C is a substance abuser. C. and his wife and their three children lived in Las Vegas for about thirty years. S.C. did not know the current status of C.'s marriage, but believes that the wife remained in Nevada and lived in a trailer park. The last contact from D.C.'s mother came in December 1999, through a mailed Christmas gift to D.C. The package was postmarked Henderson, Nevada. S.C. believed that C. last lived in Jersey City.

S.C. and J.C. have provided D.C. with financial and emotional support since he was left at their home. They are applying for legal custody and will support D.C. for however long the child needs a stable home and family. The testimony was credible.

Donald Stewart resides in Maplewood and operates a cleaning business. Stewart has known C.'s sister, J.C. for many years. In April 1999, C. was homeless and Stewart allowed him stay in his home for a brief period. C. worked for a few weeks. Stewart paid for C. to travel to California to apply for a driver's license. Thereafter, C. returned to New Jersey. Stewart testified that he knew that C. used drugs observed him "stoned". C. has moved from Stewart's home and his whereabouts are unknown.

Josefa Lopez is employed as the District Registrar. Based on the affidavit supplied by petitioners and C., the District determined that no hardship existed. Indeed, the documents merely state that D.C. lived with petitioners due to the overcrowded conditions in the home where his father stayed. Moreover, there was no mention that the father was unemployed or a substance abuser. Additionally, no information was provided on D.C.'s mother and there was no custody order. Therefore, the District permitted D.C. to enroll in the school system on October 5, 1999 and charged petitioners tuition at $44.03 per diem. The District seeks reimbursement of $5944.

LEGAL DISCUSSION AND CONCLUSIONS

The State of New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286.

The applicable statute, *N.J.S.A.* 18A-38-1(b)1, reads, in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioners are domiciled within the District; (2) petitioners are supporting D.C. *gratis;* (3) D.C.'s parents are not capable of supporting or caring for him due to family or economic hardship; and (4) D.C. is not residing with petitioners solely for the purpose of receiving a free public education in the District. Petitioners have the burden of proof to demonstrate economic hardship.

Respondent argues that the affidavit for non-resident pupil enrollment does not claim hardship. Rather, D.C.'s father claimed that his son's stay with petitioners would be temporary until he found a place to live. Thus, there is no proof that D.C.'s parents are unable to support him or provide for his care. Additionally, respondent urges this tribunal reject any references about C's "substance abuse and transient status" because petitioners have "not provided any evidence of the same." Respondent's Brief at 2.

Petitioners maintain that his natural parents abandoned D.C. D.C.'s mother has contacted her son once since July 1999. The family has no telephone number or address to contact her. Petitioners also maintain that D.C.'s father has a substance abuse problem and has refused treatment. Thus, he is unable to care for his child.

I agree with respondent that petitioners' documents are inconsistent with their testimony. Indeed, the affidavits do not claim financial hardship or family dysfunction from drug abuse. Nevertheless, some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. *United Stations of N.J. v. Getty Oil Co.*, 102 *N.J. Super.* 459 (Ch. Div. 1968). The testimony must be such that the trier of fact can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v. Murdoch*, 73 *N.J. Super.* 511 (App. Div. 1962). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, bias or prejudice of a witness may affect his credibility and justify [the trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952).

Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

Thus, a fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. united States,* 412. *U.S.* 837, 93 *S. Ct.* 2357, 37 *Ed.* 2d 380 (1973). Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United states,* 314 *N.J. Super.* 6, 24 (App. Div. 1955). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958).

Petitioner avowed that his brother-in-law is a drug user. Stewart testified that he has observed C. under the influence of drugs. These are serious claims that, if spoken recklessly or falsely, can damage one's reputation. Petitioner did not tell the District that C. was a drug user and C.'s affidavit does not admit to drug use. However, petitioners have filed for legal custody of D.C. In their petition before the Superior Court of New Jersey petitioners state that C. is a substance abuser and lives on the street. Petitioner and his wife are expecting their first child. S.C. appeared mature and protective of his family. The witnesses' demeanors persuade me that they carefully and accurately described C.'s condition about drug use.

Based on the whole of the evidence, I **FIND** petitioner, S.C. and Stewart to be a credible witnesses and thus, I **FIND** their testimony believable. I **FIND** that petitioners are domiciled within the District and that they are supporting their nephew, D.C. *gratis*. I **FIND** that petitioners took the child into their home to live

for an extended period of time because his father is on drugs and not able to care for him.

Hardship need not be based on financial status. . Family dysfunction covers a broad range of circumstances. For example, family discord might constitute hardship and entitle the child to a free education. *R.H. v Ocean C. Bd. Of Education,* 96 *N.J.A.R.* 2D (EDU) 628. Furthermore, New Jersey's Department of Human Services has recognized that a parent's alcohol and drug abuse might result in a functional incapacity to plan and secure a safe home for their dependent children. *N.J.A.C.* 10:90-6.1. Indeed, rearing children in an environment where parents use drugs are compelling circumstances that rise to the level of family hardship. Accordingly, I **FIND** that a parent who is on drugs and whose whereabouts is unknown cannot provide proper care for a child. I **FIND** that petitioners intend to provide D.C. with the safe, stable and secure home that his father is unable to give him due to his substance abuse.

Based on the whole of the record, I **CONCLUDE** that petitioners satisfied the residency requirements pursuant to *N.J.A.C.* 18A:38-1(b)1. I **CONCLUDE** that petitioners are domiciled within the District. I **CONCLUDE** that petitioners are supporting D.C. *gratisi* because his parent is not capable of providing parental support due to substance abuse. I **CONCLUDE** that D.C. is not residing with petitioners solely for the purpose of receiving a free public education in the District. Therefore, I **CONCLUDE** that petitioners are not liable for tuition to the District during the period that D.C. attends its schools.

ORDER

I **ORDER** that the petition filed by petitioners to permit D.C. to attend school in the District is **GRANTED.** I **ORDER** that the District's claim for payment of tuition is hereby **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2000
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

7/28/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 1 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Exhibits

R-1 Affidavit For Non-Resident Pupil Enrollment

R-2 Agreement for Temporary Guardianship

R-3 Affidavit of Parent

R-4 Letter of determination by Board of Education

R-5 Chart of Tuition Coasts

OAL DKT. NO. EDU 11816-99
AGENCY DKT. NO. 301-10/99

J.C. AND S.C., on behalf of minor child, D.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

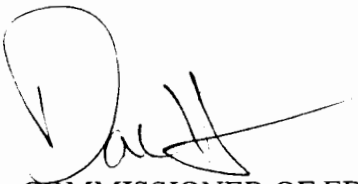
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, and based upon the Administrative Law Judge's credibility determinations, the Commissioner concurs that petitioners have demonstrated that D.C. is entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1)[1]. Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit

[1] The record indicates that, as of May 15, 2000, petitioners have applied to the Superior Court of New Jersey, Essex Vicinage Family Division, to obtain custody of D.C. Should such custody be awarded, D.C. may claim entitlement to attend school in the District pursuant to *N.J.S.A.* 18A:38-1(a). (*See L.A. v. Board of Education of the Town of West Orange*, 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.*2d (EDU) 124, *aff'd* by the State Board of Education 97 *N.J.A.R.*2d 554 (1997), establishing that, as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b).)

D.C. into its public school system.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 13 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

297-00R

297-00

J.M. AND D.M., on behalf of minor child, J.L.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents sought to compel the Board to award their daughter the most valuable player award for the women's cross-country track team for the 1995 and 1996 seasons. The case was dismissed by the ALJ because the petition was not filed within 90 days of accrual of the cause of action as required by regulation. After the Commissioner affirmed the dismissal, the State Board of Education reversed the Commissioner's decision and remanded the case for a hearing.

After remand to the OAL, the Board moved for summary decision and, after hearing oral argument, the ALJ granted summary decision to the Board. The ALJ determined that there was no issue of discrimination against J.L.M. as argued by petitioners; that the coach's determination to weigh factors other than performance in bestowing the MVP award was not unreasonable; and that his determination to give the award to team captains and graduating seniors was also not unreasonable. Finally, the ALJ concluded that the Board's determination to uphold the coach's grant of the awards was not unreasonable.

The Commissioner affirmed the determination of the ALJ for the reasons set forth in her decision and dismissed the petition.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10366-99

Agency Dkt. No. 76-3/98

(EDU 3937-98 – REMANDED)

J.M. AND D.M., ON BEHALF OF
MINOR CHILD, J.L.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF SUMMIT, UNION COUNTY,
Respondent.

J.M., on behalf of **J.L.M.**, *pro se*

Dawn Marmo, Esq., for respondent (McCarter & English, attorneys)

Record Closed: June 13, 2000 Decided: July 26, 2000

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On March 24, 1998, petitioners J.M. and D.M. filed a Petition with the Commissioner of Education seeking a ruling that the respondent, the Summit Board of Education (Summit), arbitrarily and capriciously failed to give their daughter, J.L.M., the

award as most valuable player (MVP) on the women's cross-country track team for the 1995 and 1996 seasons. On May 11, 1998, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On April 14, 1999, Administrative Law Judge Sebastian Gaeta, Jr., granted summary decision dismissing the matter pursuant to *N.J.A.C.* 6:24-1.2(c), the ninety-day rule, for failure to request the appeal in a timely manner. The decision was affirmed by the Commissioner on June 1, 1999 (C# 174-99). On November 3, 1999, the State Board of Education reversed the decision and remanded the matter for a hearing on the merits (SB# 27-99).

The Commissioner transmitted the remanded matter to the Office of Administrative Law on December 1, 1999, where it was given its present docket number and assigned to the undersigned for plenary hearing.

J.L.M. graduated from Summit High School in June 1998 and is presently finishing her sophomore year at Villanova University. She was not named as the MVP on the girls' cross-country track team (Team) during the 1995 and 1996 seasons. She is now seeking to have these awards overturned and to receive an apology from Summit as a result of this proceeding.

Summit renewed a prior motion for summary decision on the merits. The parties argued the motion on the record on June 13, 2000, and the record closed.

THE ASSUMED FACTS

The following facts are either undisputed or taken in the light most favorable to petitioners, against whom the motion was made.

During the 1995 and 1996 seasons, J.L.M. was the recipient of the Coach's Award for the Team and she was the Team's MVP in her senior year of high school. There is no requirement that there be any MVP or Coach's Award or even that the school have a cross-country track team.

During the 1995 and 1996 years, members of the Team who were graduating seniors were chosen as the MVPs instead of J.L.M., who was the number one runner both years. The recipients did not have the best performance records on the Team. The 1995 MVP had the third best record. The 1996 MVPs were senior captains and were the fourth and fifth best runners. In years prior to 1995, the Team coach gave the MVP award to runners who were not seniors.

During the 1995 and 1996 seasons, the number one runners on the boys' cross-country track team, neither of whom were seniors, were chosen as MVPs. The boys' team has the same coach as the girls' team.

According to J.M., the only criteria that the coach should have been allowed to apply in choosing an MVP for the girls' team was the runner's standing with respect to the other members of the Team. He argued that other, intangible criteria such as effort, team spirit, sportsmanship, and good citizenship should have been relegated to selecting the recipient of the Coach's Award. J.M. expressed the attitude that petitioners considered these lesser attributes than standing, since he described the Coach's Award as a sop thrown to his daughter in the 1995 and 1996 seasons to placate her while lesser runners received the MVP award she coveted, and, in their opinion, merited.

There are no standards, written or otherwise, for an MVP award for any school team. This is left solely to the discretion of the coach of the particular team and, according to Summit, is based upon intangible factors as well as performance. There is no record as to what factors the Team's coach used to select the MVPs for the 1995 and 1996 seasons for either the boys' or girls' team. He did not disclose them during

meetings held between the parents and Summit. He subsequently left his employment with Summit.

Petitioners' complaint first came to the attention of the District when they filed an Affirmative Action Grievance Report with the high school principal in March 1997, after J.L.M. did not receive the MVP award for the prior two seasons. No evidence was found at that time that there was any discriminatory conduct in violation of *N.J.S.A.* 18A:36-20 involved.

As a result, Anthony Akey, the affirmative action officer and assistant principal, dismissed the complaint in his Affirmative Action Grievance Disposition Report of March 10, 1997. In his report Akey stated, and it is undisputed, that there is no authority to require schools to implement formal criteria, guidelines or procedures for the designation of MVPs. Further, there was no discriminatory conduct cognizable under law involved in J.L.M.'s grievance.

In addition, Akey found that J.L.M. (1) missed five meets in the 1996 season and (2) was not the number one runner "at important conference and state meets." Petitioners dispute the second statement, which will therefore not be considered, but nowhere in the record do they dispute the first. Akey found that running time and place on the Team were not the only factors taken into consideration. Others, such as effort, consistency and concern for the Team, were also applied.

As a result, Akey found that there were legitimate, non-discriminatory reasons why the coach gave the MVP award to others and dismissed J.L.M.'s grievance.

Petitioners appealed Akey's decision to a three-member Education Committee in the District. The committee met with Akey and the coach and affirmed the action taken. The Summit Board of Education affirmed the committee's decision by letter dated September 12, 1997, and petitioners appealed to the Commissioner.

J.M. stated that the only injury to his daughter as a result of not receiving the MVP award in her sophomore or junior year was that she was unhappy during her senior year, but apparently recovered after leaving high school.

THE POSITIONS OF THE PARTIES

Respondent argues that the coach's decision was within his sole discretion and, as long as that discretion was not exercised for impermissible, or irrational, reasons, it can not be challenged.

J.L.M.'s parents, J.M. and D.M., argue that discrimination against their daughter was the reason she was not designated the MVP during the two years in question.

At the hearing on the respondent's motion their discrimination claim was clarified for the record, and I **FIND** that this matter involves no issue of discrimination involving any protected class of persons as designated in the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42, or in *N.J.S.A.* 18A:36-20. In addition, there is no allegation of disparate treatment of the girl's team with respect to opportunity, equipment, uniforms or quality of coaching.

J.M. specifically stated on the record that the only discrimination here is that he believes the coach applied different criteria in selecting the MVP for the girls' team than he used for the boys' team. Even if true, nothing defines this application of different standards as impermissible discrimination. If, in fact, the coach only gave the MVP award to the highest performer on the boys' team during the years in question, perhaps it was the boys' team that suffered when the coach failed to consider other valuable, intangible qualities. I **FIND** no reason to prefer one set of standards to the other to make the determination that invidious discrimination has occurred.

I **FIND** nothing unreasonable in the coach's decision to weigh other factors besides performance in choosing the recipient of the award. I **FIND** nothing

unreasonable in his failure to give the same player the MVP award year after year. I **FIND** nothing unreasonable in the coach's decision to give the award to Team captains and graduating seniors, particularly since J.L.M. still had high school years ahead of her in which to be chosen MVP. Finally, I **FIND** nothing unreasonable in Summit's decision to uphold the coach's choice of MVPs for the Team's 1995 and 1996 seasons for the reasons expressed in Akey's decision.

Based upon the lack of any discriminatory conduct cognizable under the law, I **CONCLUDE**, for reasons discussed above, that Summit correctly dismissed petitioners' Affirmative Action Grievance as being without merit.

DISCUSSION OF LAW

Boards of education enjoy wide policy-making discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Thus, the applicable standard of review in this case is whether the actions taken by the Board, in affirming the coach's decision, were arbitrary, capricious or unreasonable. The petitioner has the burden of establishing by a preponderance of the credible evidence that the action taken by the local board was improper, that is, "patently arbitrary, without rational basis or induced by improper motive." *L.B. v. Elizabeth Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 110, 111. In *Barna v. Irvington Board of Education*, 97 *N.J.A.R.*2d (EDU) 345, 347, the Commissioner of Education stated, "It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable." Consequently, if J.M. can not show that the actions taken by the Summit School District with respect to J.L.M.'s grievance were arbitrary, capricious or unreasonable the Board's determination should not be disturbed.

The first question raised by this appeal is whether the Commissioner, or the undersigned, should substitute his or her judgment for that of the coach in establishing the criteria for choosing the MVP of either the boys' or girls' team. Petitioners then seek to have the Commissioner, and this forum, apply their own standards to determine that J.L.M. was actually entitled to the MVP awards for the two years in question. Following this, the Commissioner, and forum, are asked to determine that Summit acted unreasonably in affirming the coach's exercise of discretion. These determinations are prerequisite to the decision that J.L.M. is owed the awards and an apology by the District.

I **CONCLUDE** that the case law cited above makes it clear that, since all of these determinations by the coach and the District were reasonable and not an abuse of discretion, neither the Commissioner nor the undersigned may disturb them. Consequently, I **CONCLUDE** that J.M., D.M. and J.L.M. are entitled to no relief as a result of this appeal.

SUMMARY DECISION

The New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-1.1 to -21.6) provide that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(b). In considering respondent's motion for summary decision, this tribunal must determine whether "the papers and discovery . . . together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1.1-12.5(b).

The Supreme Court of New Jersey held that when deciding a motion for summary judgment under *R.* 4:46-2,

> [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [*Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995).]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533; *see also N.J.A.C.* 1:1-12.5(b) (stating, "an adverse party [to a summary decision motion] in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding"). Therefore, through the application of summary judgment, a legal issue may be quickly and inexpensively disposed of where there is clearly no genuine issue of material fact necessitating disposition at a hearing. *Brill, supra*, 142 *N.J.* at 540.

In the present case, Summit considered the coach's exercise of discretion and found it reasonable. There are no relevant material facts that could be developed at plenary hearing to show that Summit's view of the situation was "patently arbitrary, without rational basis or induced by improper motive," since all facts have been assumed true as set forth by petitioners.

When the standards of *Brill* are applied in this case, it is clear, based upon the arguments and the affidavits and documents submitted by the parties, and resolving all disputes in favor of the petitioners, that there are no material facts in dispute that require a hearing in this forum. Consequently, I **CONCLUDE** that the District is entitled to summary decision dismissing this appeal as a matter of law. As determined above, petitioners are entitled to no relief in this forum.

Finally, I **FIND** that there are no equitable reasons for granting J.L.M. the relief she seeks. She has already completed several years of college and I **FIND** the issues

raised, being of no general significance, are moot. There was no irreparable harm. In fact, the only negative effect was that J.L.M. was unhappy during her senior year of high school because she did not get the MVP award for the prior two years.

ORDER

It is **ORDERED** that summary decision is hereby **GRANTED** to respondent and the petition herein is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 26, 2000
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

7/28/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

EK/cb

J.M. AND D.M., on behalf of minor child, J.L.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions were filed by the parties pursuant to *N.J.A.C.* 1:1-18.4. Petitioners' exceptions essentially reiterate and recast those arguments and documentary evidence presented to and considered by the Administrative Law Judge (ALJ), briefly setting forth those aspects which they believe support their position that the decisions of the Board and each of its employees involved in this matter were arbitrary, capricious and unreasonable. Petitioners urge, *inter alia*, that:

> It is obvious that Mr. Aikey cannot defend his Disposition [Report] (document #2) and that Coach Keubler cannot explain why, as coach of both girls and boys cross country teams, he used different criteria for the boys and girls MVP selection, as well as why he broke the pattern of selecting the number one runner (who possess[ed] the intangibles) in 1995 and 1996), [J.M.]'s sophomore and junior years. Also the Board of Education is not interested in the truth, but rather wants to hide behind NO CONTROLLING LEGAL AUTHORITY!
> ***
> Coach Keubler, Mr. Anderson, Mr. Aikey, Dr. Knowlton and the Summit Board have never given the reason for selecting the

> number four and five runners on the team over [J.M.], who ran with an injured leg and was still the number one runner and who possessed all the intangibles" as evidenced by her Coach's Award. How can this decision not be arbitrary, capricious, unreasonable and discriminatory?*** (Petitioners' Exceptions at 3-4)

The Board's reply exceptions urge affirmance of the ALJ's recommended decision, averring, *inter alia*, that petitioners offer nothing new in their exceptions which would provide reason for rejection of the Initial Decision other than their continued belief that the decision of the Summit High School cross-country coach to give the MVP award to someone other than their daughter was wrong.

Upon review of the record, including the exceptions submitted by petitioners and the Boards reply thereto, the Commissioner agrees with and adopts as his own the findings of fact and conclusions of law reached by the ALJ. Accordingly, the Petition of Appeal is hereby dismissed for the reasons set forth in the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 13 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

298-00

#298-00

RHONDA BLAND-CARTER,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning teacher challenged the withholding of her increment for the 1999-2000 school year. The District filed a motion to dismiss the petition because it was filed outside the prescribed 90-day period. The matter was transmitted to the OAL with instructions to first determine the threshold issue of timeliness of the petition.

After the issue was fully briefed by the parties, the ALJ determined that the petition was filed out of time, and that petitioner's argument for relaxing the requirement was unpersuasive, since she had not demonstrated that she was unable to function because of stress.

The Commissioner agreed with the ALJ that the petition was filed out of time and that the 90-day requirement should not be relaxed. The Commissioner adopted the decision of the ALJ for the reasons set forth therein and dismissed the petition.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1505-00
AGENCY DKT. NO. 375-12/99

RHONDA BLAND-CARTER,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Timothy R. Smith, Esq., appearing for petitioner
(Oxfeld & Cohen, LLC, attorneys)

Arsen Zartarian, Esq., appearing for respondent
(Hope R. Blackburn, Esq., General Counsel)

Record Closed: June 15, 2000 Decided: July 21, 2000

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured school nurse employed by the respondent, State-Operated School District of the City of Newark (District), challenged the withholding of an increment for the 1999-2000 school year. Petitioner received notice of the increment withholding on September 1, 1999. Petitioner filed a petition with the Commissioner for

a hearing to contest the withholding on December 8, 1999. On January 5, 2000, the District filed a motion before the Commissioner to have the petition dismissed as it was not filed within the prescribed 90-day time period. On February 9, 2000, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case requesting that the threshold issue of timeliness be resolved prior to any consideration of the matter on its merits.

On May 18, 1999, the undersigned held a telephone prehearing conference concerning the matter. The briefing schedule required petitioner to answer the January 5, 2000, motion by June 6, 2000 and, the District's reply to be filed by June 16, 2000. The matter had been fully briefed and the issue is now ready for disposition.

FACTS

The following facts are undisputed or uncontested and I **FIND** them to be **FACTS** in this case.

On August 30, 1999, petitioner, a tenured school nurse employed by respondent, began work for the 1999-2000 school year. As of that date, respondent had taken no action with respect to withholding petitioner's salary increment for that year. By letter dated August 31, 1999, Marion A. Bolden, State District Superintendent, informed petitioner of the District's determination to withhold her increment for the 1999-2000 school year. Petitioner received this letter on September 1, 1999.

Around the same time, petitioner's father, who had been diagnosed several years earlier with lung cancer, was hospitalized. He remained in the hospital until his death on October 8, 1999. Prior to petitioner's father's death she went to the hospital on a daily basis to support and assist in his care. Petitioner later arranged and attended her father's funeral, held on October 13, 1999. Petitioner returned to work on October 18, 1999. Subsequent to the funeral, petitioner had to put her father's affairs in order. Additionally, petitioner was left to care for her mother, who has Parkinson's

disease. Because of these unfortunate stresses petitioner did not file the subject petition within 90 days of receipt of the notice of the District's decision.

LEGAL DISCUSSION AND CONCLUSION

A petition to the Commissioner challenging a final order, ruling or other action by a Board of Education, which is the subject of the requested case hearing, must be filed no later than the 90th day from the date of receipt of the notice of such order, ruling or action. *N.J.A.C.* 6:24-1.2(c).[1] This 90-day period has been held to represent "a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow v. Bd. of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 583 (1993). An annual salary increment has been held to be subject to the time bar provided in this regulation. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587, 594 (1984).

Even when the 90-day rule applies, the Commissioner may relax the rule when appropriate. The Commissioner has the discretion to dispense with any general rule of practice "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result injustice." The 90-day time limitation has been relaxed to resolve a dispute or delay attributable to the Board of Education or to consider a substantial constitutional issue or a matter of significant public interest. *Le Mee v. Bd. of Educ. of Village of Ridgewood*, 1990 *S.L.D.* 663, 668. No recorded cases have been located by the undersigned that show that the rule was relaxed due to personal circumstances of petitioner that occurred several weeks or months prior to the 90th day. The purpose of the 90th day is described in *Kaprow:*

> The 90-day limitation provides a measure of repose, an essential element in a proper and efficient administration of the school laws. It stabilizes the relationship between teachers and administration . . . . The limitation period gives school districts the security of knowing that administrative

[1] This section is now part of *N.J.A.C.* 6A:3. As a recodification of this section took place in April 2000, after the operative facts in this case, the former regulation will be cited.

> decision regarding the operation of the school cannot be challenged after 90 days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements . . . . *Id.* at 582.

With this underlying rationale in mind it is necessary to consider the reasons for petitioner's failure to file in a timely manner. Petitioner was clearly under a great deal of personal stress, especially in September and early October. However, petitioner had almost two months after the death of her father during which time she could have timely filed the petition. The record indicates that she returned to work on October 18, 1999 and thus must have been able to function in the workplace. While petitioner had genuine personal problems, I **FIND** that there is no evidence that petitioner's circumstances rendered her unable to function. Thus, I **FIND** that holding her to the 90-day time period would not be inappropriate or an injustice. Based on the foregoing I **CONCLUDE** that the petition is time barred because it was filed after the 90th day of the notice of the withholding of the increment.

ORDER

I **ORDER** this petition to be **DISMISSED** as it is time barred because it was filed after the 90th day of the notice of the action.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

7/28/00
DATE

D Antaramis
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1505-00
AGENCY DKT. NO. 375-12/99

RHONDA BLAND-CARTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

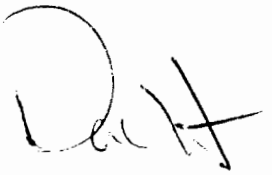
Upon careful and independent review of the record in this matter, I fully concur with the Administrative Law Judge (ALJ) that the within petition is time-barred and that relaxation of the 90-day timeline set forth in *N.J.A.C.* 6A:3-1.3(d) is not warranted under the circumstances of this case. Petitioner received notice of the District's determination to withhold her increment for the 1999-2000 school year on September 1, 1999. Petitioner filed a Petition of Appeal to the Commissioner contesting the withholding on December 8, 1999. Although the record reflects that petitioner was under stress during September and early October 1999 due to the illness and death of her father, petitioner had almost two months after the death of her father during which she could have timely filed the petition. Petitioner returned to work on October 18, 1999, and the ALJ found no evidence that petitioner's circumstances rendered her unable to function at that time.

Accordingly, I do not find that the factual circumstances set forth by petitioner constitute grounds for relaxation of the 90-day rule, and, therefore, concur with the ALJ that the

petition is time-barred because it was filed after the 90th day of the notice of the withholding of petitioner's increment. No constitutional issues are involved in this matter nor does it present issues of significant public interest beyond the parties. On the contrary, I determine, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood,* 1990 *S.L.D.* 663, 673, that the greater public interest herein lies with the enforcement of the 90-day rule.

The Initial Decision of the ALJ is, therefore, adopted for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 14 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#299-00

299-00

IN THE MATTER OF THE TENURE	:	
HEARING OF TRI NGO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF CAMDEN,	:	DECISION
CAMDEN COUNTY.	:	
	:	

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION,
SETTLEMENT
OAL DKT. NO. EDU 9601-97
AGENCY DKT. NO. 310-8/97

BOARD OF EDUCATION
OF THE CITY OF CAMDEN,
Petitioner,
v.
TRI NGO,
Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Steven R. Cohen, Esq., and **Carol Alling**, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: July 25, 2000 Decided: July 25, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner City of Camden Board of Education (BOE) brought charges against respondent Tri Ngo, a tenured teacher in the BOE's school system and, based on these charges, the BOE demanded that the respondent be dismissed from employment. See N.J.S.A. 18A:6-10. As

shown by the attached Joint Request for Approval of Settlement, etc., the parties have settled the case.

PROCEDURAL HISTORY

On August 29, 1997, the BOE's tenure charges, etc., were filed with the Department of Education. N.J.S.A. 18A:6-9. On August 29, 1997, the respondent's answer to the tenure charges was filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on October 8, 1997, it was filed as a contested case. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). The hearing was held on September 28, October 5 & 6, November 17, and December 8, 1998 and February 3 & 4, March 3, April 13, May 10, 12, 13, 24, October 28, November 23,1999. Respondent's attorneys conscientiously represented their client, serving discovery demands; making motions for relief relative to discovery and other matters; and, during the hearing, raising numerous objections the BOE's motions for admission into evidence of its exhibits. Substantial time and effort was expended in argument, conferences and decisions on such motions and objections. The BOE moved for leave to appeal from interlocutory orders sustaining some of the objections and, in the Commissioner's November 12, 1998 letter, citing N.J.A.C. 1:1-14.10(b), he declined to review the motion. Discovery and scheduling difficulties continued thereafter and the hearing dates were unusually extended. After the last hearing date, the attorneys represented that they were engaged in realistic settlement negotiations and these too were unusually extended. The complete attached, executed Joint Request for Approval of Settlement, Including Withdrawal of Tenure Charges and Settlement Agreement Regarding Actions Pending before the Commissioner of Education were received on July 25, 2000.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

A review of the BOE's charges and evidence presented during the hearing and the respondent's positions are helpful in determining the reasonableness of the parties' settlement.

In 1984, the BOE hired respondent as one of three English/Asian bilingual teachers in its school system and, as written above, in 1997, the BOE filed these charges with the Department of Education. The BOE's charge "1." referred to City of Camden municipal court charges of cruelty to animals in violation of N.J.S.A. 4:22-17, -26 and the arrest of respondent relative to such charges and the BOE submitted that these circumstances constituted unbecoming conduct. See N.J.S.A. 18A:6-10. However, as part of the municipal court plea agreement, the statutory cruelty to animals charges were dismissed and respondent pleaded guilty to violation of a City ordinance prohibiting housing certain types of animals in the City and BOE did not prove that wrongful conduct by the respondent, e.g., wrongful failure to appear in response to a summons, caused his arrest. The BOE's charge "2." alleges that filth, excrement, etc., were present in respondents' home where he tutored students. The BOE submitted that these circumstances endangered the students and constituted unbecoming conduct. However, the BOE has not identified or otherwise proven that any BOE student was present in respondent's home. The BOE's charge "3." alleges that, several times, respondent smoked on school premises and with students, constituting unbecoming conduct and relative to this charge, the BOE did present evidence in support of that charge. The BOE's charge "4." alleges that, several times, respondent left his students unattended and the BOE did present evidence in support of that charge. The BOE's charge "5." alleges that, in violation of BOE policy and contrary to respondent's superiors' directions, he failed and/or refused to sing in and sign out, failed to submit weekly lesson plans, left his students unsupervised, etc., constituting in subordination and the BOE did present evidence in support of that charge. The BOE's charge "6." alleges that, contrary to his superiors' directions, respondent was chronically and excessively late for his classes and the BOE did present some evidence in support of that charge. The BOE's charge "7." alleges that respondent engaged in a pattern of lateness, leaving his students unsupervised, etc., for which he received unsatisfactory evaluations and the BOE did present some evidence in support of that charge.

As written in the procedural history, the respondent's attorneys conscientiously represented their client. They submitted that the BOE cannot prove charges "1" and "2." Relative to the additional charges, they contended that the BOE had not sufficiently proven the alleged misconduct or that the misconduct proven could not require respondent's dismissal. Although respondent's attorneys had not presented his case in defense, they represented that they

would prove that respondent made reasonable attempts to comply with his superiors' directions, etc. For example, they represented that it was to comply with school officials' requests to assist Asian students elsewhere that the respondent occasionally left his classroom. They represented also that, after conferences with his superiors, the respondent ended the misconduct alleged by the BOE.

Given the above, this case involves substantial questions of fact. As written in the settlement papers, the BOE represents that it cannot present certain essential witnesses and complete litigation of this case will require substantial expenditure of time and effort by all involved.

I have reviewed the settlement papers and I **FIND** and **CONCLUDE** that the parties have voluntarily entered into the settlement agreement, the settlement disposes of all issues in controversy and is consistent with the law and the settlement meets the requirements of N.J.A.C. 1:1-19.1 and that it should be approved as a reasonable and expeditious resolution of this case.

ORDER

I approve of the settlement, I **ORDER** the parties to comply with it and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 21, 2000
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

27
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Counsel for Respondent,
Tri Ngo

IN THE MATTER OF THE TENURE HEARING OF TRI NGO, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDU 9601-97S
AGENCY REF. NO. 310-8/97

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the City of Camden ("Board") and counsel for its tenured employee Tri Ngo ("Ngo") join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of N.J.A.C. 1:1-19.1, recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the Board to the Commissioner of Education on July 15, 1997 against a tenured teaching staff member on grounds of forfeiture, unbecoming conduct and inefficiency. The tenure charges were transmitted to the Office of Administrative Law (OAL) as a contested case on October 8, 1997. A hearing concerning the Board's tenure charges commenced before the Honorable Judge John R. Tassini, ALJ on September 28, 1998, and continued on various dates through October 28, 1999. On December 13, 1999, counsel informed Judge Tassini that the parties had reached a tentative settlement agreement conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the Commissioner of Education in accordance with which the tenure charges might be withdrawn.

The parties have agreed under the terms of the Settleme: Agreement attached hereto as Exhibit A that Mr. Ngo will be reinstated to a position consistent with his certification as a teacher at the salary step to which he would have been assigned had the tenure charges never been brought against him and no increments withheld, and that he shall resign or retire from all employment by the Board effective no later than July 1, 2001.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that Mr. Ngo is entitled to restoration of increments withheld from the date he was suspended without pay through the date of his reinstatement, including payment of that portion of his salary he would have received had salary increments never been withheld.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Mr. Ngo shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

The parties have further agreed that neither the Board not its agents or employees will take any actions which could be adverse to Mr. Ngo's future employment interests elsewhere.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Due to the death and disability of several key witnesses and the fact that the criminal charges were reduced to a guilty plea on a violation of an ordinance, the Board has reviewed the evidence and decided to withdraw the charges upon approval of this settlement by the Commissioner of Education.

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of the hearing. Counsel, as well as Mr. Ngo and the Board which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the

Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

MURRAY, MURRAY & CORRIGAN
Attorneys for Board of Education of the City of Camden

BY: _____
KAREN A. MURRAY

SELIKOFF & COHEN, P.A.
Attorneys for Tri Ngo

BY: Steven R. Cohen
STEVEN R. COHEN

5.L

EXHIBIT A

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden ("Board") and its tenured employee Tri Ngo ("Ngo").

WHEREAS, Ngo has been continuously employed by the Board as a bilingual resource teacher since May 7, 1984; and

WHEREAS, on July 15, 1997 the Board certified tenure charges against Ngo to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF TRI NGO, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.

OAL DKT NO. EDUTH 9610-97S
AGENCY REF. NO. 310-8/97

AND, WHEREAS Ngo filed an answer contesting the tenure charges, and

WHEREAS, the aforesaid tenure charges and petition of appeal were consolidated for hearing before the Honorable John R. Tassini, ALJ; and

WHEREAS, hearing of the consolidated proceeding began on September 28, 1998, and continued for twelve more days, and

WHEREAS, due to the death and disability of several key witnesses and the fact that the criminal charges were reduced to a guilty plea on a violation of an ordinance, the Board has reviewed the evidence and decided to withdraw the charges pending this settlement;

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Ngo to be withdrawn and dismissed with prejudice;

2. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections;

3. The Board shall reinstate Ngo to a position consistent with his certification as a teacher at the salary step to which he would have been assigned had the tenure charges never been brought against him and his increments never withheld;

4. The Board agrees that Ngo is entitled to restoration of any increments withheld from the date he was suspended without pay through the date of his reinstatement and shall pay that portion of his salary he would have received had no salary increment been withheld during said period;

5. Ngo agrees in consideration of this Settlement Agreement that if it is approved by the Commissioner of Education, he will resign or retire from all employment by the Board effective no later than July 1, 2001;

6. Neither the Board nor its agents or employees will take any action which would be adverse to Ngo's future employment elsewhere;

7. Ngo further agrees in consideration of this Settlement Agreement that if it is approved by the Commissioner of Education, he will not assert in any judicial or administrative proceeding that any statements by the Board through its attorney concerning the reasons it believes this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

8. Ngo and the Board understand and agree that as a contested case transmitted to the Office of Administrative Law, all settlement documents shall become part of the public record in this matter, and, as such, shall be appended to the Initial Decision of the Administrative Law Judge and Decision of the Commissioner of Education.

DATED:

MURRAY, MURRAY & CORRIGAN
for the Board of Education
Education of the City of
Camden

BY: _____
KAREN A, MURRAY, ESQ.

SELIKOFF & COHEN, P.A.
for Tri Ngo

BY: Steven R. Cohen
STEVEN R. COHEN, ESQ.

OAL DKT. NO. EDU 9601-97
AGENCY DKT. NO. 310-8/97

IN THE MATTER OF THE TENURE	:	
HEARING OF TRI NGO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF CAMDEN,	:	DECISION
CAMDEN COUNTY.	:	
	:	

The record, the Joint Request for Approval of Settlement Including Withdrawing of Tenure Charges, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

In light of the factual circumstances set forth in the record of this matter which preclude the Board from bearing its burden of proof, including but not limited to the death and disability of several key witnesses and the reduction of the criminal charges against respondent to a guilty plea on a violation of a municipal ordinance, the Commissioner determines that the settlement terms comport with the *Cardonick* standards for review of settlements in tenure matters and are in the public interest. *See In re Cardonick*, 1990 *S.L.D.* 842, 846 decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983; *N.J.A.C.* 6A:3-5.6(a). The Commissioner, therefore, adopts the Initial Decision and Joint Request for Approval of Settlement Including Withdrawing of Tenure Charges as the final decision in this matter.*

* On page 1 of Exhibit A of the Joint Request, it is stated that "the aforesaid tenure charges and petition of appeal were consolidated for hearing" and that "hearing of the consolidated proceeding began on September 28, 1998***." The Commissioner notes, however, that there appears to be no information in the record indicating that the within tenure matter was consolidated with any other controverted matter filed pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.* or predecessor rules.

Accordingly, the matter is dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 14 2000

#300-00

300-00

C.S., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

STIPULATION OF DISMISSAL

OAL DKT. NO. EDU 11679-98

AGENCY DKT. NO. 466-10/98

C.S. ON BEHALF OF MINOR CHILD, M.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondents.

C.S. on behalf of **M.C.,** *pro se*

Joanne Butler, Esq., appearing for Respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: July 18, 2000 Decided: July 20, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 18, 1998 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was held on March 1, 2000 at the OAL, 185 Washington Street, Newark, New Jersey. The parties having agreed and stipulated, as indicated by their

signatures on the attached Stipulation of Dismissal, that this matter should be dismissed.

I have reviewed the record and the terms of the dismissal and I **FIND**:

1. The parties have voluntarily agreed to the dismissal as evidenced by their signatures or their representatives' signatures.

2. The dismissal fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 20, 2000
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

7/28/00
DATE

D Antanaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(201)539-1000
Attorneys for Respondent/Counterclaimant
Board of Education of the School District
Of South Orange and Maplewood

CILLANIE SAMEDI, on behalf of M.C. ,

Petitioner,

v

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 466-10/98
OAL DKT. NO. EDUOR 11679-98N

STIPULATION OF DISMISSAL AND MUTUAL DISMISSAL

Petitioner Cillanie Samedi, on behalf of M.C. and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, hereby stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. As a result of the foregoing, Petitioner Cillanie Samedi, on behalf of M.C. withdraw her Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Cillanie Samedi 06/30/00
CILLANIE SAMEDI Date

Attorney A. Dyson 7/6/00
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION Date

Document #: 416619/JLB

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P.O. Box 905
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(201)539-1000
Attorneys for Respondent/Counterclaimant
Board of Education of the School District
Of South Orange and Maplewood

CILLANIE SAMEDI, on behalf of M.C. ,

Petitioner,

v.

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 466-10/98
OAL DKT. NO. EDUOR 11679-98N

STIPULATION OF DISMISSAL AND MUTUAL DISMISSAL

Petitioner Cillanie Samedi, on behalf of M.C. and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. As a result of the foregoing, Petitioner Cillanie Samedi, on behalf of M.C. withdraw her Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Cillanie Samedi 06/30/00
CILLANIE SAMEDI Date

Nancy A. Dugan 7/6/00
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION Date

Document #: 416619/JLB

SCHENCK, PRICE, SMITH & KING, LLP

ATTORNEYS AT LAW

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JOANNE L. BUTLER

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July 14, 2000

Via Lawyers Service

Honorable Maria LaFiandra
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07101

RE: C.S. v. South Orange and Maplewood Board of Education
OAL DKT NO. EDUOR 11679-98N
Agency Ref. No. 466-10/98
Our File No. 12459-0111

Dear Judge LaFiandra:

Enclosed for filing, please find an original and two copies of executed Stipulation of Dismissal and Mutual Dismissal in connection with the above referenced matter. Please return "filed" copy to the undersigned in the self-addressed stamped envelope which is also enclosed.

Thank you for your cooperation in this regard.

Respectfully submitted,

SCHENCK, PRICE, SMITH & KING LLP

Joanne L. Butler, Esq.

JLB/cs
Enclosures
cc: Cillanie Samedi (w/o enclosure)
Document #: 418974/JLB

OAL DKT. NO. EDU 11679-98
AGENCY DKT. NO. 466-10/98

C.S., on behalf of minor child, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the Initial Decision and the Stipulation of Dismissal and Mutual Dismissal, has been reviewed.

Noting the absence of sufficient terms of the parties' settlement agreement so as to permit his full review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 14 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#301-00

301-00

CORDELL WISE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nontenured physical education teacher, challenged the nonrenewal of his contract for the 1999-2000 school year. The Board contended that petitioner failed to state a cause action upon which relief might be granted and that the petition was not timely filed.

The ALJ noted that the final action in a nonrenewal of contract case occurs when the teaching staff member receives a notice that his/her contract will not be renewed. The ALJ determined that petitioner was required to file within 90 days of the notice of nonrenewal (letter dated April 29, 1999 herein), not within 90 days of the exhaustion of other avenues and mechanisms (September 20, 1999 in this instance). (*Sorace; Riely; N.J.A.C.* 6:24-1.2(c)) The ALJ concluded that the petition was time-barred and it was, therefore, not necessary to reach the question of relief.

The Commissioner agreed with and adopted the conclusion of the ALJ that this matter was time-barred. Moreover, the Commissioner did not find that the factual circumstances presented herein constituted grounds for relaxation of the 90-day rule. Petition was dismissed.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DECISION ON MOTION

OAL DKT. NO. EDU 160-00

AGENCY DKT. NO. 337-11/99

CORDELL WISE,

Petitioner,

v.

BOARD OF EDUCATION

OF THE CITY OF TRENTON,

Respondent.

Mel Narol, Esq., for petitioner (Pellettieri, Rabstein and Altman, attorneys)

Thomas W. Sumners, Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: July 10, 2000 Decided: July 25, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Cordell Wise, petitioner, challenges nonrenewal of his contract of employment by the Trenton Board of Education, respondent. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. The respondent Board moved for summary judgment.

The petitioner, Cordell Wise, was employed for the 1998-99 school year as a physical education teacher by the Trenton Board of Education, respondent. He was assigned four days per week to the Rivera Elementary School and one day per week to the Grant School. At some time before April 26, 1999, the principal of the Rivera School informally told Wise that the principal would recommend to district administration that the Board not renew Wise's contract for the 1999-2000 school year. This appears to have happened. Before the event, however, Wise wrote a letter dated April 22, 1999 to the appropriate assistant superintendent in which he requested reasons the administration relied on when recommending that the Board not renew Wise's contract.

On April 26, 1999, the Board voted not to renew Wise's contract. A letter from the assistant superintendent to the petitioner states the reason for nonrenewal of the contract are "on file in the Division of Human Resources."

The petitioner states that, through counsel, he made several requests for a statement of reasons in writing. Wise also requested a meeting with the Board. On June 24, 1999, Wise's attorney received a letter from Assistant Superintendent Clarence L. Guthrie, Jr., giving reasons for the recommendation that Wise's contract not be renewed. After two further requests, he was afforded a closed session meeting with the Board on August 30, 1999. Two weeks passed and Wise heard nothing from the Board. His attorney wrote to the Board on September 13, 1999 requesting a response concerning the nonrenewal decision. On September 20, 1999, Wise's counsel received a letter from the Board's counsel stating, "Please be advised that on August 30, 1999, the Trenton Board of Education did not decide to renew the contract for Cordell Wise for the 1999-2000 school year."

Wise filed this petition with the Commissioner of Education on November 4, 1999. On November 12, the Board filed an answer. On November 30, 1999, the Director of the Bureau of Controversies and Disputes requested a letter brief or memorandum of law addressing the Board's affirmative defense that the petition fails to state a cause of action upon which relief may be granted. Wise's attorney submitted a brief on December 20, 1999 and the Board's counsel filed a response on January 4, 2000. The Board addressed its defense of failure to state a cause

cause of action upon which relief may be granted and its defense that the petition was not timely filed, both having been asserted in the Board's November 12, 1999 answer.

Because Wise had not been asked to address the timeliness issue, he now requested to do so. In the meantime, the matter was transmitted to the Office of Administrative Law. Upon receiving the file, I wrote to counsel advising that the case had been assigned to me, that the file contained a letter from the Bureau of Controversies and Disputes stating that the Board's affirmative defense would be threshold issues and that I would take a reply brief from each party on the timeliness issue because if the petition is not timely, the other points are moot.

The petitioner argues that *N.J.A.C.* 6:24-1.2(c) applies and provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The Board argues that once Wise received the April 29, 1999 letter, he had 90 days in which to file a petition of appeal. The petitioner insists that because he has the right to request a statement of reasons and to request an informal appearance before the Board to try to convince the Board to offer reemployment, *N.J.A.C.* 6:3-4.2, his 90 days does not begin to run until the Board notifies him of its final administration, in writing, within three days following the informal appearance. *N.J.A.C.* 6:4-4.2(c)(i). The petitioner cites *Stockton v. Board of Education of City of Trenton*, 210 *N.J. Super.* 150 (App. Div. 1986), in which the issue was when the petitioner appealed misplacement on the salary guide. Stockton, who was hired in March 1980, was placed at step 11 during his first year of employment with defendant. Pursuant to the negotiated bargaining agreement between the Board and the education association, Stockton should have been placed and paid at the same step level for the 1980-1981 school year; during the 1982-1983 school year, he was placed and paid at step 13. Stockton continued working for defendant with increases in his step level for each year, except for the 1983-1984 school year. At that point, Stockton was paid at a lower step level, and he complained to the personnel and business office.

His attorney also sent a letter to the New Jersey Education Association, with a copy of the letter to the Board.

In January 1984, Stockton sent a letter to the Board's assistant superintendent and business administrator regarding his salary, seeking the proper increase and back pay. Stockton received a letter from the assistant superintendent in February 1984, stating that Stockton's salary had been calculated properly. Stockton filed a petition with the Commissioner in April 1984.

The petition was transferred to the OAL, and an administrative law judge found that the petition was not timely filed and dismissed Stockton's petition. The Commissioner, however, found that Stockton's petition was timely filed, noting that the final order or decision from which he appealed was the February 1984 letter. The Commissioner set aside the ALJ's findings and remanded the matter to the OAL. On appeal, the State Board of Education reversed the Commissioner's rulings and reinstated the findings of the ALJ.

The Appellate Division reversed and remanded the matter to the Commissioner. *Id.* at 158. The court noted that a unilateral decision to correct a financial error made in September 1981 may have been a violation of the state law that deals with tenured teachers. *Id.* at 157. In addition, the court noted:

> Certainly receipt of a salary check for less of an increase than one anticipates cannot provide notice that a decision has been made to correct an error allegedly made three years before . . . More importantly, the reasoning of the ALJ and the majority of the State Board would open the floodgates to petitions to the commissioner before the dispute really evolved into a "controversy." . . . The issuance of a paycheck for the wrong amount is of course neither an order nor a ruling and must therefore fall within the category of "other action." We do not believe the incipient action of a school board employee to unilaterally attempt correction of a three year old error can be categorized as a "controversy or dispute" within the meaning of *N.J.A.C.* 6:24-1.2. *Perhaps upon discussion after the parties "reason together," one of the parties may accede to the position of the other and a controversy or dispute may never arise.* *Id.* at 157-158 (emphasis added).

I think *Stockton* is different from today's case. In *Stockton*, the "final action" did not occur when Stockton received the wrong amount in a paycheck, but when the parties could not agree on adjustment of Stockton's salary. By contrast, the final action in a nonrenewal of contract case occurs when the teaching staff member receives notice that his contract will not be renewed. In this case, that happened on or about April 25, 1999. This is analogous to *Sorace v. Board of Education of Morris School District*, OAL DKT. EDU 7427-90 (April 8, 1991), adopted, Comm'r of Ed. (May 20, 1991), in which the petition of appeal was dismissed because Sorace did not file her petition within 90 days of receipt of an April 24, 1990 letter from the Board Secretary advising that her contract would not be renewed for the 1990-91 school year. She filed on August 22, 1990. The judge held, and the Commissioner agreed, that the statutory and regulatory scheme does not contemplate "speculation" concerning what the Board might do subsequent to issuing the nonrenewal notice. Opportunity to appear before the board of education is established to assist a petitioner in the prosecution and early resolution of a dispute and not intended to be a condition precedent to perfecting the right to administrative review.

The decision refers to *Riely v. Hunterdon Central High Board of Education*, 173 *N.J. Super.* 109 (App. Div. 1980), perhaps the leading case interpreting the 90-day rule. In *Riely*, the teacher waited until the resolution of arbitration before filing an appeal with the Commissioner of Education. As in today's case, the petitioner had a responsibility to file within 90 days of notice. As in *Sorace*, there could be no reliance on what might happen. The petitioner was required to file within 90 days of the notice of nonrenewal, not within 90 days of the exhaustion of other avenues and mechanisms.

In light of the above, I **FIND** and **CONCLUDE** that Condell Wise did not timely file the present petition and the petition this is time barred.

It must be observed that the Trenton Board of Education was dilatory in providing Wise a statement of reasons for nonrenewal pursuant to *N.J.S.A.* 18A:27-3.2 and *Donaldson v. North Wildwood Board of Education*, 65 *N.J.* 236 (1974). This does not cure the defects in Wise's petition. It is a matter of import, however, and all boards of education are reminded that the statute is a command, not a suggestion. Similarly, the Board is cautioned to observe, evaluate and meet with nontenured teachers in accordance with *N.J.A.C.* 6:3-1.19.

It is not necessary to reach the question of whether there was relief the Commissioner of Education could afford in this case.

In accordance with the foregoing, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

JUL 25 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7/27/00
DATE

Kathi Antanaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

OAL DKT. NO. EDU 160-00
AGENCY DKT. NO. 337-11/99

CORDELL WISE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions aver that it is the Board's September 20, 1999 determination from which petitioner appeals, not the Board's April 29, 1999 letter, as determined by the Administrative Law Judge (ALJ), because September 20 is the date of the Board's *final* decision regarding the renewal of his employment. As to this, petitioner argues, *inter alia*, that the wording of *N.J.S.A.* 18A:27-10(b) does not use the word "final" regarding the written notice from the chief school administrator;[1] thus, his petition was timely filed pursuant to *N.J.A.C.* 6:24-1.2(c).[2] Petitioner further argues that the ALJ's interpretation of the statutes and regulations is incorrect, having failed to consider the doctrine of exhaustion and other policy issues.

[1] *N.J.S.A.* 18A:27-10 states, "On or before May 15 of each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
a. A written offer of contract for employment from the board of education***, or
b. A written notice from the chief school administrator that such employment will not be offered."

[2] It is noted for the record that at the time the petition was filed in this matter, *N.J.A.C.* 6:24-1.2(c) controlled. That regulation has since been recodified as *N.J.A.C.* 6A:3-1.3(d).

Moreover, petitioner insists that even if, for the sake of argument, his petition is time-barred, relaxation of the rules is appropriate because, from the facts presented in this matter, it is evident that the Board did not abide by the timelines set forth in applicable statutes and regulations. *N.J.S.A.* 18A:27-3.2; *N.J.A.C.* 6:3-4.2.

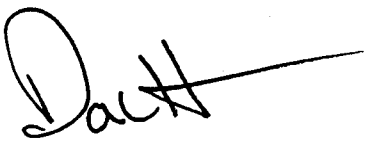
Upon careful and independent review of the record, the Commissioner agrees with and adopts the conclusion of the ALJ that this matter is time-barred pursuant to *N.J.A.C.* 6:24-1.2(c) for the reasons stated in the Initial Decision. As correctly determined by the ALJ, *Stockton, supra,* is not applicable to the instant matter. Rather, as determined in *Riely, supra,* and *Sorace, supra,* petitioner was required to file his petition within 90 days of the notice of his nonrenewal, not within 90 days of the exhaustion of other avenues and mechanisms. *See, also, Pacio v. Bd. of Ed. of Lakeland Regional High School District,* 1989 *S.L.D.* 2060, wherein the Lakeland Board voted on April 19, 1988 not to renew a nontenured teacher's contract. Notice of the board's action was sent on May 2, 1998. As in the instant matter, the petitioner in *Pacio,* also sought to convince the board to reverse its nonrenewal decision, which resulted in a decision by the Lakeland Board on May 24, 1988 to affirm its prior decision. In the Pacio matter, the Commissioner determined that May 2, 1988 was the date of notice to petitioner which triggered the 90-day filing timeline "because this date represents when [the petitioner] unquestionably received a written notice from the Board of its 'final determination' not to renew her contract.*** Further, the Commissioner would clarify for the record that requests to a board [of education] for reconsideration of its final determination do not toll the running of the 90-day rule.***" (at 2069) This principle of law was also applied in *LeMee v. Board of Education of the Village of Ridgewood, 1990 S.L.D.* 663, 672, which states, "Initially, the Commissioner notes that *Pacio, supra,* is clearly dispositive of the threshold question herein, in that it stands unequivocally for the proposition that in nonrenewal disputes the 90-day period for appealing to

the Commissioner is tolled from receipt of the nonrenewal notice, requests for reconsideration notwithstanding." *See, also, Portee v. Newark Board of Education.*, 94 *N.J.A.R.*2d (EDU) 381(1994).

Further, upon consideration of the parties' arguments regarding relaxation of the 90-day rule, the Commissioner concurs with the Board's position that there is nothing within this matter which justifies relaxation of the filing requirement set forth in *N.J.A.C.* 6:24-1.2(c). As stated in *Portee, supra*, the 90-day filing requirement has been strictly construed by the Commissioner, the State Board of Education and the Courts and, while the rule gives the Commissioner broad discretion, relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties. Upon review of the pleadings in this matter, the Commissioner does not find that the factual circumstances presented herein constitute such grounds for relaxation of the 90-day rule. *Pacio, supra; Sorace, supra; LeMee, supra.*

Accordingly, for the reasons stated in the Initial Decision and herein, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 15 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#302-00

302-00

M.J., on behalf of minor grandson, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning grandparent challenged Board's residency determination that petitioner's grandson, P.J., was not entitled to a free public education within the District.

The ALJ found that P.J. was living permanently with petitioner and petitioner has provided support for P.J. since he was three months old. Petitioner met the burden of demonstrating an economic hardship on behalf of the mother that required P.J. to live with him. The ALJ concluded that petitioner sustained his burden of proof and that no tuition was owed to the District.

The Commissioner adopted the findings and determination in Initial Decision as his own. The Commissioner ordered the Board to continue to admit P.J. into its public school system, free of charge, so long as there is no change in circumstances that would alter his entitlement.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11825-99

AGENCY DKT. NO. 303-10/99

M.J. ON BEHALF OF MINOR GRANDSON P.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

Ralph Neibart, Esq., appearing for Petitioner

Stephen J. Christiano, Esq., appearing for Respondent
(Christiano & Christiano, attorneys)

Record Closed: June 23, 2000 Decided: July 19, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging the determination of Respondent Board of Education (BOE) that his grandson is not a person who is kept in the home of another who is domiciled within the school district and is supported by such other person *gratis*, as if he were such other person's own child and, consequently is not entitled to a free public education within the District.

The District seeks reimbursement for cost of tuition during the pendency of this matter if P.J. is determined to be ineligible to attend West Orange public schools. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to -13 for determination as a contested case on November 18, 1999.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1) Petitioner, M.J. is a person domiciled within the school district of West Orange. He has lived there as a homeowner since 1977.

2) P.J. is Petitioner's grandson; P.J.'s father is Petitioner's son.

3) Petitioner has supported P.J. since he was three months old.

4) P.J. arrived in the United States from Haiti in May, 1999. He resided with his mother and four siblings for approximately one month after his arrival; he began living with his grandfather in July, 1999, although his grandfather has supported him all the time he has been in the United States.

5) M.J. sought to enroll P.J. in the West Orange school district in September 1999; P.J.'s enrollment in the district was denied on the basis that there was no showing that P.J.'s mother was not capable of supporting P.J. on account of economic or family hardship.

6) P.J.'s mother and four siblings live in a one bedroom apartment in Brooklyn. His mother is a factory worker who is paid minimum wages and who earned just under $11,000 last year. She qualified for Earned Income Credit on her federal income tax in 1999.

DISCUSSION AND CONCLUSION

Attendance in a public school shall be free to persons domiciled within the district or to persons over five and under 20 years of age who are kept in the home of another person, and are supported by such other person *gratis.* The other person shall file a sworn statement that he is domiciled within the district, he is supporting the child *gratis,* he will assume all personal obligations for the child relative to school requirements, and he intends to keep and support the child gratuitously for a longer time than merely through the school term. *N.J.S.A.* 18A:38-1a&b. Thus, there are several bases on which this case may be determined: is P.J. a domiciliary of West Orange and/or have the statutory criteria of the "affidavit law" been satisfied?

M.J., P.J.'s paternal grandfather, testified that his grandson intends to stay with him permanently. P.J. testified that he has lived with his grandfather since July, 1999; he is involved in school activities, he has a room of his own and a place to study at his grandfather's. Moreover, M.J. has provided support for P.J. since he was three months old. P.J. does not see his father at all and his mother would visit him once a year in Haiti. P.J. has never resided with his mother and half-siblings.

There is no question that Petitioner, M.J., has filed the sworn statement required by statute. Moreover, his grandson will be living with him permanently and M.J. has supported P.J. since he was three months old.

In addition to the foregoing statutory requirements, however, the child's parent or guardian must also file, with the secretary of the BOE, a sworn statement that she is not capable of supporting or providing case for the child due to economic or family hardship

and that the child is not residing in the district solely for the purpose of receiving a free public education within the district. *Id.*

In this case, it should be noted that the mother's sworn statement and supporting documentation was not provided until after this matter had been determined by the BOE. The information, however, does disclose that there are four other children, two older daughters who are attending or about to attend college in New York City, as well as two younger school age children. In addition to the basic facts set forth above, the testimony of M.J. and P.J. disclosed that the apartment in which the family resides in Brooklyn has one bedroom, one living room, a kitchen and a bathroom, the rent for which is $572 per month.

While he lived with his mother, P.J. slept on a couch in the living room, where his two older sisters also slept. The two young children, a boy and a girl six and 12 years of age, slept in the bedroom with the mother. P.J.'s 23 year old sister attends college and the 21 year old will begin college[1] in the fall. Both have part-time jobs and both contribute financially to the household.

Respondent asserts that this mother has not demonstrated the requisite family or economic hardship because the mother spends several hundred dollars once a year to visit family and friends in Haiti, she is able-bodied and able to support four other children. Moreover, Respondent contends that the fact that this family receives no public assistance is an indication that there is no economic hardship.[2]

Respondent fails to consider, however, that P.J. has never resided with his mother. It is clear from the testimony that his grandfather has always provided for him. The record is equally clear that P.J. only stayed with his mother and half-siblings for

[1] Neither P.J. or M.J. knew what college either of the two young women attended. It should be noted that the extensive, comprehensive City University of New York (CUNY) provides post secondary education at minimal tuition cost to residents of New York City.

[2] It is worth noting that under New Jersey regulations, this family may be entitled to public assistance. *N.J.A.C.* 10:90 *et seq.*

approximately one month after immigrating to the United States. He has resided with his grandfather ever since.

The Commissioner has recognized that, in interpreting a statute, he must look at the fundamental purpose for which it was enacted. The amendments to *N.J.S.A.* 18A:38-1 were intended to facilitate the removal of illegally enrolled students, either those living with a parent or guardian who claims to be domiciled within the district but who is not or those living with a person other than a parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. *J.B. o/b/o R.H. v. BOE of the Township of Ocean, Monmouth County*, 96 *N.J.A.R.* 2d (EDU) 628 (citations omitted).

In the case at bar, it is clear that M.J. has been and is supporting P.J. completely; it is equally clear that, under present circumstances, P.J.'s mother does not have the wherewithal to support her child. The argument that because the family is not receiving public assistance, there is no economic hardship specious – there are many families who are not receiving public assistance who suffer financial hardship for various reasons. Moreover, there is nothing in the statute which requires a parent to extend already over extended resources to exacerbate a situation which, on its face, has the indicia of both family and economic hardship. This mother lives in Brooklyn and works in New Jersey; a van picks her up for work; she earns minimum wage. The two older children contribute to the household, notwithstanding the fact that they attend college. Respondent seeks to imply that the mother should do more. That is not what the statute intends or requires.

Petitioner has met the burden of demonstrating an economic hardship. If Respondent wished to go behind the proofs to demonstrate that the hardship was either illusory or self-serving, Respondent could have investigated the circumstances. It did not. Accordingly, I **FIND** that an economic hardship requiring P.J. to live with his grandfather does exist.

Moreover, P.J. testified that while he was staying with his mother, he slept on a couch in the living room, where his then 20 and 22 year old sisters also slept; at the time P.J. was 15 and a half. I **FIND** that the necessity of this kind of sleeping arrangement constitutes a family hardship deriving from the economic hardship.

I **CONCLUDE**, therefore, that Petitioner has sustained the burden of proof in this matter. I further **CONCLUDE** that no tuition is owed to the district.

ORDER

It is hereby **ORDERED** that P.J. be permitted to attend the appropriate facility within the West Orange school district; it is further **ORDERED** that no tuition be paid by M.J. to the district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 19, 2000
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

7/28/00
DATE

D Antanatis
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Josefra Lopez

M.J.

P.J.

Exhibits:

P-1 Copy of 1999 Income Tax Return with attachments

R-1 Affidavit of Parent, February 20, 2000

R-2 Affidavit for Non-Resident Pupil Enrollment, September 16, 1999

R-3 Document of Calculation

R-4 Rent Receipt, November 1, 1999

R-5 Telephone Statement, October 27, 1999

OAL DKT. NO. EDU 11825-99
AGENCY DKT. NO. 303-10/99

M.J., on behalf of minor grandson,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto are duly noted, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner has demonstrated that his grandson, P.J., is entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit P.J. into its public school system, free of charge, so long as there is no change in circumstances that would alter his entitlement.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 15 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

297-00

EDU #10366-99
C # 297-00R
SB # 56-00

J.M. AND D.M., on behalf of minor child, J.L.M., :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, September 11, 2000

For the Petitioners-Appellants, J.M., pro se

For the Respondent-Respondent, McCarter & English (Brenda C. Liss, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 3, 2001

Date of mailing JAN 04 2001

301-00

EDU #160-00
C #301-00
SB # 58-00

CORDELL WISE,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 11, 2000

For the Petitioner-Appellant, Joseph F. Polino, Esq.

For the Respondent-Respondent, Sumners, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

The decision of the Commissioner of Education to dismiss the petition in this matter as untimely pursuant to N.J.A.C. 6:24-1.2(c) [now codified at N.J.A.C. 6A:3-1.3(d)] is affirmed for the reasons expressed therein.

We stress, in addition, that a district board has virtually unlimited discretion in hiring or renewing non-tenured teachers. Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982). "[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Id. at 456. Thus, where a non-tenured teacher challenges a district

JAN. 3, 2001

board's decision to terminate his employment on the grounds that the reasons provided by the board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. Guerriero v. Board of Education of the Borough of Glen Rock, decided by the State Board of Education, February 5, 1986, aff'd, Docket #A-3316-85T6 (App. Div. 1986).

January 3, 2001

Date of mailing JAN 04 2001

#303-00

303-00

C.M., on behalf of F.O.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDGEWATER, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination that F.O., a 20-year-old with multiple handicaps, was not entitled to tuition payment by the District for his residential placement.

The ALJ concluded that the Board violated *N.J.S.A.* 18A:38-1(b)2 when it failed to provide C.M. with a hearing prior to determining that she and F.O. were no longer domiciled in the District. The ALJ ordered the Board permanently restrained from determining the issue of petitioner's domicility without following the orderly procedure required by the statute.

The Commissioner adopted the findings and determination in Initial Decision as his own insofar as it directs that the Board is restrained from determining the domicile issue until it properly takes action pursuant to *N.J.S.A.* 18A:38-1(b)2. Commissioner forwarded a copy of this decision to the Office of Special Education, since the residency matter before the Commissioner was decided as part of a consolidated matter involving related special education issues on which the ALJ's decision is final.

September 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2189-00
AGENCY DKT. NO. 91-3/00
FINAL DECISION
OAL DKT. NO. EDS 2321-00
AGENCY DKT. NO. 00-3783
CONSOLIDATED

C.M., on behalf of F.O.,

Petitioner,

v.

EDGEWATER PARK TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

Herbert D. Hinkle, Esq., for petitioner

John T. Barbour Esq., for respondent

Record Closed: July 7, 2000

Decided: July 26, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

C.M. (petitioner) is the mother and court-declared legal guardian of C.M. C.M. is 20 years old with multiple handicaps. The Edgewater Park Township Board of Education (Board) found C.M. to be in need of special education. It determined to place C.M. in the Bancroft School as a residential pupil. During February 2000, the Board determined through its

superintendent of schools, that it would no longer pay F.O.'s tuition at Bancroft because C.M., it claimed, is no longer a resident of Edgewater Park Township. Petitioner filed a Verified Petition of Appeal under *N.J.S.A.* 18A:6-9 before the Commissioner of Education alleging the Board violated *N.J.S.A.* 18A: 46-22 and *N.J.A.C.* 6A: 14-7.7. Petitioner also filed a request for a due process hearing under the Individuals with Disabilities Education Act (IDEA), as amended, 20 *U.S.C.A.* 1401, et seq., and *N.J.S.A.* 18A:46-1, et seq. because the dispute centers on a pupil classified as being in need of special education whose rights were allegedly being violated.

The Commissioner of Education transferred the former matter March 21, 2000 to the Office of Administrative Law as a contested case under *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13. This case is docketed as OAL DKT. NO. EDU 2189-00. The initial decision, which follows, is subject to review by the Commissioner. The latter case was transferred March 29, 2000 to the Office of Administrative Law for final determination by an administrative law judge. 20 *U.S.C.A.* 1415; 34 *C.F.R.* 300.500, et seq. This case is docketed as OAL DKT. NO. EDS 2321-00. The decision, which follows, is a final administrative decision.

The undersigned administrative law judge was assigned both cases on or about May 15, 2000 which were consolidated, without objection, pursuant to *N.J.A.C.* 1:1-17.1 for purposes of hearing. Petitioner moved for summary decision on May 30, 2000 with supporting memorandum, exhibits, and affidavit. The Board filed a letter memorandum in opposition to the motion. The Board was granted the opportunity to present the testimony of the superintendent of schools on July 6, 2000 at the Office of Administrative Law, Mercerville in opposition to the motion. Petitioner's motion for summary decision is ready for determination.

FACTS

For purposes of the motion for summary decision and in the absence of a stipulation of fact, the facts are established by petitioner's affidavit and the superintendent's testimony. Additional facts are established by the exhibits referenced by the superintendent and as attached to the respective memoranda of the parties.

Petitioner's Affidavit

Petitioner's affidavit filed in support of her motion for summary decision reads as follows:

. . .

1. I am the mother of [F.O.]

2. For all times relevant herein, I have resided at [* * * Drive], Edgewater Park, New Jersey, 08010.

3. [F.O.] was born on December 29, 1979.

4. [F.O.] is multiply handicapped. He has mental retardation, an incurable eye disorder known as Stargardt's Disease, and a seizure disorder. I was appointed his guardian by the Superior Court of New Jersey, Burlington County, in January 1998.

5. [F.O.] has been determined to be in need of special education services by [the Board] for all times relevant herein.

6. [F.O.] attends the Bancroft School ("Bancroft") on a residential basis. Bancroft is located in Haddonfield, New Jersey. [F.O.] was placed at Bancroft by [the Board].

7. I received a letter dated February 14, 2000, from Walter J. Dold, Superintendent of Schools, stating that he had determined that [F.O.] was no longer eligible to receive a free appropriate education from Edgewater Park because I am no longer domiciled in Edgewater Park. Mr. Dold also had the District stop making tuition payments to Bancroft for January, February and March. Payments were later resumed.

8. On February 25, 2000, my attorney replied to Mr. Dold advising Mr. Dold that his action was illegal and that the District had failed to offer me the hearing mandated by N.J.S.A. 18A; 38-1 and to follow the special education procedures. The District did not respond to this letter and no hearing was ever offered to me. In fact, to the best of my knowledge, it was Mr. Dold and not Edgewater Park Board of Education who determined to terminate my son's placement because of residency.

9. The District has never provided notice of an intention to revise my son's Individualized Education program and in fact has not revised the IEP. The IEP still requires the District to provide residential placement at Bancroft.

> 10. I have read the letter brief, dated March 26, 2000, prepared by my attorney, and state that the facts contained therein are true.
>
> 11. In contesting my residency, the District failed to follow procedures and grant me the rights to which I am entitled.

There is no dispute between the parties that Edgewater Park Township has been the district responsible for F.O.'s education at Bancroft for the past two and one-half years.

Superintendent's Testimony and Referenced Exhibits

The superintendent testified that sometime in February 2000 he received a report that petitioner no longer lived at her stated Edgewater Park Township address. He telephoned petitioner at or about the same time he received the report, after February 11 but before February 14, and discussed the information he received with her. On February 14, 2000 the superintendent wrote petitioner the following letter:

> It has come to our attention that you are no longer residing at [* * * Drive] in Edgewater Park.
>
> We have sent Bancroft a letter informing them to contact you and obtain the current address where you are domiciled so that the proper district can be billed for [F.O.'s] residential placement.
>
> Edgewater Park will not be responsible for [F.O.'s] tuition until your residency can be verified.
>
> (Exhibit A, attached to Petitioner's memorandum).

The referenced letter the superintendent wrote the Bancroft School the same day reads as follows:

> It has come to my attention that [C.M.], guardian of [F.O.], a residential student in your facility, no longer resides at [* * * Drive], Edgewater Park, NJ. Until [C.M.] can prove residency in Edgewater Park, our district will **no longer be responsible** for [F.O.'s] tuition.

> Please check with [C.M.] to determine where she is presently domiciled so the appropriate district can be billed for [F.O.'s] residential placement. . . (Emphasis in original) (C-1, p.3).

Shortly after having sent Bancroft the letter advising of his determination, the superintendent received an invoice from Bancroft requesting payment of $6,707 for F.O.'s tuition and residential costs. The superintendent wrote another letter to Bancroft on February 23, 2000, which states as follows:

> Regarding your invoice #52053 - for [F.O.], please see a copy of my attached letter [I sent you on February 14, 2000].
>
> We still have received no proof of residency from [C.M.], [F.O.'s] legal guardian. Therefore, we continue to decline being the responsible district for payment of [F.O.'s] residential placement at Bancroft. . . (C-1, p.1).

The invoice Bancroft sent the Board for the tuition and residential placement costs was not paid. Despite the testimony of the superintendent that he received no reply from C.M. to his letter until the verified petition of appeal and the request for a due process hearing were filed with the Commissioner of Education on or about March 15, 2000, counsel for petitioner did write the superintendent on February 25, 2000 advising that "It is illegal [for] you to unilaterally terminate funding. I ask that you rescind your decision immediately." Counsel also advised that if he, the superintendent, believes his clients are not residents of Edgewater Park the procedures outlined in N.J.S.A. 18A:38-1 must be followed before F.O.'s exclusion from Bancroft may occur. (Exhibit B, attached to Petitioner's memorandum).

The superintendent brought the entire matter to the attention of the Board for the first time on February 28, 2000 when he reported he needed to discuss with it a matter involving ". . . a costly residential placement. . ." and his discovery that the guardian was not living in Edgewater Park. (Exhibits C, D, attached to Board's memorandum) There is no evidence showing what action, if any, the Board took at its February 28 meeting. It is reasonable to infer, however, that the Board approved the actions the superintendent had taken because the verified petition of appeal and the request for a due process hearing contesting the superintendent's action were filed after that meeting, on or about March 15, 2000.

In addition, the evidence shows the superintendent reported to the Board at its next regular meeting held March 27 as follows:

> As per the Board's directive at our last meeting [February 28 ?], I notified D.O.'s mother that due to the fact they were not residing in Edgewater Park, the Edgewater Park Board of Education would no longer be responsible for tuition. As per the law it is the parent's obligation to file with the commissioner of education to prove residency and that has been done [by the filing of the verified petition of appeal]. There is a twenty-one day time frame for an administrative law judge to review the case and give a decision. (Exhibit F, attached to the Board's memorandum).

The Board then adopted a motion by which it determined to seek back tuition from C.M. for the time it says she did not live in Edgewater.

The record shows that on March 24, 2000 counsel for petitioner wrote Board counsel:

. . .

> I have been notified that the District stopped paying for the child's [F.O.] placement at Bancroft NeuroHealth, Inc., and he is now about to be discharged.
>
> Under N.J.S.A. 18A:38-1 and under the stay-put provision of 20 U.S.C.A. §1415(e), your client must maintain the placement pending the outcome of a dispute.
>
> I ask that your client pay the arrearages to Bancroft immediately and abide by the law.
>
> . . .
>
> By copy of this letter I am advising [the New Jersey Department of Education] of this and asking that their agencies order compliance. (Exhibit E, attached to Petitioner's memorandum).

The Director of the New Jersey Department of Education's Office of Special Education Programs, Barbara Gantwerk, advised the superintendent in writing on March 31, 2000:

. . .

> We have been requested by counsel for C.M. [petitioner] to ensure that Edgewater Park Board of Education will continue to pay for F.O.'s placement at Bancroft NeuroHelath, Inc. During the pendency of the hearing on this matter. You advised [my office] that the district is aware of its responsibility and continues to support F.O.'s placement, and that F.O. is in no danger of having his program terminated. Additionally, you assured [my office] that your board secretary would cut a check to Bancroft and that you would contact the school to confirm F.O.'s continuing placement. . . . I am obligated to remind you that any failure on the part of the district to fulfill its responsibilities in this matter may result in further action by the Department of Education. (C-2).

The superintendent testified the invoice received from Bancroft in late February, which he initially refused to pay, was paid after having received the letter from Ms. Gantwerk. F.O. remains at Bancroft and the Board continues to pay the associated costs of his placement. The record also shows the Board, through counsel, advised petitioner on June 6, 2000 that, pursuant to *N.J.S.A.* 18A:38-1, it intended to hold a hearing June 26, 2000 regarding the superintendent's claim she is a nonresident. The hearing was not held as scheduled due to the filing of the motion for summary decision and the limited hearing for the superintendent to give testimony of the events as they occurred between February and May 2000.

ARGUMENTS OF THE PARTIES

Petitioner's Arguments

Petitioner argues there are no genuine issues of material fact in dispute and, as such, she is entitled to summary decision under *N.J.A.C.* 1:1-12.5 as a matter of state and federal law. Petitioner claims the Board violated the mandatory procedure under state law at *N.J.S.A.* 18A:38-1 of affording her a hearing before determining she is not domiciled within its district and that it is, therefore, not responsible for the financial burden of his placement. Petitioner further argues the conduct of the superintendent reaching a unilateral determination that she is a non-resident without prior knowledge of the Board is contrary to the statutory mandate of his being required to secure Board approval before the removal of a child on residency grounds occurs.

Petitioner argues under federal law that the Board's action through the superintendent on February 14, 2000 notifying her and the Bancroft School it no longer intended to pay residential placement and tuition constitutes a change placement and in F.O.'s Individualized Education Plan (IEP) for which she received no prior notice, nor was she provided an opportunity to participate in any meetings leading to the change. These actions, petitioner says, are contrary to the Individuals with Disabilities Education Act (IDEA), 42 *U.S.C.A.* §1401, et seq. and state implementing regulations at *N.J.A.C.* 6A:14-2.3 and 3.7.

Board's Arguments

The Board opposes summary decision on the grounds the material issue of fact, petitioner's residency, is not yet resolved. It argues petitioner failed to request it to afford her a hearing on the issue of residency and, it notes, petitioner has offered no proof of either her or F.O.'s residency in its district as she is required to provide at *N.J.S.A.* 18A:38-1.b(2). The Board notes that even the February 25, 2000 letter from petitioner's attorney fails to notify it of a failure to provide petitioner a hearing, and it also fails to request it to provide a hearing. Furthermore, the Board asserts once petitioner filed the Verified Petition of Appeal before the Commissioner of Education it was preempted from conducting a hearing.

Finally, the Board contends F.O.'s residential placement at Bancroft School has not been interrupted and, in fact it argues, it immediately reinstated the payment of tuition when the petition of appeal was filed and upon the request of petitioner's attorney. Consequently, the Board maintains it did not violate the provisions of the IDEA.

ANALYSIS

Initially, it is noted the evidence shows the Board did not resume payments to the Bancroft School for F.O. until ordered to do so by the Office of Special Education Programs of the New Jersey Department of Education on March 31, 2000.

N.J.S.A. 18A:38-1 provides in relevant part:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

b. . . .

(2) If the superintendent. . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district. . . the superintendent. . . may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district. . . the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. . .

The statute provides for an orderly procedure when the residency of one of its pupils, otherwise already enrolled in its schools and being provided a free, appropriate education by it, becomes an issue.

In this case, the Board has been responsible for F.O.'s education for the past two and one-half years. The Board's child study team recommended the placement of F.O. at the Bancroft School for an appropriate educational program under the IDEA. The Board and superintendent apparently were satisfied for the past two and one-half years that it was responsible for F.O.'s educational program under *N.J.S.A.* 18A:38-1 because there is no evidence in the record that during that time any question of petitioner's residency placement was raised.

When the superintendent unilaterally determined petitioner was not a resident of the district on or about February 14, 2000, he did so contrary to a plain reading of the statute. The superintendent did not 'apply' to the Board for the removal of F.O. Rather, the superintendent immediately notified petitioner and the Bancroft School of his determination that from that day forward the Board would not pay for F.O.'s placement at Bancroft. Nor did the superintendent advise petitioner she was entitled to a hearing before the Board prior to his determination being given effect. Indeed, on February 23, 2000 the superintendent refused to authorize the payment of Bancroft's invoice for service to F.O. based on his determination of the residency issue.

Despite the Board being advised on February 28, 2000 of the superintendent's actions in the matter, it took no action to notify petitioner she was entitled to a hearing before it. Rather, through a lack of action it continued the then existing *status quo* created by the superintendent which was that it was not responsible for the placement costs of F.O. at the Bancroft School. The record is absent of any 'order' from the Board to petitioner or to Bancroft that it determined to 'transfer or [remove F.O] from school.' as is required by the statute.

While the Board argues that it is petitioner's obligation to have requested a hearing before it on the superintendent's action, I do not read the statute in that manner. The statute is clear that before the Board may order the transfer or removal of a child from school, the parent or guardian is entitled to a hearing before it. It is the Board's obligation to provide a hearing for the parent or guardian before it reaches a decision to transfer or remove. But beyond that omission, there is no authority for a superintendent to unilaterally terminate funding of a special education pupil on residency grounds without first applying to the board for his/her removal from its enrollment. Had the Board provided petitioner a hearing, she may well have presented persuasive evidence of her district residency.

The Board's argument that F.O.'s program was not interrupted is without merit. When the superintendent sent petitioner and the Bancroft School notice that the Board was no longer responsible for F.O.'s placement costs, it constructively interrupted F.O.'s placement. Petitioner was put in the position of having to file legal action against the Board and the superintendent in order to vindicate her statutory right to a hearing before such an adverse decision was made against her interest and the interest of her son, F.O. That this is so is evidenced by the fact the Board learned of the superintendent's action on February 28 without it taking any corrective action to insure petitioner's rights were honored.

The Individuals with Disabilities Education Act ("IDEA"), 20 *U.S.C.* 1400-1485, requires that students with disabilities receive a free and appropriate public education, or specialized instruction and related services individually designed to provide educational benefit to the handicapped. *Hendrick Hudson Central School District v. Rowley*, 458 *U.S.* 176, 200 (1982). To this end, students in need of special education are to have an Individualized Education Program designed to meet their unique needs. 458 U.S. at 209. Once designed and implemented at a facility to provide the program, the IEP may not be changed without prior notification to the parent or guardian. N.J.A.C. 6A:14-2.3(i).

CONCLUSIONS

Petitioner's Motion for Summary Decision under State Law

A party is entitled to summary decision under *N.J.A.C.* 1:1-12.5 when the established facts show the moving party is entitled to judgment as a matter of law. In this case, the facts show the Board violated petitioner's rights under *N.J.S.A.* 18A:38-1 by failing to afford her a hearing prior to its determination her son, F.O., is not entitled to enrollment in its schools. The Edgewater Park Township Board of Education is permanently restrained from determining the issue of petitioner's domicility without following the orderly procedure required by the statute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 26, 2000
DATE

Daniel L. B. McKeown by RJ ALJ
DANIEL B. MCKEOWN, ALJ t/a

Receipt Acknowledged:

7/28/00
DATE

D Antanaitis (jb)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

Petitioner's Motion for Summary Decision under Federal Law

The facts show the Board violated the provisions of the Individuals with Disabilities Education Act by constructively causing a change in F.O.'s IEP without prior notification to petitioner and by constructively causing a change in placement without the prior consent of petitioner. The Edgewater Park Township Board of Education is permanently restrained from causing a change in F.O.'s IEP without prior notification to petitioner and from causing a change in his placement without the prior approval of petitioner.

This decision is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.510 (1999) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a district court of the United States. 20 *U.S.C.A.* § 1415(i)(2), 34 *C.F.R.* § 300.512 (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

July 26, 2000
DATE

Daniel B. McKeown by BJZ ALJ
DANIEL B. MCKEOWN, ALJ t/a

cc

DOCUMENTS IN EVIDENCE

C-1 Letter, February 23, 2000

C-2 Letter, March 31, 2000

OAL DKT. NO. EDU 2189-00
AGENCY DKT. NO. 91-3/00

C.M., on behalf of F.O.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDGEWATER, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge ((ALJ) that the Board violated *N.J.S.A.* 18A:38-1(b)2 when it failed to provide C.M. with a hearing prior to determining that she and F.O. were no longer domiciled in the District.[1]

Accordingly, the Initial Decision of the ALJ is adopted insofar as it directs that the Board is restrained from determining this domicile issue until it properly takes action pursuant to *N.J.S.A.* 18A:38-1(b)2. A copy of this decision shall be forwarded to the Office of Special Education.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 11 2000

Date of Mailing: SEP 15 2000

[1] This matter, after transmittal to the OAL, was consolidated with its companion case, EDS 2321-00, wherein petitioner asserted that the Board violated the Individuals with Disabilities Education Act. The ALJ's decision on that issue is final.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#304-00 E

304-00

P.H. AND P.H., on behalf of minor child, M.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, DAVID C. HESPE, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

September 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL ORDER FOR
EMERGENT RELIEF

OAL DKT. NO. EDU 7381-00
AGENCY DKT. NO.

M.C., a minor child,
by his parents P.H.,
Petitioners,
v.
BERGENFIELD BOARD OF EDUCATION, DAVID C. HESPE, Commissioner of Education of New Jersey and NEW JERSEY STATE BOARD OF EDUCATION,
Respondents.

Elizabeth Athos, Esq., for petitioner
(Education Law Center, attorneys)

Joanne L. Butler, Esq., for respondent Bergenfield Board of Education
(Schenck, Price, Smith & King, attorneys)

Thomas Russo, Deputy Attorney General, for the State respondents
(John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: August 18, 2000 Decided: August 18, 2000

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE **KEN R. SPRINGER**, ALJ:

Procedural History

This matter was initiated on July 31, 2000 by petitioner's motion for emergent relief, filed with the Commissioner of Education ("Commissioner"). In support of that motion, petitioner filed an affidavit of the child's mother P.H. and a legal brief with two attachments.[1] Respondent Bergenfield Board of Education filed its opposing papers on August 9, 2000. These papers included an affidavit of Superintendent of Schools Dr. John Galish with several attachments.[2] In addition, the Bergenfield Board of Education filed an affidavit of School Business Administrator/Board Secretary Thomas Egan, with an attached resolution from the Bergenfield Board of Education, adopted March 21, 2000. Bergenfield Board of Education also filed a legal brief. Thereafter, on August 11, 2000, the Deputy Attorney General filed a notice of cross-motion to dismiss the petition of appeal, together with a supporting letter brief. Finally, on August 18, 2000, petitioner filed a letter reply brief.

On August 18, 2000, the Office of Administrative Law held oral argument limited to petitioner's application for emergent relief. In its application, petitioner seeks an order directing respondents to assess M.C.'s alternative education needs and directing respondents to provide an alternative education program by the beginning of the 2000-2001 academic year. For the reasons which follow, most, but not all, of this relief will be granted.

---

[1] These attachments consist of: The *Safe Schools Initiative* published by the New Jersey Department of Education (July of 1994) and *A Guide and Application for Operation and Approval of High School Alternative Education Programs* published by the New Jersey Department of Education (November 1999).

[2] These attachments consist of: An excerpt from a student handbook; a copy of the Bergenfield Board of Education Policy No. 5114 entitled "Suspension and Expulsion;" photographs of various weapons; a hearing notice sent to the mother, dated February 8, 2000; a notice of adjourned hearing sent to the mother, dated March 2, 2000; a delinquency complaint filed in the Superior Court, Chancery Division, Family Part, Bergen County on January 28, 2000; and a letter of expulsion sent to the mother, dated March 22, 2000.

Findings of Fact

Based on the pleadings, the affidavits and the attached exhibits, the facts necessary for disposition of this motion are largely undisputed. For purposes of this preliminary proceeding, I **FIND:**

At the time of the incident, M.C. was a fifteen-year-old sophomore attending Bergenfield High School. On January 26, 2000, while on school property, M.C. slashed at another student with a box-cutter razor, causing a large gash in that student's coat. Questioned by school administrators shortly after the event, M.C. freely confessed that he had slashed the other child's coat. When asked to empty his pockets, he produced a small arsenal of weapons comprised of three razor-blade box cutters, one razor scraper and one Swiss army knife. He admitted using the longest razor-blade box cutter to slash the other student's clothes. Although the Law Center argues that he had no intent to cause bodily injury to the other student, it leaves out the essential detail that the other child happened to be wearing the coat at the time of the attack.

A Bergenfield police officer called to the scene verified the existence of the weapons in M.C.'s possession and charged him as a juvenile with aggravated assault in violation of *N.J.S.A.* 2C:12-1.b(2) and unlawful possession of weapons on school grounds in violation of *N.J.S.A.* 2C:39-5e(2). According to the verified petition, M.C. pled guilty to two disorderly persons offenses resulting from the charges and was placed on probation.

Meanwhile, school officials commenced disciplinary action against M.C. State statutes authorize local school districts to suspend or expel students for certain acts of misbehavior, including "conduct of such character as to constitute a continuing danger to the physical well being of other pupils." *N.J.S.A.* 18A:37-29(c). In addition, *N.J.S.A.* 18A:37-2.2 provides for immediate removal of any pupil who commits an assault with a weapon upon another student on school property, pending a hearing before the local board of education. Students removed under these conditions shall be placed in an alternative education program or, if such placement is unavailable, shall be provided

home instruction. However, the last sentence of the statute provides that, "Nothing herein shall be construed as prohibiting the expulsion of a pupil."

Board officials followed proper procedures for disciplining of students. Initially, school administrators suspended M.C. for ten school days, later extended for an additional four days until the next meeting of the Board. By notice dated February 8, 2000, the superintendent of schools notified petitioner's mother of the nature of the charge against her son, gave her access to written materials, offered the opportunity for a hearing before the Board, and set forth the possible penalties including expulsion. At the request of M.C.'s attorney, the hearing was postponed for one month. On March 13, 2000, the school sent a second notice advising the mother of the new hearing date. The Bergenfield Board of Education held a hearing on March 21, 2000. M.C. was represented by counsel at the hearing and afforded a full panoply of due-process rights, including the right to confront the witnesses against him, the right to cross-examine witnesses and the right to call witnesses in his defense.

As noted, M.C. essentially admitted the truth of the charges against him. Proofs show that M.C. has a record of prior school suspensions for offenses ranging from repeated tardiness to improper touching of a female student. After the hearing, the Board members deliberated in private and adopted a resolution expelling M.C. from the Bergenfield public school system. On the following day, the superintendent sent a confirming letter to M.C.'s parents advising them of the Board's decision.

Under applicable statutes, petitioner has the right to appeal the Board's decision to the Commissioner and ultimately to the State Board of Education. During the pendency of the disciplinary proceedings below, the District furnished M.C. with home instruction. Once the expulsion decision had been reached, however, the District discontinued all services and now takes the position that it is no longer responsible for delivery of his education.

Because home instruction terminated on March 22, 2000, M.C. was unable to complete his tenth-grade year. As a result, he did not earn credit for tenth grade and

must repeat that year. On June 19, 2000, M.C. turned sixteen years old. In four years, he will be twenty years old and no longer eligible to attend high school. Unless emergent relief is granted, he will lose any chance of earning a high school diploma. Significantly, M.C. is not seeking to return to Bergenfield High School in September. Rather, he is simply requesting that respondents assess his needs and provide him with an alternative education program.

Conclusions of Law

While there remains, of course, the necessity to explore more fully the factual issues in this case, the purpose of interlocutory relief is to maintain the status quo pending the plenary hearing. *Nat'l Starch & Chem Corp. v. Parker Chem Corp.*, 219 *N.J. Super.* 158, 163 (App. Div. 1987). *N.J.A.C.* 1:1-12.6(a) provides:

> Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon application of a party.

Although there exists no express statutory authority for the Commissioner to grant emergency relief, courts have consistently recognized the broad implied powers of the Commissioner to ensure that the constitutional mandate of a thorough and efficient education is implemented. *N.J. Const.* Art. VII, §4 ¶1. *In re Trenton Bd. of Educ.,* 186 *N.J.* 327 (1981); *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483 (1971). In addition, the Legislature has conferred upon the Commissioner general supervisory power over the public school system in this State. *N.J.S.A.* 18A:4-22 to –25.

The leading case in New Jersey outlining the factors to be considered is *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). There the New Jersey Supreme Court set forth a four-part test for determining whether to grant preliminary relief.

First, the moving party must demonstrate such relief is necessary to prevent irreparable injury.

Harm is generally considered irreparable if it cannot be redressed adequately by money damages. Petitioner has satisfied the requirement that he makes a showing of irreparable injury. If emergent relief is not granted, the continuity of his education will be interrupted and it may be that he will never have an opportunity to finish school. While there is some dispute as to whether he must graduate before his nineteenth or twentieth birthday, the fact remains that if his education is interrupted now it will be difficult for him to make up any lost time. Even if he is ultimately successful in this case, he will have lost an important part of his educational development which could affect his future livelihood and his ability for success in our society.

The next two factors may be grouped together for discussion.

Second, emergency relief shall be withheld when the legal right petitioner's claim is unsettled.

and

Third, the moving party must make a preliminary showing of a reasonable probability of ultimate success on the merits.

Mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. In other words, "the point of temporary relief is to maintain the parties in substantially the same condition[.]" 90 *N.J.* at 134. At the outset, it must be emphasized that the Bergenfield Board of Education acted within its statutory powers and did not deprive petitioner of any due-process rights. Certainly, the act which M.C. committed in a school setting threatened the physical safety and welfare of other students in the building and the school clearly had an obligation to act immediately to remove him from the premises.

Review of the facts shows that the Board was scrupulous in affording petitioner the full procedural rights to which he was entitled. All of the procedural protections elaborated in such landmark cases as *Goss v. Lopez*, 419 *U.S.* 565 (1975), *R.R. v. Bd. of Educ.*, 109 *N.J. Super.* 337 (Ch. Div. 1970) and *Tibbs v. Franklin Twp. Bd. of Educ.*, 114 *N.J. Super.* 287 (App. Div. 1970), *aff'd* 59 *N.J.* 506 (1971) were carefully followed. Petitioner was given notice of the charge against him and a full opportunity to be heard,

granted the right to confront and cross-examine adverse witnesses, and allowed to present evidence on own his behalf.

Similarly, petitioner has not made a showing of the substantial likelihood of success in his due-process and equal protection claims. As the Deputy Attorney General points out in his brief, there is nothing inherently unconstitutional about a legislative scheme which allows local school districts to handle disciplinary problems. An equal protection issue is not generated merely by an assertion that someone else was dealt with differently. *Traprock Indus. Inc. v. Kohl*, 63 *N.J.* 1, 5 (1973). The equal protection clause does not require that every person be dealt with identically. *Reiser v. Pension Comm'n,* 147 *N.J. Super* 168, 179-80 (Law Div. 1976). Equality in the constitutional sense does not mean mathematical exactitude. *Camden Cty. v. Pennsauken Sewerage Auth.*, 15 *N.J.* 456, 471 (1954). Boards of education must be able to impose discipline without having to examine whether another school district would find good cause to impose the same discipline for similar conduct. A classification is not adopted simply because there exists a possibility that local boards may reach different conclusions when determining whether to suspend or expel the student. Given the severity and nature of the misconduct in this case, the Bergenfield Board did not overreach its legitimate authority when it expelled M.C. from the regular public school system. Nevertheless, that does not necessarily end Bergenfield's legal obligation.

Stripped of the Law Center's due process and equal protection rhetoric, the central issue of this case is a student's legal entitlement to education after he has been lawfully expelled from his local school district. Art. VIII, §4, ¶1 of the New Jersey State Constitution mandates that, "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of *all* children in the State between the ages of five and eighteen years. (Emphasis added)." There is nothing in this clear language which qualifies the constitutional right or restricts its benefits to students who behave properly. Recently, in *State ex rel. G.S.*, 330 *N.J. Super.* 383 (Ch. Div.2000), the Chancery Division held that the State has a constitutional obligation to provide an education to a juvenile who has been adjudicated

delinquent and placed on probation, even though his local school district had expelled him. 330 *N.J. Super.* at 393. In a well-reasoned opinion, the Superior Court judge noted that, "Obviously then, the Legislature recognizes that expulsion of an adjudicated juvenile by his local school board does not sound the death knell for his constitutional right to receive an alternative education in another setting[.]" 330 *N.J. Super.* at 394. Consequently, the Court ordered that the student be placed in a school instruction program "that is grade-level appropriate for him, including an in-school program, in-home instruction program or other alternative education facility or program." *Ibid.* The Court left open to be decided later by the Commissioner whether the cost of such further education was to be borne by the State of New Jersey or the local school district. Since M.C. has also been adjudicated to be a juvenile offender, it would seem that the language of this case applies squarely to him. Surely the logic of the case would apply with even greater force to students who have been expelled from their local school district without being adjudicated as delinquents.

The New Jersey Supreme Court has recognized the efficacy of placing disruptive students in alternative educational settings. In *Abbot v. Burke,* 153 *N.J.* 480, 515 (1998) ("Abbot V"), the Court referred to research that "placing students in alternative education programs decreases disruption in the regular school and, for students in the programs, increases academic performance, fosters positive lifestyles and reduces aggressive behavior." Indeed, the Commissioner has encouraged removal of violent or disruptive students from the regular school environment and their placement in some alternative setting. Thus, in the *Safe School Initiative* published by the New Jersey State Department of Education in July 1994, the authors of the report noted;

> Alternative schools and programs provide removed students with an education outside the regular school or classroom site. Alternative education strategies can help to address the underlying social causes of students' violent or severely/chronically disruptive behavior. However, as proposed here, the primary purpose of the strategies is to meet students' educational needs in an alternative environment so that they can be removed from the regular environment more readily. [at 5]

In practice, it appears that school boards frequently provide alternative instruction voluntarily and, on occasion, that the Commissioner will require it. Illustratively, in *Scher v. Bd. of Educ. of West Orange*, 1968 *S.L.D.* 92, 97, the Commissioner observed:

> While [expulsion] may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation.

In numerous cases, expelled students have been provided with alternative instruction. *See, e.g., C.S. v. Bd. of Educ. of the Twp. of Piscataway*, 97 *N.J.A.R.*2d (Edu.) 573 (Comm'r May 19, 1997) ("The Commissioner finds that the Board failed to consider, investigate and effectively utilize the local- and county-based alternative education program options which are available."); *M.T.C. v. Bd. of Educ. of Lower Camden Cty. Reg. Sch. Dist. No. 1*, 1976 *S.L.D.* 274 ("Expulsion" until the end of the school year modified by the Commissioner to allow for either in-school or home instruction); *A.D. v. Bd. of Educ. of East Windsor Reg. Sch. Dist.,* 1974 *S.L.D.* 451, 456 (School board tempered petitioner's exclusion from the school's day program by allowing her to attend the evening program and reapply for admission to the day program); *T.K. v. Bd. of Educ. of the City of Millville,* 1980 *S.L.D.* 188, 192 (School board expelled petitioner from regular high school program, but offered him the opportunity to enroll in an evening program); *W.S. v. Bd. of Educ. of East Windsor Reg. Sch. Dist.,* 1973 *S.L.D.* 652, 656 (Commissioner upheld petitioner's expulsion for threatening the assistant principal, but added "[T]his board is urged to make every possible effort to effect placement for W.S. with another agency which may be able to assist him."); *Wharton v. Bd. of Educ. of the City of Bridgeton*, 1972 *S.L.D.* 23, 27 (Commissioner upheld board's expulsion decision, but directed "that the Board provide an offer of alternative instruction, either an evening school or at home, for either a

regular or an equivalency diploma."). Thus while the Commissioner has stopped short of mandating alternative instruction, he frequently has recognized its desirability for providing continuing educational services to students who have been removed from their home school for good cause.

Based on the clear language of the Chancery Division in the recent *J.S.* case and the long history of offering alternative education to expelled students, it is likely that petitioner will ultimately prevail on the merits of this case.

Fourth, there must be a balancing of the relative hardships in granting or denying relief.

If this were merely a clash between the right of society to protect the safety of students enrolled in public schools and the individual right of a student to receive his education, there can be no doubt that the interest of school safety would prevail. Any right to education is meaningless unless students feel safe in their schools. Effective learning cannot occur in an atmosphere of fear and intimidation.

Fortunately, those choices are not the only options available. Here there is already a program in place which will accomplish the dual governmental objectives of protecting other students from a violent student and, at the same time, allowing the expelled student to receive some educational benefit in an isolated setting. The only hardship to the Bergenfield Board of Education is whatever the cost may be to place M.C. in an alternative educational placement. Since Bergenfield is already under a constitutional mandate to educate its residents until the age of nineteen, this does not impose any extra burdens upon the local school district.

To the extent that there may be a remaining question as to whether the local school district or the State is responsible to fund the alternate educational program, that issue need not be resolved on an emergent basis. In New Jersey, the state has delegated primary responsibility for delivery of education to the local school district. Accordingly, Bergenfield must bear the initial expense, without prejudice to its right to seek reimbursement from the State at a later date.

Order

For the foregoing reasons, it is **ORDERED** that respondent Bergenfield Board of Education immediately assess M.C.'s alternative education needs.

It is further **ORDERED** that Bergenfield Board of Education identify an appropriate alternative education program for M.C.[3]

And it is also **ORDERED** that Bergenfield Board of Education place M.C. in an alternative education program no later than the first day of the 2000-2001 school year; provided, however, that in the event that such alternative educational placement is unavailable, Bergenfield Board of Education furnish home instruction to M.C. while continuing its best efforts to find a suitable alternative education placement.

I hereby **FILE** this oral initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended oral decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention:

[3] Contrary to Petitioner's request, such alternate program need not cover all core curriculum content standards. Instead, the content of the curriculum is best left to professional educators.

Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ken R. Springer's oral decision as edited by the administrative law judge for form and style, but not substance, rendered in the above matter on August 18, 2000.

DATED _____

_____
ANNA M. LEGGETT, Secretary

Aug. 25, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8/29/00
DATE

Debbie Antonaitis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

_____
DATE

_____
OFFICE OF ADMINISTRATIVE LAW

al

P.H. AND P.H., on behalf of minor child, M.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, DAVID C. HESPE, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

OAL DKT. NO. EDU 7381-00
AGENCY DKT. NO. 222-6/00

P.H. AND P.H., on behalf of minor child, M.C.,	:	
PETITIONERS,	:	
V.	:	
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, DAVID C. HESPE, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

The recommended Order issued by the Administrative Law Judge (ALJ) in this emergent matter, together with an audio cassette tape of the hearing conducted at the Office of Administrative Law (OAL) on August 18, 2000, has been reviewed. Petitioners and respondents were accorded until September 1, 2000 to file exceptions to the ALJ's recommended Order, and were given until September 5, 2000 to submit replies. All parties submitted timely exceptions and reply arguments.

Petitioners initially except to the ALJ's "conclusion that the Board was 'scrupulous in affording [M.C.] the full procedural rights to which he was entitled,'" and that "M.C. 'has not made a showing of the substantial likelihood of success in his due-process...claims.'" (Petitioner's Exceptions at 2, citing Initial Decision at 6-7) Here, petitioners assert that they neither argued nor briefed in their motion for emergent relief the procedural due

process issues identified by the ALJ.[1] Rather, petitioners alleged due process and fundamental fairness violations based, *inter alia*, on the Board's overbroad zero tolerance policy, its failure to provide written notification of its zero tolerance policy, and on its failure to provide written notification of the reasons for its expulsion decision and the time limit for appealing that decision. (Petitioner's Exceptions at 2)

Petitioners additionally except to the ALJ's conclusion that M.C. has not shown that he is likely to succeed on the merits of his equal protection claim. In this connection, petitioners underscore that respondents have permitted the classification of students into two groups: those who receive alternative education after expulsion and those whose education is terminated by expulsion. Yet, as petitioners note, respondents have provided no justification for denying the fundamental right to public education to some children, while providing it to others who are similarly situated. (*Id.* at 3) In opposition, the Board contends that "[t]he mere fact that some boards of education offer alternative education programs and others do not does not result in an equal protection violation." (Board's Reply at 2) Accepting petitioners' argument, the Board reasons, would leave local boards without the ability to impose any degree of discipline if that imposition results in one student being treated differently from another. (*Id.*)

Petitioners next object to that portion of the ALJ's Order wherein he determines that an appropriate alternative education placement for M.C. need not cover all core curriculum content standards, essentially contending that the program must meet these standards if it is to be a meaningful one, consistent with M.C.'s right to a thorough and efficient education. (Petitioners' Exceptions at 3-4) Lastly, to the extent the ALJ has ordered that Bergenfield is

[1] The ALJ's recommended Order indicates that notice was provided to petitioners of the charge against M.C., and that he was given a full opportunity to be heard, the right to confront and cross-examine witnesses and to present evidence on his own behalf. (Initial Decision at 6-7)

responsible for M.C.'s alternative education program, petitioners contend that the ALJ erred in failing to address the State's obligations in this regard.

The Board excepts to the ALJ's conclusions of law, contending that petitioners have not satisfied the standard for granting emergent relief. That is, the Board avers that petitioners have not demonstrated that M.C. will suffer irreparable harm absent the grant of relief requested. Instead, the Board contends that M.C. has options for continuing his education in that he may enroll in a neighboring local public school district as an affidavit pupil under *N.J.S.A.* 18A:38-1b(1), may seek enrollment in a neighboring school district, with or without tuition payment, pursuant to *N.J.S.A.* 18A:38-3, and may be home schooled or enrolled in an adult high school program pursuant to *N.J.A.C.* 6:30-1.2. (Board's Exceptions at 2) Conversely, petitioners reject the notion that M.C. has viable options for continuing his education. That is, M.C. cannot enroll in a neighboring district as an affidavit pupil pursuant to *N.J.S.A.* 18A:38-1b(1) since he could not meet the statutory requirement that he reside with a resident of the district for a purpose other than receiving an education in the district. (Petitioners' Reply at 2, footnote 2)

> Further [petitioners argue] based on P.H.'s sworn statement that she is "currently unemployed while undergoing treatment for cancer," that her family "is just scraping by financially on [her] husband's income," and that she and her husband cannot afford to pay tuition for M.C., it is clear that they cannot enroll M.C. in another school. *** To suggest that P.H. could home school M.C. is also equally implausible, since home schooling a high school student requires a mastery of content in multiple areas that few parents can claim to possess at a level sufficient to provide high school level instruction***. Finally, while adult high schools and GED programs may be alternative ways to obtain a high school diploma, there can be little doubt that a student whose secondary education is involuntarily terminated and who is compelled to take the GED instead is irreparably harmed.***" (*Id.* at 2-3, footnote 2)

As to the ALJ's conclusion that petitioners have demonstrated a probability of success on the merits of their claim to M.C.'s entitlement to alternative education after his

expulsion, the Board argues that the ALJ's conclusion ignores prior decisions affirming that a pupil's constitutional right to attend public schools, free of charge, is not unbridled. Further, the Board contends that to the extent *G.S., supra*, can be relied upon as support for the ALJ's conclusion that M.C. is entitled to education in an alternative setting after his expulsion, that case placed such obligation *on the State*, not on the local board. (Board's Exceptions at 3) In this regard, the Board posits that neither State statute nor regulation mandates the provision of an alternative education program following a pupil's expulsion. To the contrary, referring to *N.J.S.A.* 18A:37-2.2, a statute adopted in 1995 addressing the discipline of students who commit assaults with a weapon, the Board argues:

> The statute does not provide that there must be an alternative education program provided after the hearing. In fact, the statute specifically allows a board to expel a pupil. Had the Legislature wanted to require a local board of education to provide education following an expulsion, it would have so indicated. *** The only enumerated right to an alternative educational program under the law is where the student is removed because of the assault and awaiting a hearing before the board of education. The right to an alternative education program does not also attach after the imposition of expulsion. If such were the intention of the Legislature, surely the last sentence of the statute would have been akin to the following: "*Nothing herein shall be construed as prohibiting the expulsion of a pupil, provided that an alternative educational program is made available to the expelled pupil.*" But, the statute does not say that.*** (emphasis in text) (*Id.* at 4)

The Board construes the ALJ's Order as erroneously placing a continued obligation to provide an alternative education program to an expelled student during the pendency of the student's appeal before the Commissioner, absent any statute or regulation requiring the same.

Finally, the Board argues that the ALJ improperly found that the balancing of hardships tips in petitioners' favor. In this analysis, the Board stresses its obligation to protect the safety of all its students, which obligation cannot be abridged in favor of educating one

violent student. "Boards of education must not be stripped of their ability to maintain safety and order within the schools, and must be permitted to exercise their statutory right to expel a dangerous student." (*Id.* at 5) Petitioners, however, find the Board's argument to be "beside the point," since they are not seeking to undermine the right of all students to safety and order by having M.C. return to Bergenfield High School. Rather, they maintain that an alternative school environment is a suitable setting for violent or disruptive students. (Petitioners' Reply at 4)

The State respondents except to the ALJ's holding, although not reflected in his emergent Order, not to consider their Motion to Dismiss the Petition of Appeal within the context of the emergent hearing. Additionally, the State objects to the ALJ's grant of partial emergent relief to petitioners, since they have not met the legal standard for such relief.

Upon careful and independent review of the parties' arguments pursuant to petitioners' application for emergent relief, the Commissioner determines to grant partial relief, as specified herein. Initially, the Commissioner concurs with the ALJ that, notwithstanding the variety of relief sought by petitioners in their Petition of Appeal, the issue most amenable to emergent remedy is petitioners' request to have M.C. placed in an alternative education program subsequent to his expulsion.[2] The standard for granting such emergent relief is established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6.

First, the Commissioner has considered the harm to petitioners and the relative hardship to the parties in granting or denying relief. In so doing, he recognizes that boards of education, including those governing alternative schools, have an obligation to provide safe learning environments, and he notes, with great concern, that M.C. undisputedly assaulted another student using a box-cutter razor and, thereafter, was found to be in possession of "a small

[2] In so finding, the Commissioner affirms the ALJ's decision to defer a ruling on the State's Motion to Dismiss.

arsenal of weapons," including three razor-blade box cutters, one razor scraper and one Swiss Army knife. (Initial Decision at 3) However, the Commissioner is likewise cognizant that M.C.'s education, absent some grant of interim relief, will not continue during the pendency of proceedings on the merits and that such interruption could result in irreparable harm to M.C should petitioners ultimately prevail in their claims.

The Commissioner has also considered petitioners' likelihood of success on the merits of their claim together with their burden to demonstrate that the legal right underlying the claim is settled. Initially, the Commissioner finds that the right to a free public education in an alternative setting *after* a student's lawful expulsion from the regular education program cannot at this point be considered a matter of fully settled law. Notwithstanding that the present matter appears in some respects similar to *G.S., supra, N.J.S.A.* 18A:37-2.2, which was inapplicable and therefore not considered in the *G.S.* decision, clearly directs a local board to seek an alternative placement when the student has, as M.C. did, committed an assault upon a teacher, administrator, board member, other employee of the board, or another student, with a weapon, on school property, on a school bus or at a school-sponsored function. However, the statute goes on to clarify that this obligation in no way prohibits expulsion:

> Any student that is removed from the regular education program pursuant to this section shall be placed in an alternative education program. If placement in an alternative education program is not available, the pupil shall be provided home instruction or other suitable facilities and programs until placement is available. *** *Nothing herein shall be construed as prohibiting expulsion of a pupil. N.J.S.A.* 18A:37-2.2. (emphasis supplied)

Nonetheless, for purposes of the instant application, the Commissioner concurs that the Court's holding in *G.S., supra*, as relied upon by petitioners, provides a sufficient basis for grant of some form of interim relief while the matter is more fully litigated.

The Commissioner does not, however, concur that the appropriate grant of interim relief is placement in an alternative educational setting. Rather, the Commissioner finds that, under the totality of circumstances in this matter, re-instituting home instruction to M.C., as had been provided prior to his expulsion, appropriately recognizes the weight of *G.S., supra*, for purposes of a temporary application and balances the interests of petitioners and the Board.

Accordingly, without reaching the ALJ's factfinding and conclusions on the merits, since definitive holdings in these regards more appropriately await plenary proceedings, the Commissioner concurs that relief is appropriate, but modifies the relief recommended by the ALJ and directs the Board to immediately place M.C. in a program of home instruction until this matter is fully litigated and decided. The matter shall continue at the OAL for further proceedings on the merits of petitioners' claims.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 15 2000

Date of Mailing: SEP 15 2000

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

305-00

MELVIN HOLSTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff member alleged the District improperly withheld his salary increment for the 1998-99 school year based on evaluations of his teaching performance wherein he received unsatisfactory ratings.

The ALJ determined that the District had demonstrated that petitioner, among other things, was deficient in assessing needs evaluating the progress of students, did not employ effective organization and planning and was in need of improvement in addressing affective domain. The ALJ determined that the withholding of petitioner's increment was appropriate and so concluded in her recommended decision.

The Commissioner adopted findings and determination in Initial Decision as his own. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3818-99
AGENCY DKT. NO. 399-9/98

MELVIN HOLSTON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY,
Respondent,

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: June 15, 2000 Decided: July 25, 2000

BEFORE **ELINOR R. REINER**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold his salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education on August 31, 1998. Count 12 of the multi-count petition alleged the wrongful withholding of the increment of petitioner, Melvin Holston. On September 21, 1998, the District filed its answer. Subsequently, on October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Holston case, designated OAL Dkt. No. EDU 3818-99, on March 6, 2000. Witnesses and exhibits are listed in the attached appendix.

FINDINGS OF FACT

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the State-Operated School District submitted a detailed review of the testimony and proposed findings of fact, which I largely have adopted herein.

1. Petitioner was assigned to teach art at two public schools in Jersey City during most of the 1997-98 school year. One of his assigned schools was Public School (P.S.) No. 15, where he taught art to various grades two days per week. In April 1998 his schedule was revised. He was assigned to teach art at a third school and assigned to P.S. 15 for only one day a week.

2. Holston is presently working at P.S. 23. He has a bachelor of arts degree in art education and is a professional artist. He has been working in the Jersey City School District for twenty-four years.

3. The petitioner's teaching performance at P.S. 15 was formally evaluated on two different occasions during the 1997-98 school year by Annie Graham, then principal of P.S. 15. Ms. Graham has been employed by the District for twenty-one years and is presently principal of P.S. 12. Ms. Graham found petitioner's performance to be less than satisfactory on both occasions.

4. The first formal observation by Principal Graham was conducted on January 16, 1998, from 9:50 a.m. to 10:40 a.m. when petitioner was teaching brush strokes and colors to seventh- or eighth-grade students.

5. After the observation, Ms. Graham prepared a written report on a standard form used by the District. The form lists five performance factors. 1 - demonstrates proficiency in subject matter; 2 - assesses needs and evaluates progress of pupils; 3 - employs effective organization and planning; 4 - utilizes effective instructional techniques; and 5 - addresses affective domain.

6. Ms. Graham found petitioner to be unsatisfactory in the area of assessing needs and evaluating the progress of pupils, because of his lack of basic student records. Petitioner had a roll book, which had no recorded grades in it for any child in any of his twelve classes. Since petitioner had submitted grades to the students' homeroom teachers for the prior two marking periods, the basis for those grades is undocumented and unascertainable. Petitioner did not have seating charts or records of student attendance and did not take attendance during Ms. Graham's observation. He did not have a folder for each student, and the folders that he did have available contained papers without any organization.

7. Ms. Graham also found petitioner's performance to be unsatisfactory in the area of organization and planning. Proper planning requires the assessment of the needs of the students. Petitioner had made no notations at all regarding the progress of the students.

8. Ms. Graham gave petitioner a rating of "improvement needed" in the area of affective domain, because petitioner did not call the students by their names and did not seem to have made any connection with them.

9. Ms. Graham prepared a written report of her observation of January 16, 1998 (R-1) and reviewed the report in detail with petitioner at a conference on January 29, 1998. The written report specifically advised petitioner to "Create portfolios. Take attendance. Make attendance cards or note attendance in your roll book daily. All skills covered for the year are to be recorded in your roll book with a grade provided assessing students' progress."

10. Ms. Graham explained to petitioner how to set up a roll book and talked about using name tags for the students so that he could identify the students in his classes.

11. Ms. Graham had previously spoken to petitioner on several occasions, in his classroom and in her office, primarily about disciplinary concerns, but also about organization and management. Ms. Graham had also previously informed the teachers at staff meetings of what would be expected in formal evaluations, and had distributed a handbook containing that information.

12. Petitioner read Ms. Graham's report but refused to sign it.

13. Ms. Graham conducted a second formal observation of petitioner's classroom performance on March 13, 1998, from 12:31 p.m. until 1:15 p.m. Ms. Graham prepared a written report (R-3), in which she rated petitioner's performance as less than satisfactory on three performance factors.

14. Ms. Graham gave petitioner an unsatisfactory rating in the area of assessing needs and evaluating the progress of students. She found that petitioner did not have a seating chart in his plan book, did not have any grades at all in his roll book and did not have folders for each student. Ms. Graham saw stacks and stacks of papers in the classroom. The papers were not separated by student

and had no grades on either side. Petitioner did not take attendance nor was the students' attendance recorded in any book.

15. Petitioner had no writings from the students, even though writing had been stressed as a particular need at P.S. 15 because of the students' low writing test scores.

16. Ms. Graham rated petitioner's performance as needing improvement in the area of planning and organization. Petitioner had a plan book, but the plan book was undated, so it was difficult to determine whether the lesson being taught by petitioner was the lesson that had actually been planned for that day.

17. On the day of Ms. Graham's observation, the students were asked to create a futuristic design of a city. Petitioner's failure to give examples, such as by modeling a design or by having film strips, videos or slides with such examples, was not good planning. The failure to give models or examples of potential futuristic designs caused uncertainty for the students regarding what was expected of them.

18. Ms. Graham rated petitioner's performance as needing improvement in the area of affective domain, because petitioner had not properly prepared for the lesson and because he still could not identify the students in his class. He also did not keep his classroom neat and organized.

19. Ms. Graham held a post-observation conference with petitioner on March 26, 1998, and went through each indicator on the evaluation report. Petitioner refused to sign the report.

20. Ms. Graham did not conduct another observation.

21. Ms. Graham recommended the withholding of petitioner's increment and made the recommendation on a list that she submitted to the Department of Human Resources in March or April 1998.

22. Petitioner acknowledges that the class first observed by Ms. Graham was his problem class. He was so stressed out by the class that he threatened to resign. He subsequently was transferred and remained in P.S. 15 only on Fridays for his special education class.

23. Petitioner had some students with behavioral problems. Some students would not tell him their names. When Ms. Graham came in to do her observation, the class calmed down; it was rowdy again when she left.

24. After the first evaluation, petitioner gave written assignments to the students, which they refused to do. He wrote and called parents and gave students second chances, but they still refused to do the assignments.

25. Petitioner has never previously been denied an increment, nor was he ever advised by Ms. Graham that his increment was in jeopardy.

26. On March 10, 1998, petitioner was evaluated by Daniel R. Cupo, principal of P.S. 23, who gave him all satisfactory ratings (R-2). In an Instructional Annual Written Performance Report dated May 20, 1998, Mr. Cupo recommended that petitioner's increment be granted (R-5).

27. On June 15, 1998, Betty Crook, principal of P.S. 1, evaluated petitioner, with results similar to those of Mr. Cupo (R-6).

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Holston's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary

increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Petitioner admitted that he was behind in grading his students when Ms. Graham formally observed his class on January 16, 1998, and that he failed to take attendance on March 13, 1998 (R-4). He also admitted that he failed to call the students by name during the class and that he was having a discipline problem in the class. However, the sum and substance of petitioner's testimony was to the effect that he was doing the best he could with a difficult situation. He contends that any alleged deficiency in his teaching skill was the result of an unruly and uncontrollable class. He contends that the District has penalized him for the incorrigible behavior of the students.

Petitioner further alleged that there was a serious question as to the motives and credibility of Ms. Graham, who had a personal predilection against him. Petitioner

alleges that the criterion requirements were not clear to Ms. Graham and were not made clear to him. She negatively critiqued him, not based on objective District-wide criteria, but based on her own personal views of what an art teacher should do. If the District had requirements as to how roll books should be maintained, he was not made aware of them.

Petitioner asserts that the District failed to set forth the guidelines it uses to grant or deny increments. Without guidelines, neither a teacher nor the District nor the Commissioner can properly ascertain the reasons for an increment denial. More to the point, petitioner asserts that if a teacher receives good evaluations from at least two evaluators and in fact is recommended for an increment, his increment should not be denied based upon the opinion of a third evaluator.

Petitioner failed to provide evidence to support these allegations. Specifically, he failed to present any evidence to support his claim that Ms. Graham had a personal predilection against him. He failed to demonstrate that she negatively critiqued him based upon her own personal views of what an art teacher should do. In fact, her critique of him was substantially based upon effective District-wide requirements regarding taking attendance, maintaining grade books, maintaining student folders, requiring writings from the students, updating plan books, and providing models. In addition, petitioner failed to demonstrate that he was not properly advised of these requirements. In fact, it is clear that he was so advised by Ms. Graham prior to the observations and after each evaluation. Moreover, his argument that the problem was due to an unruly class also did not serve him well. Even if one could argue that the class first observed by Ms. Graham caused petitioner some difficulty, it is clear that Ms. Graham observed a different class when she conducted her second evaluation.

In sum, petitioner's effort to blame his failure to comply with the requirements of his job either on the principals who conducted the evaluations or other factors was unsuccessful. Petitioner failed to prove that it was unreasonable for Ms. Graham, who observed and evaluated his teaching performance twice, to conclude that his performance was less than satisfactory.

Of import, his assertions were contrary to the testimony and evidence adduced by respondent's witness. Petitioner was evaluated on two occasions by an independent and experienced evaluator. Ms. Graham's testimony, as substantiated by her reports, was clear, specific, credible and worthy of belief. It demonstrated that petitioner properly received unsatisfactory ratings in assesses needs and evaluates progress of pupils and employs effective organization and planning, and was in need of improvement in addressing affective domain. Clearly, the evidence demonstrated that petitioner's teaching performance on the two occasions on which he was observed by Ms. Graham was actually less than satisfactory in the performance categories set forth above. Moreover, Ms. Graham attempted to advise petitioner of what was expected of him and make suggestions for his improvement. Petitioner failed to improve significantly by the second evaluation so that he could receive a satisfactory evaluation.

While it is true that petitioner was evaluated by other administrators at the two other schools in which he taught and his performance was found to be satisfactory by those administrators, this does not demonstrate that the Board's decision to withhold his salary increment was arbitrary, capricious or unreasonable. Petitioner taught at three different schools. While his teaching at two of the schools may have been satisfactory, his performance at P.S. 15 was sufficiently unsatisfactory for the District to withhold his increment. His service is to the District and his performance must be evaluated District-wide. Simply because he received good evaluations from at least two evaluators does not mean that his increment cannot be denied if his service to one of the schools was unsatisfactory. Under the circumstances, I **CONCLUDE** that petitioner has not proven that the Board's decision to withhold his salary increment was arbitrary, capricious or unreasonable.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner is **DENIED** and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2000
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG - 4 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

List of Witnesses

For Petitioner:

Melvin Holston

For Respondent:

Annie Graham

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Instructional Staff Observation Report for Mel Holston, dated January 16, 1998

R-2 Instructional Staff Observation Report for Melvin Holston dated March 10, 1998

R-3 Instructional Staff Observation Report for Melvin Holston, dated March 13, 1998

R-4 Letter from Melvin Holston to To Whom It May Concern dated March 27, 1998 (3 pages)

R-5 Instructional Annual Written Performance Report of Melvin, dated May 20, 1998

R-6 Instructional Staff Observation Report of Melvin Holston, dated June 15, 1998

R-7 Letter to Melvin Holston from Judi Granick dated June 1, 1998

R-8 Letter to Mr. Holston from Judi Granick dated April 2, 1998

OAL DKT. NO. EDU 3818-99
AGENCY DKT. NO. 399-8/98

MELVIN HOLSTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, which included a transcript of the hearing conducted at the OAL on March 6, 2000, the Commissioner determines to affirm the Initial Decision. As noted therein, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. *Kopera, supra.* Notwithstanding petitioner's arguments to the contrary, the Commissioner finds no basis, either in the transcript or in the record as a whole, to challenge the credibility determinations of the Administrative Law Judge, who had the benefit of observing the witnesses firsthand, or to disturb her findings and conclusions. As such, the Commissioner concurs that petitioner has failed to meet his burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 15 2000

Date of Mailing: SEP 15 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

306-00

C.C., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

September 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
PARTIAL SUMMARY
DECISION
OAL DKT. NO. EDU 4036-00
AGENCY DKT. NO. 161-5/00

C.C. ON BEHALF OF HER
MINOR SON, R.S..

Petitioner,

v.

BOARD OF EDUCATION OF
THE BOROUGH OF RIVERTON,

Respondent.

C.C., petitioner, *pro se*

Frank P. Cavallo, Jr., Esq., on behalf of the respondent (Parker, McCay & Criscuolo, P.A., attorneys)

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed with the Commissioner of Education (Commissioner) on May 16, 2000. The petitioner alleged a number of inappropriate actions by employees of the Board, and also asked for emergent relief to stay the proposed detention of R.S., which C.C., his mother, alleges was improperly imposed.

The matter was transmitted on May 16, 2000, to the Office of Administrative Law, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, prior to the filing of any papers by the respondent, since the petitioner was requesting emergency relief.

The oral argument as to the motion for emergency relief took place on June 1, 2000. After considering the arguments of the parties, I denied the request for emergency relief by order dated June 2, 2000. The hearing as to the petition is scheduled for September 18, 2000.

On April 25, 2000, I received a motion for partial summary decision from Frank P. Cavallo, Jr., Esq., on behalf of the respondent. By this motion, Mr. Cavallo stated that the petition contains allegations of inappropriate actions which occurred in May 1998, December 1999 and January 2000, and that these allegations should be dismissed as being filed out-of-time pursuant to *N.J.S.A.* 6:24-1.2. This statute provides that a party has 90 days from the date of notice of alleged inappropriate action to file a petition with the Commissioner (90-day rule).

The respondent argued that summary decision as to the May 1998, December 1999 and January 2000 alleged incidents is appropriate since there are no factual disputes as to the dates of the incidents and the date of the filing of the petition, and the respondent is entitled to prevail as a matter of law. See, *N.J.A.C.* 1:1-12.5(b).

Mr. Cavallo argued that the courts have upheld the reasonableness of the 90 day rule, have held that the 90 day rule is mandatory and that the 90 day period starts from the notice of the alleged adverse actions, *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572 (1993). Mr. Cavallo recognized that in a few cases the 90-day rule was not applied and cited a court decision holding that such a relaxation of the rule only occurs "where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves" *American Fed. of Teachers v. Bd. of Educ. of Twp. of Berkeley Heights*, 1998 W.L. 831336 (N.J. Amin.) (quoting *Bogart v. Bd. of Educ. of the City of East Orange*, EDU 6245-82 (Jan. 26, 1983), aff'd by Comm. of Ed. (March 14, 1983).

Mr. Cavallo argued there are no such compelling reasons as to the May 1998, December 1999 and January 2000 alleged incidents, and that the parts of the petition that relate to these alleged incidents be dismissed.

C.C. argued that the allegations regarding the May 1998, December 1999 and January 2000 incidents should not be dismissed since these incidents show a pattern of inappropriate actions towards her son. C.C. did not give any reason as to why she did not ask for administrative hearings as to these incidents right after they occurred.

I am persuaded by Mr. Cavallo's arguments and I **CONCLUDE** that the 90 day rule clearly applies to the incidents which allegedly occurred on May 1998, December 1999 and January 2000. I will not accept any testimony as to what happened on those three dates nor will I make any determination as to whether the respondent's actions on those dates were appropriate and reasonable. Therefore, I **ORDER** that the parts of the petition that ask for relief as to the alleged incidents on May 1998, December 1999 and January 2000 be **DISMISSED**.

This order granting partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make the final decision in this matter. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

9-13-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cad

C.C., on behalf of her minor son, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record and recommended Order of the Administrative Law Judge (ALJ) Granting Partial Summary Judgment to the Board have been reviewed.

The Commissioner finds that he cannot accept the ALJ's conclusion that petitioner's allegations concerning incidents in May 1998, December 1999 and January 2000 should be dismissed for petitioner's failure to file a petition on each of these incidents within 90 days from the date of notice of the Board's alleged inappropriate actions.

In this matter, petitioner seeks to challenge the Board's disciplinary action assigning her son after-school detention for allegedly copying another student's homework. Petitioner has refused to permit her son to serve the detention imposed, arguing that her son was not guilty of copying another student's homework and, therefore, the Board erred in imposing discipline upon him. Petitioner further argues that allegations regarding the 1998 incident (teacher allegedly yanked son by his arm), the 1999 incident (son allegedly sent home bleeding after he was injured at recess) and the 2000 incident (principal allegedly embarrassed son by talking about his grades in public) should not be dismissed since they show a pattern of inappropriate actions towards her son. (Initial Decision at 3) Petitioner also expresses concern for her son's safety and alleges that her son has experienced "pain and suffering (all at the hands

of teachers and administrators)***" and requests that the Board pay tuition and transportation costs for her son to transfer to Palmyra School District, a neighboring school district. (Petitioner's Answer to Motion for Summary Judgment at 1)

The Commissioner has considered the Board's arguments for dismissal of the 1998, 1999 and 2000 incidents for untimely filing, petitioner's argument that the incidents which occurred in the past show a pattern of inappropriate actions towards her son, and petitioner's expressed concern for her son's safety. In instances of this type where a parent seeks to show a pattern of inappropriate actions by a school district in an effort to illustrate that her son should be placed in a different school district, the Commissioner finds it unduly restrictive, under these circumstances, to limit those arguments to the incidents falling within 90 days prior to the filing of the petition. Further, the effect of the ALJ's interpretation could be to encourage unnecessary litigation if parents so barred from advancing arguments indicating a pattern of actions were restricted to incidents on which the parents had previously filed a timely petition.

Accordingly, the Commissioner rejects the ALJ's conclusions and denies the Board's Motion for Partial Summary Judgment. Petitioner shall, therefore, be permitted to advance her arguments with respect to the 1998, 1999 and 2000 incidents for the purpose of establishing a pattern of alleged inappropriate actions towards her son by the Board. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim consistent with the decision herein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 18 2000

Date of Mailing: SEP 18 2000

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

308-00

PAMELA C. SWALLOW,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

September 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10056-99
(EDU 6012-97 On Remand)
AGENCY DKT. NO. 222-6/97

PAMELA C. SWALLOW,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzalli, Fagella & Nowak, attorneys)

David W. Carroll, Esq., for respondent (Parker, McKay & Criscuolo, attorneys)

Record Closed: July 19, 2000 Decided: August 2, 2000

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

On September 21, 1999, the Commissioner of Education issued a decision rejecting a previous settlement agreement entered into in the within matter (OAL DKT. NO. EDU 6012-97) because of a provision in that agreement which provided:

> If the Teachers' Pension and Annuity Fund does not accept and implement this agreement, all provisions of this agreement shall be deemed null, void and of no effect, and . . . the Petition of Appeal, in its entirety, shall be deemed active . . . .

On November 16, 1999, the matter was retransmitted to the Office of Administrative Law to be held in abeyance pending review by the Division of Pensions and Benefits of the parties' proposal to credit petitioner with additional pension contributions.

By letter dated July 18, 2000, counsel for respondent advised the undersigned administrative law judge in pertinent part as follows:

> At long last I have received the necessary approval from the Division of Pensions. I enclose herewith a copy of a July 17, 2000 letter from Peter J. Gorman, Executive Assistant with the Division of Pensions confirming that the back wages award will be pension creditable. I am also enclosing an original of a revised Settlement Agreement.
>
> I believe that this now clears the way for the final entry of an Initial Decision on Remand approving the Settlement. The matter would then go back to the Commissioner for final approval.

. . .

The July 17, 2000 correspondence from the Division of Pensions referenced in counsel's letter to me and the revised settlement agreement and stipulation of settlement are attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The Division of Pensions has confirmed that upon receipt of normal pension contributions from petitioner, she will receive pension credit for an additional $30,000 in base salary for the period September 1, 1997 through June 30, 1999.

3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug 2, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/4/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 7 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7715
www.state.nj.us/treasury/pensions

Mailing Address:
PO Box 295
Trenton, NJ 08625-0295
Location:
50 West State Street
Trenton, New Jersey

ROLAND M. MACHOLD
State Treasurer

THOMAS P. BRYAN
Acting Director

CHRISTINE TODD WHITMAN
Governor

July 17, 2000

David W. Carroll, Esq.
Parker, McCay & Criscuolo
3131 Princeton Pike
Building 1-B
Lawrenceville, New Jersey 08648

Re: Patricia Swallow
TPAF # 341028

Dear Mr. Carroll:

This is to acknowledge receipt of your attached correspondence as well as to confirm our telephone conversations today concerning the wording within the attached proposed back wages award to Ms. Patricia Swallow.

Please be advised that I have reviewed the contents of the attached settlement agreement. Since the provisions therein indicate that Ms. Swallow is granted $30,000.00 in back wages for the period between September 1, 1997, and June 30, 1999, she could receive pension credit for such period upon the payment of the normal pension contributions. Such normal pension contributions will be calculated at the rate at 4.5% of the base salary being paid to Ms. Swallow at the time of her termination.

Such employee normal pension contributions should be deducted from Ms. Swallow's back wages and forwarded to the Division of Pensions and Benefits by reporting such award and employee pension contribution payments on the employer's report of contributions form. I would suggest that the employer include a copy of the attached agreement to that report. I am sending a copy of this letter and attachments to our Audit Section and requesting that, if I have stated any of the procedures mentioned above, they contact you or the employer to rectify my misstatements.

If I can assist you further, please contact me at (609) 292-0132 between 8:00 A.M. and 4:00 P.M. or by fax at (609) 393-4606.

Make it a good day for yourself.

Sincerely,

Peter J. Gorman
Executive Assistant

c.c. R. Morley

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ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, NJ 08608
(609) 392-8172
Attorneys for Petitioner

PAMELA C. SWALLOW,	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DOCKET NO.: EDUOR 06012-97S
v	
HOLLAND TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY,	**SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT**
Respondent.	

The parties to the within matter hereby agree to settle and resolve the claims which were asserted by petitioner in the Petition of Appeal with the above docket number, based upon the following terms:

1. The parties recognize that petitioner filed a Petition of Appeal with the Commissioner of Education which asserts that the termination of her employment at the end of the 1996-97 school year and retention and/or employment of other teaching staff members violated petitioner's tenure and seniority rights.

2. The parties recognize that this agreement resolves petitioner's claim for a

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remedy for the alleged violation of her rights, and that the acceptance and implementation of all of the terms of this agreement shall result in the termination of any rights that petitioner may have or have had to reinstatement or re-employment with respondent, whether based upon tenure, seniority, or otherwise, and that the termination of petitioner's tenure and seniority rights and of any other re-employment rights is contingent upon the approval of this agreement in its entirety by the Commissioner of Education, the effectuation of all of its terms by respondent, and its acceptance and implementation by the Teachers' Pension and Annuity Fund.

3. The parties agree that this settlement agreement shall not apply to any claims which are based upon facts not presently known to petitioner. Nor shall it apply to any claims based upon any facts which may arise or occur after the date that petitioner signs this agreement. The parties also agree that any such claims are neither waived nor abandoned by this agreement, and this agreement shall only extinguish those claims which petitioner is aware of as of the date of signing this agreement.

4. The parties agree that this settlement agreement must be approved by the Commissioner of Education, and that if the Commissioner of Education rejects any provision of this settlement agreement, if respondent does not fully implement the terms of this agreement, or if the Teachers' Pension and Annuity Fund does not accept and implement this agreement, all provisions of this agreement shall be deemed null, void, and of no effect, and that the Petition of Appeal, in its entirety, shall be deemed active and shall be remanded to the Administrative Law Judge and the Commissioner

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ATTORNEYS AT LAW

of Education for proceedings as a contested case, and that in such event, the parties shall retain all legal rights that they had prior to their entering into this agreement.

5. The parties recognize that during the 1997-98 and 1998-99 school years, petitioner was employed as a teaching staff member by the Lebanon Board of Education and had substantial earnings which mitigated her losses, and that such mitigation must be taken into account together with unemployment benefits received in determining the back pay and benefits that the petitioner shall receive. Accordingly, the parties agree that respondent shall pay to petitioner, as back pay, after consideration of mitigation, the sum of $30.000.00 covering the period of September 1, 1997 through June 30, 1999. The parties specifically agree and recognize that this payment constitutes back pay minus mitigation and is paid as full compensation after deduction for mitigation for the 1997-98 and 1998-99 school years, which sum together with petitioner's other earnings and unemployment benefits, is substantially the amount petitioner would have earned if employed by the respondent for those school years.

6. The parties agree that the payment required by this agreement shall be made within 60 days of the Commissioner's approval of this settlement agreement.

7. The parties agree that petitioner shall receive pension credit for the 1997-98 and 1998-99 school years as if she had been employed on a full time basis by respondent. The parties recognize that petitioner has already received partial pension credit as a result of her employment with the Lebanon Board of Education. To provide

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ATTORNEYS AT LAW

the additional pension credit required by this agreement, respondent shall deduct from petitioner's back pay the additional employee's share of contributions on those portions of the full salaries that petitioner would have earned for the 1997-98 and 1998-99 school years if employed by respondent (which was not previously remitted to the Division of Pensions) and shall remit those contributions to the Teachers Pension and Annuity Fund. Respondent shall also inform the Division of Pensions of the basis for the deductions, i.e., that said deductions are the additional deductions due based upon the salary petitioner would have earned as if employed full-time by respondent for the 1997-98 and 1998-99 school years, but that pension contributions have already been paid on the portion of salaries for those years, so that the additional pension contributions should be taken only on the amount necessary to result in pension credit being provided for the salaries petitioner would have earned if employed full-time for the 1997-98 and 1998-99 school year.

8. Respondent shall request that the Division of Pensions contribute the employer's share of petitioner's pension contributions for the 1997-98 and 1998-99 school years, but if required by the Division of Pensions, respondent shall pay the employer's share of additional pension contributions for petitioner's pension credit for the 1997-98 and 1998-99 school years.

9. The parties agree that if the Division of Pensions refuses to grant or recognize the pension credit required by this agreement, this settlement shall be null and void, petitioner shall not be deemed to have waived, abandoned, or surrendered any tenure,

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seniority, or other re-employment rights, and petitioner's case shall be returned to active status for determination by the Office of Administrative Law.

10. This agreement constitutes the entire understanding of the parties and may not be altered, amended, modified or otherwise changed except by an instrument in writing executed by the parties.

Pamela C. Swallow — Dated: May 18, 2000
Pamela C. Swallow
Petitioner

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____ Dated: June 1, 2000
Richard A. Friedman, Esq.

Holland Township Board of
Education

By: _____ Dated: 6/7/00
Superintendent

PARKER, McCAY & Siriscuolo, P.A.
~~CARROLL, WEISS & JOSEPHSON~~
Attorneys for Respondent

By: _____ Dated: 6/1/00
David Carroll, Esq.

OAL DKT. NOS. EDU 10056-99 AND EDU 6012-97 (ON REMAND)
AGENCY DKT. NO. 222-6/97

PAMELA C. SWALLOW, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record, Settlement Agreement and Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 18 2000

Date of Mailing: SEP 18 2000

309-00

KITTRELS EDUCATIONAL TRAINING SYSTEMS, INC. AND ALONZO KITTRELS,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, prior to the District being taken over by the State, contracted with the Newark School District to provide various educational services to the District. After the State-operated School District was created, petitioners' services to the District were terminated. Petitioners filed a petition seeking payment in the amount of $4,445.37 for services rendered during the period from July 1 to July 12, 1995, 60 calendar days pay after July 12, 1995 pursuant to *N.J.S.A.* 18A:7A-44, and a $1,200 payment in the form of a salary adjustment or bonus payment, which payment had allegedly been previously authorized for certain senior staff employees of the School District.

The matter was transmitted to the OAL. After a hearing was conducted, the ALJ determined that petitioners were not entitled to 60 calendar days pay after July 12, 1995 pursuant to *N.J.S.A.* 18A:7A-44 because they were hired to provide consultant services and, thus, they did not fall within the purview of the statute. In addition, the ALJ concluded that petitioners had failed to provide testimony or documentary evidence to support their claim for a $1,200 payment in the form of a salary adjustment or bonus. Finally, the ALJ concluded that petitioners were entitled to a *quantum meruit* payment in the amount of $4,445.37 for work performed from July 1 to July 12, 1995.

The Commissioner affirmed the determination of the ALJ.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 1083-98

AGENCY DKT. NO. 387-10/97

KITTRELS EDUCATIONAL TRAINING SYSTEMS, INC, AND ALONZO KITTRELS,

Petitioners,

v.

THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Robert T. Pickett, Esq., for petitioners

Philip E. Stern, Esq., for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: October 28, 1999 Decided: July 24, 2000

BEFORE **STEPHEN G. WEISS**, ALJ:

I am now on the record in this matter. It is my intention to today, July 24, 2000, issue an oral decision in the matter of Kittrels Educational Training Systems, Inc. and Kittrels, individually, v. the State Operated School District of the City of Newark. The OAL Docket Number is EDU 1083-98. I am rendering this oral decision today in order

to comply with the requirements of the last Order of Extension which had been entered in this matter which Order extended the time for issuance of this initial decision until July 24, 2000. I was unable to coordinate an effort this morning to try to get both attorneys here so that the oral decision could be rendered in their presence. However, the rules pertaining to oral determinations found in *N.J.A.C.* 1:1-18.2 no longer require that an oral decision be rendered in the presence of the parties unlike the earlier version of the rule which did. In that respect, I refer counsel to the Comment in LeFelt 37 New Jersey Practice, Section 258.

With respect to my determination in the case I have already identified the parties. The attorneys who had appeared were Robert T. Pickett, Esq., for petitioners, and Philip E. Stern, Esq. of the firm of Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys for the respondent. The following constitutes my oral decision.

This matter was transmitted to the Office of Administrative Law by the Department of Education in January 1998 following the filing of a petition by Kittrels Educational Training Systems, Inc. hereinafter referred to as "KETS and Alonzo Kittrels, individually, alleging that since October 1987 KETS annually had entered into written agreements with the Newark Board of Education engaging it as a consultant to provide various educational services. The contract and agreement anticipated that in providing those services the individual petitioner, Alonzo Kittrels, exclusively would be doing the same. No other KETS employees were involved.

No successor written contract was entered into for the 1994-95 school year. However it was extended on a month-to-month basis as of July 1, 1994. I would direct counsel to Exhibits P-3 and P-7 with respect to that extension.

On July 12, 1995 the State took over operation of the Newark School District and forthwith advised Kittrels that his services no longer were needed. See Exhibit P-13. According to Kittrels, however, he, number 1, should have been paid in accordance with the contract, as extended from July 1 to July 12, 1995, in an amount he calculated to be

$4,445.37. Second, that pursuant to *N.J.S.A.* 18A:7A-44 he was entitled to sixty calendar days pay after July 12, 1995 and third, that he also was entitled to a $1200 payment in the form of what has been called either a bonus or a salary adjustment, which payment had been authorized for certain senior staff employees of the school district. In response to the petition setting forth those claims the State Operated School District filed an answer generally denying the allegations and setting out a variety of separate defenses. A prehearing conference was conducted by former Administrative Law Judge Mary Louise Lucchi-McCloud in September 1998 and her prehearing order set forth the following issue to be decided in the case. "At time contract was terminated did respondent owe petitioner for services?"

A plenary hearing was conducted before the undersigned Administrative Law Judge on July 21, 1999 and post hearing briefs thereafter were filed in accordance with an agreed scheduled, as extended. Unfortunately, I was required to take a lengthy leave because of illness of a family member thereby necessitating several time extensions for issuance of this decision. As indicated earlier, today is the last date of the last extension and I will therefore be rendering my decision today. Pursuant to the rules of the OAL a transcript will be prepared and provided to the agency and the parties within fifteen days of today's date.

With respect to the hearing held last July, testimony was received from two witnesses, both on behalf of the petitioners: Eugene C. Campbell, who was the Executive Superintendent of the Newark School District during the period in question here; namely, between 1987 and July 12, 1995, the date of the State takeover, and individual petitioner Alonzo Kittrels.

Campbell had been Executive Superintendent of the District for several years prior to the takeover. Indeed, he had been employed since 1984. In October 1987, by Board Resolution, KETS was engaged to provide consultant services. This agreement then, as I indicated earlier, annually was renewed according to Campbell, through the

end of the 1993-94 school year. (Exhibit P-1). Since, during 1994, the School District was under monitoring by the State Department of Education, a renewal contract for 1994-95 was never formally approved by the State. (Exhibit P-3). However, in order to avoid confusion, Campbell, without State objection, rehired KETS and therefore Kittrels as KETS' employee, on a month-to-month basis for the 1994-95 school year. Campbell did this because the functions performed by Kittrels were critical. (Exhibit P-5.) In June 1995, Campbell issued a Notice of Continuing Employment for 1995-96 pertaining to senior staff and at will employees which he testified included Kittrels. (Exhibit P-7). Kittrels continued to perform services for the period July 1 through July 12, 1995 when the State formally took over the School District and Kittrels was discharged. Although Campbell could not recall specifically, he believed he may have spoken to senior administrators at the Department of Education to let them know that the KETS contract again had been continued on a month-to-month basis, similar to what occurred during the 1994-95 school year. Campbell also identified a voucher and invoice which had been submitted by KETS in October 1994 with respect to a $1200 bonus or payment adjustment which Kittrels claimed was due and owing to him but which was never paid. (Exhibit P-8). This extra payment was to be a "payment adjustment" designed to bring Kittrels' 1994-95 compensation in line with a Deputy Executive Superintendent's pay for that school year.

On cross-examination, Campbell indicated he was "almost sure" there was a Board Resolution passed in June 1995 approving the month-to-month engagement of Kittrels for the school year beginning July 1, 1995. Although the resolution could not be found, Campbell recalled that ordinarily this would have been the practice and he was sure that a resolution to that effect had been prepared by Board counsel. He also believed that whether or not the Board actually approved the month-to-month extension it was a binding act since, as Executive Superintendent, he had the statutory authority to take this action on his own as part of his administrative duties.

The second witness was individual petitioner Alonzo Kittrels. He had been employed as Executive Director of Human Resource Services in the Newark School District and from 1977-78 through 1980-81 was Executive Superintendent of Schools. In October 1987, KETS, a Corporation formed by Kittrels a few years earlier was retained as a consultant by the Board and its original contract (Exhibit P-1) was renewed annually through 1993-94, although the duties required of Kittrels were changed from time to time (Exhibit P-2). For tax reasons, KETS, rather than Kittrels, individually, was designated as official vendor of the services rendered but it was understood that Kittrels personally would be paid because it was he who was providing the exclusive services. A renewal contract for 1994-95 (Exhibit P-3) was never executed, he said, because the State Acting Audit General, who was in charge of the District's monitoring at that time, as well as the Commissioner, raised certain questions about it. Kittrels explained that for 1995-96 Campbell resolved the same issue by again suggesting a month-to-month extension of the contract. Kittrels understood this extension agreement was actually presented for Board approval at the end of June. Thus he worked on that basis until July 12, 1995 when, as indicated, he was discharged when the State takeover took place. A series of letters subsequently were exchanged between Kittrels and others concerning his status (Exhibits P-13 through P-18) which also touched upon Kittrels' claims to be paid the $1200 and his contention that the sixty calendar day salary was an entitlement which should be paid to him.

On cross-examination, Kittrels agreed that usually he worked only three days per week for the Newark School District and that he received no pension, sick time or vacation pay benefits. He also paid for his own medical coverage. Basically, his position was that he properly was engaged as a consultant through KETS, that he fully performed the services that were required of him and was entitled to be paid what was due and owing to him, namely sixty calendar days pay subsequent to July 12, 1995 per *N.J.S.A.* 18A:7A-44A, the sum of $4,455.37 for the period July 1 to July 12, 1995 and the additional $1200 payment adjustment or bonus which had been approved for other employees of the District.

Following conclusion of the presentation of petitioner's case, the respondent determined not to offer any evidence on its own. Rather, it rested in reliance upon a Joint Stipulation of Facts which had been orally spread upon the record at the outset of the hearing and the testimony of Campbell and Kittrels, together with the documentary evidence submitted. A list of the documentary evidence will be attached to this initial decision.

Based upon my review and consideration of the Campbell and Kittrels testimony and the documentary evidence, and after reading and considering the contents of the posthearing briefs filed in the matter, I agree in large part with the position taken by the Board.

First, with respect to the major salary claim by Kittrels, namely his entitlement to 60 calendar days pay pursuant to *N.J.S.A.* 18A:7A-44(a), I agree with the Board. The applicable statute with respect to providing sixty days pay does not, in my judgment, apply to consulting contracts with corporations like KETS, or with independent contractors like Kittrels. Neither of them, corporately, or individually, can be considered "Executive Administrators responsible for curriculum, business and finance", the category to whom the sixty days pay applies. Rather, persons and entities like petitioners are covered by *N.J.S.A.* 18A:7A-42 which specifically mentions it is applicable to consultants and has no like 60 day payment provision as may be found in *N.J.S.A.* 18A:7A-44A. The decision *In Massa v. Jersey City School District*, 92 *N.J.A.R.* 2d (EDU) 52 (1991), aff'd. Commissioner of Education, 92 *N.J.A.R.* 2d. (EDU) 54, aff'd State Board 92 *N.J.A.R.* (EDU) 336 (1992), supports this conclusion. In that matter it was held that persons hired and dismissed pursuant to *N.J.S.A.* 18A:7A-42 , like Kittrels, do not enjoy the benefits of the sixty calendar day payment or of the sixty day notice provision which also may be found in Chapter 7A-44. Clearly, in my view, consultants like Kittrels fall within the category to which the benefit does not apply. As *Massa*, and another case, *State Operated School District of the City of Jersey City* have

held, the 44(a) provision is intended to give procedural protections to regular tenured school employees. Corporate entities like KETS, consultants and other such *ad hoc* entities do not acquire tenure or seniority and therefore should not and do not fall within the penumbra of *N.J.S.A.* 18A:7-44(a). Thus, to the extent Kittrels claims entitlement to the sixty calendar days pay his contention is rejected.

Beyond that, of course, the contract between the parties identifies Kittrels specifically as an independent contractor, not as a school employee (Exh. P-1, para. C.) and categorically excluded him from the receipt of any benefits provided by the Board to its regular employees. Therefore, the plain language of both the statute and the contract excludes Kittrels from the sixty days' pay entitlement.

However, I must disagree with the Board's position that the 1995-96 month-to-month extension approved by Campbell is unenforceable because it is either *ultra vires* or exceeded the powers of the Board to enter into a contract for more than one fiscal year. Even though both arguments technically are correct, Kittrels is entitled on an equitable, *quantum meruit* basis to recover because he actually performed the services in good faith. While certainly there is case law to the effect that *quantum meruit* recovery against public entities is not usual, I believe given all the circumstances of this case, the public interest will not be contravened by this recovery. As noted, services were performed in good faith by Kittrels. Therefore, whether Campbell had the statutory authority to approve the extension itself, or whether the Board approved it, or whether since it extended beyond June 30, 1995 it was *ultra vires* the authority of Campbell or the Board, the fact is that the services were performed in good faith and I thus will sustain the *quantum meruit* claim for the amount involved which, as I indicated, is $4,455.37.

Finally, I agree with the Board that no $1200 bonus or payment adjustment is required here. First, as the Board accurately points out, there is no compelling proof that the Board approved the bonus or adjustment for Kittrels in the first place. A

notation at the bottom of the purchase order could not clearly be identified by any witness and therefore cannot provide a basis for payment. Statements allegedly made by State officials to Kittrels indicating that he ought to be paid that amount are not evidential, especially without first-hand corroborative evidence sufficient to provide a residuum to overcome the clearly hearsay aspects of the testimony in this regard.

Accordingly, based upon the testimony and the documentary evidence in this case, I conclude that relief will be limited to recovery on a *quantum meruit* for the twelve days that Kittrels worked during July 1995, which has been calculated to be $4,455.37. However, payment to Kittrels of sixty calendar days pay based upon *N.J.S.A.* 18A:7A-44 is rejected, as is the payment of $1200. Thus, the total award to Kittrels will be $4,455.37. Neither costs nor prejudgment interest are appropriate in this matter. See, *Newark Board of Ed. V. Levitt*, 197 *N.J. Super.* 239,244 (App. Div. 1984). Thus for these reasons, the petition of appeal will be dismissed, except for the *quantum meruit* payment and I so **ORDER**. The claims for sixty calendar days and the $1200 bonus, as indicated, are **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days of receipt and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which the transcript of this recommended decision is mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview**

Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

That concludes the rendering of my initial decision in this case pursuant to *N.J.A.C.* 1:1-18.2. As noted a transcript will be issued and filed with the agency head and mailed to the parties within fifteen working days of today's date.

END OF TRANSCRIPT

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on July 24, 2000.

August 3, 2000
DATE

Marie V. Hackett
MARIE V. HACKETT

August 3, 2000
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/4/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG - 8 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\gt-mvh

APPENDIX

Witness List:

Eugene C. Campbell

Alonzo Kittrels

Exhibits:

J-1 Joint Stipulation of Facts

P-1 Board Resolution and attached contract for 1993-94 with KETS

P-2 Letters, March 8, 1990, April 11, 1990, January 9, 1991

P-3 Contract for professional services between BOE of the City of Newark and KETS

P-4 Letter, June 29, 1994 from Commissioner Klagholtz to Executive Superintendent Campbell

P-5 Letter, June 29, 1994 from Executive Superintendent Campbell to Commissioner Klagholtz

P-6 Organizational charts

P-7 Memorandum to senior staff and at will-employees from Executive Superintendent Campbell, June 29, 1995

P-8 Invoices

P-9 Letter, July 1, 1994 from Commissioner Klagholtz to Mr. Kittrels

P-10 Letter, May 31, 1994 from Mr. Kittrels to Commissioner Klagholtz

P-11 Letter, February 17, 1995 from Deputy Attorney General Semple to Mr. Kittrels

P-12 Invoice, December 1994 and attachments

P-13 Letter, July 12, 1995 from Acting State District Superintendent Anderson to Mr. Kittrels

P-14 Letter, July 13, 1995 from Mr. Kittrels to Dr. Anderson with attachment

P-15 Letter, July 14, 1995 from Mr. Kittrels to Dr. Cappello

P-16 Letter, July 28, 1995 from Hope R. Blackburn, Acting General Counsel to Mr. Kittrels, with attachments

P-17 Letters, July 27, 1995, July 28, 1995 and August 7, 1995 from Mr. Kittrels to Ms. Blackburn

P-18 Letter, August 28, 1995 from Mr. Kittrels to Commissioner Klagholtz and letter, September 21, 1995 from Assistant Commissioner Contini to Mr. Kittrels

OAL DKT. NO. EDU 1083-98
AGENCY DKT. NO. 387-10/97

KITTRELS EDUCATIONAL TRAINING SYSTEMS, INC. AND ALONZO KITTRELS,	:	
PETITIONERS,	:	
V.		COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.[1]

The District excepts to that portion of the Initial Decision which allows petitioners' *quantum meruit* recovery of $4,445.37, arguing that: 1) *quantum meruit* should be awarded sparingly against public entities and should not be permitted where the contract was *ultra vires* or the work was performed without proper authorization; 2) Superintendent Campbell lacked the statutory authority to administratively extend contracts; and 3) even if the Board had approved the extension of the contract on a month-to-month basis, any extension which exceeded one year (beyond June 30, 1995) was *ultra vires*. (District's Exceptions at 3-8) The District, additionally, re-advances its contention that should *quantum meruit* recovery be permitted, the amount of such award should be reduced, arguing that "[*q*]*uantum meruit* must be awarded fairly and is only intended to compensate a party for the fair value of services actually rendered."

[1] Petitioners did not file a reply to the District's exceptions.

OAL DKT. NO. EDU 1083-98
AGENCY DKT. NO. 387-10/97

KITTRELS EDUCATIONAL TRAINING SYSTEMS, INC. AND ALONZO KITTRELS,	:	
PETITIONERS,	:	
V.		COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
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[1] Petitioners did not file a reply to the District's exceptions.

(citation omitted) (District's Exceptions at 8) Here, it reasons, any such award is intended to compensate petitioners for services rendered during the period from July 1 through July 12, 1995. The District finds it significant that, because of the 4th of July holiday and weekends, petitioners were awarded $4,445.37 for what amounts to "seven days of work, or approximately *$640 per day for consulting services in 1995,"* an astronomical figure constituting a "windfall," and contrary to the objective of *quantum meruit.* (emphasis in text) (*Ibid.*) As such, the District urges that any award be "limited to a reasonable daily figure, and ***only be awarded for the number of days actually worked." (District's Exceptions at 9)

Upon his careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on July 21, 1999, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that petitioners possess no entitlement to 60 days pay pursuant to *N.J.S.A.* 18A:7A-44(a) for the reasons clearly articulated on pages 6-7 of the Initial Decision. The Commissioner, likewise, agrees that petitioners have presented no documentary or testimonial evidence sufficient to support their claim to a $1,200 bonus or payment adjustment from the District.

Finally, in considering the recommended *quantum meruit* award of compensation for services rendered by petitioners during the July 1 – July 12, 1995 time period, the Commissioner, according due regard to the District's arguments, concurs with the ALJ that "given all the circumstances of this case, the public interest will not be contravened" by recovery in the designated amount. (Initial Decision at 7) In this respect, the Commissioner specifically notes that the ALJ had the opportunity to hear all testimony, observe all witnesses and evaluate all evidence, and that, while the District excepts to the ALJ's recommendations, it identifies no

compelling basis on which to disturb the conclusions reached by the ALJ in light of the totality of applicable law and fact.

Accordingly, the recommended decision of the OAL is affirmed for the reasons stated therein. The District is hereby directed to compensate petitioners in the amount of $4,455.37, representing recovery, in *quantum meruit*, for the services rendered during the period at issue in July 1995. Petitioners' remaining claims in their Petition of Appeal are hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 18 2000

Date of Mailing: SEP 20 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

310-00

310-00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH GRACEFFO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WAYNE, PASSAIC COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent vice principal for allegedly violating State law and Board Policy 5131.6 on six occasions regarding handling of students who were suspected of being under the influence of alcohol or drugs. The Board averred that under the plain language of the statute and the District's drug policy, a teacher's referral of a student as appearing to be under the influence of alcohol or drugs obligated respondent to drug test the student; respondent had no discretion in deciding whether to test. Respondent contended each test must be supported by reasonable suspicion. The Board sought respondent's dismissal from employment.

In light of testimony from witnesses presented during 15 days of hearing, numerous exhibits and post-hearing briefs, the ALJ concluded that the Board established by a preponderance of evidence that respondent violated the statute, *N.J.S.A.* 18A:40A-12, and the Board's policy in charges 1 and 2, the N.L. incident, in charges 3 and 4, the A.F. incident and the J.B. incident, but not in charges 3 and 4, the "rage" incident and the D.M. incident. With respect to penalty, although the Board demonstrated that from 1995 to 1999, respondent failed to properly implement the policy and law with three students, the Board did not discipline him until the death of N.L. In addition, respondent had consistently positive performance evaluations. Thus, the ALJ determined that the Board failed to establish that respondent's conduct constituted a pattern of unbecoming conduct sufficient to warrant his dismissal from employment. The ALJ ordered that respondent suffer a permanent reduction of one step on the salary guide and forfeit all salary and benefits that would otherwise have accrued during the first 120 days of his suspension.

The Commissioner adopted the ALJ's determinations in charges 1, 2, 3, and 4, except for charges 3 and 4 in the "rage" incident, and modified the ALJ's analysis and conclusions in certain respects. The Commissioner rejected the ALJ's conclusions in the "rage" incident and, unlike the ALJ, found respondent guilty of the charges in that incident. The Commissioner determined that, notwithstanding any concern respondent may have had as to whether the referral of the "rage" student was reasonable, respondent's obligation under the law was to arrange for an immediate medical examination of the student upon the staff member's persistence in her belief that the student exhibited indicators of possible substance abuse. The Commissioner clarified that, under *N.J.S.A.* 18A:40A-12, once a teaching staff member, school nurse or other educational personnel has reported, based upon observation and articulation of specific indicators, that a student may be under the influence of alcohol or other drugs, the principal or his designee *must* arrange for an *immediate medical examination* of that student. The Commissioner further stressed that drug testing is not a substitute for the required medical examination. Because there was clearly confusion in the District with respect to roles and responsibilities under the law and District policy, and because District policies were not entirely in conformance with statute and rule as interpreted by this decision, the Commissioner directed the Board to revise its policies and procedures, institute a continuing education program for staff in the identification of symptoms of substance abuse and the requirements imposed upon them by *N.J.S.A.* 18A:40A-12, and submit its revisions and plans in this regard to the County Superintendent for review and approval.

September 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5619-99
AGENCY DKT. NO. 113-5/99

IN THE MATTER OF THE TENURE HEARING OF JOSEPH GRACEFFO, SCHOOL DISTRICT OF WAYNE, PASSAIC COUNTY

Stephen R. Fogarty, Esq., and **John R. Vreeland**, Esq., for petitioner School District of Wayne, Passaic County (Fogarty and Hara, attorneys)

Robert M. Schwartz, Esq., for respondent Joseph Graceffo

Record Closed: May 3, 2000 Decided: June 19, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of Wayne, Passaic County, (Board) certified tenure charges against respondent Joseph Graceffo, a vice principal in the Wayne School District (District). The Board contends that on six occasions Graceffo willfully violated state law and the Board's policy regarding drug testing students who were suspected of being under the influence of alcohol or other drugs. The Board submits that Graceffo's conduct was unprofessional and unbecoming and, therefore, warrants his dismissal from employment. Graceffo denies any charges of wrongdoing. If any of

the charges is sustained, the Commissioner of Education must determine whether dismissal or some lesser penalty is warranted.

PROCEDURAL HISTORY

On March 24, 1999, the Board served Joseph Graceffo with charges of conduct unbecoming an administrator. Graceffo has been employed in the District since 1966, and from August 1991 until August 1998 he was one of the two vice principals at Wayne Valley High School. In August 1998 Graceffo was transferred to Wayne Hills High School, where he served as one of the school's two vice principals until he was suspended in February 1999.

On May 14, 1999, the Board filed the tenure charges with the Commissioner of Education. Also, the Board served Graceffo with notice of its decision to certify the tenure charges to the Commissioner and to suspend respondent without pay effective May 14, 1999.

On June 8, 1999, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On June 22, 1999, a prehearing conference was held and hearings were held on October 4, 5, 21, 22 and 25, November 9, and December 7, 8 and 9, 1999, and January 11, 12 and 31, February 28 and 29, and March 2, 2000.

During the hearing, the Board raised two incidents, one occurring in 1991 and the other occurring in 1994, that were not contained in the statement of charges. On October 5, 1999, respondent moved to strike incidents occurring prior to 1995. Respondent contended that the Board's failure to provide notice of the specific incidents prior to the hearing denied him the opportunity to properly defend the allegations. The Board argued that the two incidents were sufficiently identified to enable respondent to understand the events to which it referred. I granted respondent's motion to strike the incidents that were not contained in the petition. The

Board filed an interlocutory appeal before the Commissioner. On October 20, 1999, the Commissioner reversed the ruling and concluded that the Board adequately set forth the incidents in question to allow respondent to prepare a defense.

The parties filed post-hearing briefs and the record closed on May 3, 2000.

CHARGES

Charge No. 1: That during the 1998-1999 school year, Joseph Graceffo, a tenured administrator in the employ of the Wayne Township Board of Education, exhibited unprofessional and unbecoming conduct by failing to comply with *N.J.S.A.* 18A:40A-12 regarding the drug testing of a student suspected of drug use, and, as a result of said unbecoming conduct, he should be dismissed from his position.

Charge No. 2: That during the 1998-1999 school year, Joseph Graceffo, a tenured administrator in the employ of the Wayne Township Board of Education, exhibited unprofessional and unbecoming conduct by failing to comply with Board Policy No. 5131.6 regarding the drug testing of a student suspected of drug use, and, as a result of said unbecoming conduct, he should be dismissed from his position.

Charge No. 3: That during the 1995-1996 and 1996-1997 school years, Joseph Graceffo, a tenured administrator in the employ of the Wayne Township Board of Education, exhibited a pattern of unprofessional and unbecoming conduct by failing to comply with *N.J.S.A.* 18A:40A-12 regarding the drug testing of students suspected of drug use, and, as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

Charge No. 4: That during the 1995-1996 and 1996-1997 school years, Joseph Graceffo, a tenured administrator in the employ of the Wayne Township Board of Education, exhibited a pattern of unprofessional and unbecoming conduct by failing to comply with Board Policy No. 5131.6 regarding the drug testing of students suspected of drug use, and, as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

ISSUE

Whether in each of the four tenure charges Graceffo failed to comply with *N.J.S.A.* 18A:40A-12 and Board Policy No. 5131.6 and, thus, exhibited unbecoming conduct? And, if so, what is the appropriate penalty?

Petitioner has the burden of proof to establish the claims by a fair preponderance of the evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982).

BACKGROUND

On April 1, 1987, the Board adopted Board Policy No. 5131.6, "Drugs, Alcohol and Tobacco" (policy). The policy was revised on December 15, 1988, October 19, 1989, August 23, 1990, August 22, 1991, November 21, 1991, August 20, 1992, July 15, 1993, January 18, 1996, and April 20, 1998. The current policy states in part:

> A. Procedure for identifying and assisting students who may be at risk of developing alcohol and/or drug dependencies excluding classes involving anabolic steroids
>
> 1. Whenever it shall appear to any teaching staff member, school nurse and/or other educational or professional medical staff member that a pupil may have used, consumed and/or be under the influence of alcohol or other drugs, that staff member shall report the matter as soon as possible to the building's professional medical staff member and principal or other administrator. . . . The pupil shall not be left alone. . . .
>
> 2a. In compliance with *N.J.S.A.* 18A:40A-12, the principal or, in his absence, his/her designee shall immediately notify the parent/guardian and the Superintendent and arrange for the pupil to immediately be medically examined by a doctor selected by the parent/guardian. . . .
>
> 2b. The principal or his/her designee shall explain to the student's parent/guardian the details of the examination process which will be used by the District if the student is not examined by the parent's/guardian's own doctor. . . .
>
> 2c. As soon as possible after a student is reported as possibly being under the influence, the principal or designee and the school nurse shall verbally explain to the student's parent/guardian what the symptoms were which led to the reporting. . . .

3. If the school authorities are unable to contact the parent/guardian and/or if the doctor selected is not immediately available, the school medical inspector or designee shall be immediately called upon to examine the pupil for the purpose of diagnosing whether or not the pupil is under the influence of alcohol or drugs pursuant to *N.J.S.A.* 18A:40A-12 . . . .

4. If such doctor, medical inspector or his/her designee is not immediately available or if the situation becomes life threatening, the pupil shall be immediately taken to the emergency room of the Wayne General Hospital or the nearest hospital, for examination and/or treatment . . . .

E. Pupils for Whom There is a Concern About Behavior Which May Indicate Alcohol or Drug Use/Abuse Though There is No Evidence of Violation of Law or School Regulations

A referral may be made by a member of the school staff, an administrator, a pupil, parent/guardian, or by the pupil himself/herself.

Statutory law regarding testing students suspected of drug use states, in part:

> Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 of this act, . . . that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence.
>
> [*N.J.S.A.* 18A:40A-12(a).]

The Board's Policy Regarding Drug Testing Students Suspected of Drug Use

Section (A) and Section (E) of the policy are relevant to this matter. Section (A), "Procedure for identifying and assisting students who may be at risk of developing alcohol and/or drug dependencies," is based upon *N.J.S.A.* 18A:40A-12.

Under Section (A)(1) of the policy, whenever a teaching staff member suspects that a student may have used, consumed and/or may be under the influence of alcohol or other drugs, "that staff member shall report the matter as soon as possible to the building's professional medical staff member and principal or other administrator." P-23. In the District's two high schools, the vice principals are the administrators designated to receive and act upon referrals under Section (A) of the policy. Graceffo served in this capacity as vice principal of Wayne Hills High School.

Section (A)(2) of the policy mirrors the statutory language, as it requires the vice principal, upon receipt of a referral, to "immediately notify the parent/guardian and the Superintendent and arrange for the pupil to immediately be medically examined by a doctor selected by the parent/guardian" to confirm whether the pupil is under the influence of alcohol or other drugs. P-23. This section also describes the procedures to be followed in the event that the administrator cannot reach the parent or if the doctor selected by the parent is not available. In the event that a student is tested, the policy requires that the vice principal explain to the student's parents or guardians what symptoms led to the testing.

The second major component of the policy is Section (E), "Pupils For Whom There is Concern About Behavior Which May Indicate Alcohol or Drug Use/Abuse Though There is No Evidence of Violation of Law or School Regulation." P-23. A referral under this section does not necessarily result in the student being tested for drugs. Rather, a referral by a teaching staff member under this section triggers the involvement of a student assistance specialist, who determines whether it is necessary to involve one of the Core Teams.

There are four Core Teams in the District, one at each of the two high schools and two middle schools. Each Core Team is a cross section of the school's professional staff, including members of the child study team, the school nurse, guidance counselors and teachers. After receiving a referral under Section (E) of the policy, a Core Team member will raise the student's name at the next Core Team meeting. Those professionals who either have regular contact with the student or who have access to the student's records will determine whether the information reflects the profile of a student who may be involved with alcohol or other drugs. If so, the Core Team then considers what type of intervention might be most effective.

ALLEGATIONS OF MISCONDUCT

The four tenure charges are based on six incidents involving five students who were referred to Graceffo by a teacher or staff member who suspected that the student might be under the influence of alcohol or other drugs. The students were an unidentified student who was being disciplined by Graceffo (1991), D.M. (1994), A.F. (1995), J.B. (1996), and N.L. (1999).

The Board presented thirteen witnesses and respondent presented eight witnesses. The witnesses testified to their understanding of the application of the law and the policy. Some witnesses agreed with Graceffo's implementation of the policy; others disagreed. I have considered each incident to determine whether Graceffo's conduct constituted unbecoming conduct, individually and collectively.

SUMMARY OF EVIDENCE

Charges 1 and 2

January 21, 1999, N.L. Incident

On the morning of January 21, 1999, Graceffo summoned an eleventh-grade student, N.L., to his office to discuss the student's excessive absenteeism. During the

meeting, N.L. gave Graceffo a doctor's note indicating that his recent absence had been due to bronchitis. Graceffo advised N.L. to speak to his teacher about making up missed schoolwork and sent N.L. to his classes.

Later that day, Susan Ammerman, N.L.'s physical education instructor, approached N.L. to discuss his recent absence from her class. Ammerman testified that when she spoke with N.L., she detected an odor of marijuana and observed that his pupils were dilated. She then summoned the school nurse.

Deborah Cordo, R.N., a part-time nurse employed by the District, responded to Ammerman's call. Standing in the classroom doorway, Ammerman told Cardo that she wanted a student drug tested. Cardo could not recall whether Ammerman said the student smelled of marijuana or that his eyes were dilated. Cardo observed N.L. and smelled only cigarette tobacco on him. Cardo summoned Marilyn DeStefano, who was in the lunchroom.

Marilyn DeStefano, R.N., has been employed by the District since 1996 and was the school's full-time nurse. She went to Ammerman's classroom and was informed by Ammerman of her suspicions about N.L. Ammerman wanted N.L. drug tested. Graceffo was soon informed about the situation and had N.L. evaluated. DeStefano checked N.L.'s vital signs, *e.g.,* blood pressure, temperature and pupils. DeStefano was suffering from a sinus infection and was unable to smell any particular odor on N.L.

Graceffo removed N.L. from the class and escorted him to the nurse's office, where DeStefano evaluated him. Thereafter, DeStefano reported her findings that "everything was normal." She also told Graceffo that she had a sinus infection and could not smell anything. Graceffo asked Cordo whether she smelled marijuana on N.L. Cordo responded, "No." Graceffo returned to his office with N.L. and phoned N.L.'s mother. He told her of the suspicions about N.L. and said that the suspicions had not been confirmed. Subsequently, Graceffo informed Ammerman that he was not going to test N.L. because he could not corroborate her suspicions. Ammerman

testified that she asked Graceffo to test N.L. Graceffo testified that Ammerman never specifically requested that N.L. be tested.

On the following day, January 22, 1999, Robert Flower, chairperson for the Department of Art, Music and Physical Education, spoke to N.L. about his poor grades in physical education. During their discussion, Flower detected an odor of marijuana on N.L. Flower spoke with Ammerman, who told him that the prior day she suspected that N.L. was under the influence. Flower told Graceffo that he also suspected drug use by N.L. However, Flower never specifically requested that N.L. be tested. Graceffo informed Flower that he had spoken with N.L.'s mother. Flower assumed the matter was being taken care of by Graceffo.

Ammerman became very upset when she learned that Graceffo would not test N.L. On February 4, 1999, she attended the Core Team meeting and announced her resignation from the team in protest of Graceffo's refusal to test N.L. Upon learning of this situation, Vicki Musetti, the student assistance specialist, informed Eugene Sudol, the school principal, that Graceffo had failed to test N.L., despite Ammerman's suspicions and request.

On February 5, 1999, Sudol began an investigation of Graceffo's handling of the N.L. case. On February 6, 1999, N.L. died of a drug overdose. Graceffo was subsequently suspended following an administrative investigation.

Charges 3 and 4

1991 Incident

Musetti testified that in 1991 she witnessed a student run out of Graceffo's office in an agitated state and proceed to knock everything off the front office counter. Musetti told Graceffo that she believed this student might have been under the influence of drugs and that he should be tested.

Graceffo testified that he did not test the student for drugs because there was no reasonable suspicion to believe the student was under the influence. Moreover, Musetti did not know the facts of the situation because she had no prior involvement with this student.

Musetti concluded that Graceffo's failure to drug test the student constituted non-compliance with drug-testing policy and she reported the matter to the school principal, Russell DeVries. Neither Musetti nor Graceffo could remember the name of the student.

1994 D.M. Incident

Musetti testified that Graceffo also failed to act upon a referral in 1994. She claimed that on October 17, 1994, a teacher named Bob Bishop referred three students to be tested. Graceffo had two of the students tested and told Musetti that he didn't test the third student, D.M., because he had negative interactions with the mother of this student in the past and did not want another confrontation. Musetti testified that she informed Graceffo that the law required that this student be tested and he responded, "laws were meant to be broken." Graceffo vigorously denied saying "laws were meant to be broken." Musetti also testified that she also reported this incident to DeVries and raised the issue at a subsequent Core Team meeting.

1995 A.F. Incident

At approximately 9:00 a.m. on October 23, 1995, Linda Remolino, a guidance counselor at Wayne Hills High School and member of the Core Team, referred a student, A.F., to Graceffo to be drug tested. Remolino had referred A.F. for drug testing on two prior occasions. She had tested positive for drugs both times. Upon receiving this latest referral, Graceffo contacted A.F.'s mother at 11:00 a.m. and informed her that she needed to come to school so that A.F. could be tested. Ms. F. told Graceffo that she could not come to school until 2:00 p.m. the next day. Graceffo agreed that A.F. could be tested at that time.

At the Core Team meeting on October 24, 1995, the Team expressed concern that A.F. had not yet been tested. The Core Team drafted a formal complaint to Principal DeVries about Graceffo's failure to comply with the drug-testing policy with respect to A.F. Graceffo testified that he had A.F. tested as soon as possible and that the student was tested on the afternoon of October 24, 1995.

1996 J.B. Incident

Musetti testified that at the end of the school day on November 5, 1996, Fran Curasco, a teacher at Wayne Valley High School, referred one of her students, J.B., to Musetti to be tested for drugs. After J.B. left the building, Musetti referred the matter to Mary Jane Tierney, the vice principal responsible for testing J.B., and told her to contact the parents. Tierney told Musetti that she planned to be absent the next morning and asked Musetti to contact Graceffo. Musetti called Graceffo's office and told his secretary that Tierney had asked that Graceffo be told that J.B. needed to be tested first thing in the morning.

The following morning, Musetti contacted the school nurse and learned that Graceffo would not test J.B. Musetti then called Graceffo and requested that J.B. be tested. Musetti testified that Graceffo acknowledged his responsibility to test the student but claimed that he could not implement the drug test because he was the only administrator in the building. Thus, Graceffo informed Musetti that the test would have to wait until Tierney returned. Tierney returned at about noon that day and arranged for J.B. to be tested.

Musetti filed a complaint with the building principal, Robert Reis. She claimed that Graceffo's inaction with regard to the testing of J.B. posed a serious health risk and placed the entire school community in jeopardy. According to Musetti, Reis told her that he told Graceffo that he should have overseen the drug test of J.B.

LEGAL DISCUSSION

Statutory Interpretation

The parties differ as to what triggers the statute and Board policy. The Board contends that once a student has been referred by a teaching staff member based on a suspicion that the student may be under the influence of alcohol or other drugs, neither the vice principal nor the school nurse has any role in determining whether the student will be drug tested to confirm the presence of drugs. Thus, the policy is triggered whenever the teaching staff member reports a suspicion that the student is under the influence.

Graceffo argues that the drug policy is not triggered by the referral from a teacher/staff member who suspects that the student may be under the influence of alcohol or other drugs. Rather, the decision to drug test a student is based on the totality of the circumstances and the standard of reasonable suspicion.

The court's discussion on statutory interpretation in *County of Camden v. South Jersey Port Corp.*, 312 *N.J. Super.* 387, 396 (App. Div. 1998), provides guidance here:

> The clearest indication of an Act's meaning is its plain language. However, in times when the statute's plain language creates ambiguities, courts must interpret the statute in a manner consistent with the legislative intent. It is the general intent of the statute that controls the interpretation of its parts. 'Statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion.'
>
> [Citations omitted.]

Applying the court's enunciated principles in this matter requires that "the principal or his designee . . . shall arrange for an immediate examination of the pupil by a doctor." *N.J.S.*A. 18A:40A-12. The pivotal question is whether the use of the word "shall" leaves any room for administrative discretion. In general, use of the word "shall" is construed to be mandatory and the word "may" to be permissive or directory. *No Illegal Points, Citizens for Drivers' Rights, Inc. v. Florio*, 264 *N.J. Super.* 318 (App. Div.

1993). In *Murnick v. Asbury Park*, 187 *N.J. Super.* 455, 460 (App. Div. 1982), the court stated that "[t]he word 'shall' connotes a mandatory legislative intent unless it is used merely to effectuate a provision relating to form and manner." "[S]uch a mandatory construction is warranted where the essential spirit, *e.g.*, the underlying purpose, of the enactment is served." *Devonshire Dev. Assoc. v. Hackensack*, 184 *N.J. Super.* 371, 385 (N.J. Tax Ct. 1981). Nevertheless, the terms have been held to be interchangeable when necessary to implement legislative intent. *Franklin Estates v. Edison*, 142 *N.J. Super.* 179, 184 (App. Div. 1976). Use of the word "shall" has not been found to be conclusive, but rather is indicative of a presumption that can be overcome through interpretation of the legislation's purpose. *Ibid.*

The Legislature declared that a significant number of young people are involved in alcohol and other drugs. *N.J.S.A.* 18A:40A-8. Thus, each local board of education must establish in the elementary and secondary schools a comprehensive substance abuse intervention, prevention and treatment referral program. *N.J.S.A.* 18A:40A-10. The purpose of the program shall be to "identify pupils who are substance abusers, assess the extent of these pupils' involvement with these substances and, where appropriate, refer pupils and their families to organizations . . . [for] professional treatment." *Ibid.* Here, the underlying purpose of *N.J.S.A.* 18A:40A-12 supports interpreting "shall" as a mandatory directive. Thus, administrators have no discretion to decide whether to test students "[w]henever it shall appear to any teaching staff member, school nurse or other educational personnel . . . that a pupil may be under the influence of substances." *N.J.S.A.* 18A:40A-12(a). The legislative intent behind the statute reflects a "zero-tolerance" attitude towards drug abuse and the statutory language leaves little room for interpretation. Moreover, there is nothing in the legislative history to indicate that the statutory provision was not intended to be mandatory. Accordingly, whenever a staff member reports a student whom she/he suspects might be under the influence of drugs, the administrator must implement the drug test.

However, the "courts should avoid interpreting a statute in a manner that leads to an absurd, anomalous, or unreasonable result. Statutory interpretations should turn on the breadth of legislative objectives and the common sense of the situation." *County of Camden v. South Jersey Port Corp., supra*, 312 *N.J. Super.* 387. Indeed, logic dictates that no test would be required if a teacher referred a student for testing without having observed significant symptoms of possible drug use. Thus, the mandatory testing requirement is triggered upon a referral from the teacher that is based upon reasonable suspicion.

Conduct Unbecoming

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. Thus, tenured employees are protected "in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control." *In re Maratea*, 1966 *S.L.D.* 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee that may help to explain the situation. *In re Romanoli*, 1975 *S.L.D.* 352.

"Unbecoming conduct" is broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *Karins v. Atlantic City*, 152 *N.J.* 532, 554 (1998), quoting *In re Emmons*, 63 *N.J. Super.* 136, 140 (1960). Behavior that constitutes unbecoming conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is

morally and legally correct." *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 32, 40 (App. Div. 1992), quoting *Asbury Park v. Department of Civil Serv.*, 17 *N.J.* 419, 429 (1955). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974).

Tenure Charge No. 1

In the first tenure charge, the Board alleges that Graceffo exhibited unprofessional and unbecoming conduct and violated *N.J.S.A.* 18A:40A-12 by not testing N.L. for drugs after his physical education teacher, Ammerman, referred him for a drug test. The Board's position is straightforward and relies on the plain language of the statute. Once Ammerman voiced her suspicions about N.L. to Graceffo the statute left him no choice but to test N.L. Petitioner's Brief at 63. Additionally, the Board contends that Graceffo's obligation to test N.L. was triggered when Flower told Graceffo of his suspicion of N.L.'s possible drug use. *Id.* at 64. The Board maintained that under the statute, the vice principal has no role in deciding whether to drug test a student who was referred as possibly being under the influence of alcohol or drugs. *Id.* at 67.

Respondent argues that he did not violate the drug-testing statute and contends that there must be reasonable suspicion to drug test a student. Graceffo maintains that this level of suspicion did not exist with respect to N.L. Respondent's Brief at 73. In particular, Graceffo claims that no one corroborated Ammerman's detection of a marijuana smell on N.L. *Id.* at 73. Furthermore, Graceffo maintained that he was not told that N.L.'s pupils were dilated. He would have tested N.L. if these symptoms were evident.

Further, respondent argues that nothing in the statute precludes an administrative investigation of a student suspected by a teacher of using drugs. *Id.* at 74. Indeed, Graceffo implies that such an investigation is required because significant

symptoms must be uncovered and reasonable suspicion must exist before a student is tested for drugs. *Id.* at 74.

Although the parties dispute whether Ammerman told Graceffo or the school nurse that N.L.'s pupils were dilated, the evidence reveals that Ammerman articulated more than enough suspicion about N.L. based upon her detection of an odor of marijuana on him. Moreover, Graceffo's prior contact with N.L. should have put him on alert that there might be a concern with drug abuse. Indeed, in December 1998 Graceffo met with N.L. about his truancy over the past few months. Additionally, Graceffo spoke with N.L.'s parent about his cutting classes and possible discipline. The evidence also reveals that Ammerman was concerned about N.L.'s failing grades, failure to dress for gym class and his absences. The record discloses, however, that N.L. was never referred to the Core Team for intervention. Indeed, N.L. was not mentioned to the team until Ammerman threatened to resign because Graceffo did not implement the drug test. Ammerman and Flower smelled the distinct odor of marijuana on N.L. and suspected that he might be under the influence. Both informed Graceffo of their suspicions. Either communication to Graceffo was sufficient to trigger the mandatory-testing requirement of the statute.

Accordingly, I **FIND** and **CONCLUDE** that Graceffo violated *N.J.S.A.* 18A:40A-12 by not testing N.L. after receiving referrals from Ammerman and Flower. I **FIND** and **CONCLUDE** that Graceffo was guilty of unprofessional and unbecoming conduct.

Tenure Charge No. 2

In the second tenure charge, the Board alleges that by not testing N.L. after receiving a referral from Ammerman, Graceffo exhibited unbecoming conduct by not complying with the Board's drug-testing policy. Since the language of the Board's policy mirrors that of the statute, the same analysis is applied in charge number 1 and need not be reiterated here. Indeed, both parties use the same arguments with respect to the first two tenure charges. Thus, I **FIND** and **CONCLUDE** that Graceffo also

violated the Board's policy. Further, I **FIND** and **CONCLUDE** that Graceffo was guilty of unprofessional and unbecoming conduct.

Tenure Charges No. 3 and No. 4[1]

In charges 3 and 4, the Board alleges that during the 1995-96 and 1996-97 school years, Graceffo exhibited a pattern of unprofessional and unbecoming conduct by failing to comply with *N.J.S.A.* 18A:40A-12 and the Board's drug-testing policy. These charges concern four separate incidents that occurred between 1991 and 1996.[2] Each incident will be considered separately to determine whether Graceffo violated the statute and Board policy. Whether Graceffo exhibited a pattern of unbecoming conduct during all of these incidents will also be considered.

1991 Incident

The Board contends that Graceffo was guilty of unbecoming conduct when he refused to administer a drug test in 1991 to a student who left his office in a state of rage although Musetti requested that the student be tested. Petitioner's Brief at 75. The Board was unable to identify the student and referred to this incident as the "rage incident." The Board avers that under the plain language of the statute and the drug policy, Musetti's request constituted a referral. Therefore, Graceffo was obligated to test the student.

Respondent counters that each test must be supported by reasonable suspicion and that Musetti's request was not supported by reasonable suspicion because she had no prior contact with this student. Respondent's Brief at 79.

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[1] The difference between these two charges is that Charge No. 3 addresses the statute and Charge No. 4 addresses the Board's drug-testing policy. Since the two provisions are identical, they will be considered simultaneously.

[2] Pursuant to the Commissioner's interlocutory order the statement of tenure charges that references the 1995-96 and 1996-97 school years was amended to include the 1991 incident and the 1994 incident.

I have considered the arguments of the parties. It is clear that Graceffo violated the statute and the Board's drug policy if the mandatory testing language of these provisions is given a rigid interpretation. A literal reading of the statute requires an administrator to automatically test every student referred by a teacher/staff member, regardless of the level of support for the referral. However, this is not a reasonable or sensible interpretation of the testing provisions. The Board's policy also requires that after a student is referred and drug tested, the vice principal must explain to the student's parents or guardians what symptoms led to the testing. This provision implicitly requires the vice principal to ensure that the reported symptoms warranted testing.

In this instance, Graceffo would have been obligated to tell the parent that the student was being tested for drugs because he was in a state of "rage." While a staff member, Musetti, stood outside Graceffo's office, she overheard the student and the vice principal having a loud discussion. As the student left Graceffo's office, Musetti observed that his face was "contorted" and "bright red." Then, he knocked everything off the counter and left the building. Based on these symptoms, Musetti suspected that the student's behavior might be drug related and requested that he be drug tested.

Russell DeVries, the high school principal at Wayne Valley from 1990 to 1996, testified to his understanding of the policy and described how it was applied at the school. Notwithstanding the express language of the policy, unless the teacher/staff member made the request, the administrator exercised his/her discretion in determining whether to drug test the student. Depending on the circumstances presented by the referring staff member, the teacher or the administrator and the school nurse could determine if a student should be drug tested. However, if a teacher specifically requested that a student be drug tested, the administrator was obligated to test the student, without question or discretion. DeVries did not recall receiving a complaint from Musetti about the "rage incident." Although he conceded under cross-examination that the administrator must test a student upon request, he believed that a situation like the "rage incident" did not call for a drug test by the vice principal.

Given a hypothetical situation with similar facts, DeVries candidly responded as follows:

> Q: Have you ever had a situation where a student who was in your . . . office for a disciplinary matter . . . then referred to you by someone for drug testing?
> A: No.
> Q: . . . And if that were to occur, and if the teacher came to you and said I want this student drug tested, you wouldn't have any choice but to drug test regardless of what took place in your office before?
> A: Well, it would depend on the circumstances there. I think that—
> Q: You just told me —
> A: Yes, I did . . . if I had a student in my office and I - - the student was there for a period of time and I was disciplining the student, and at some point when I decided that I would suspend him and I notified the student of that, or whatever the punishment would be, and I told him that and he got very upset and he walked, slammed outside the door, and a person was standing out there and because of that instant, say I want the student drug tested, I - - we'd have questions of that . . . I would - - discuss what went on in my office . . .
> And I think you're right, . . . would it would be a violation of the law if I didn't do that? Technically, yeah. Would it be right? . . . I don't think it would be right. I think it would be overkill in that . . .
> Q: But you acknowledge that it would be a violation of the law and the policy to refuse?
> A: A technical violation, that's right . . .
> Q: No question about it?
> A: There's no question about it being a technical violation of the law. The circumstances would be - - wouldn't think it would be very appropriate.
>
> [Transcript of Jan. 11, 2000, at 171-74.]

I am persuaded by the evidence that Graceffo was in a better position than Musetti, who had no prior contact with this student, to understand the reasons behind the student's "rage." Thus, in applying a sensible rather than a literal interpretation to the law and policy, I **FIND** and **CONCLUDE** that Graceffo's refusal to honor Musetti's request did not constitute a violation of the statute or the Board's policy. Therefore, I **FIND** and **CONCLUDE** that Graceffo is not guilty of unprofessional and unbecoming conduct with respect to the 1991 incident.

1994 D.M. Incident

The Board contends that Graceffo's failure to drug test one of the three students referred to him for testing on October 17, 1994, constituted a willful violation of the statute and the policy. The Board relies exclusively on the testimony of Musetti, who

claims that Graceffo did not test this student, D.M., because he feared a confrontation with the student's mother. At the hearing Musetti recalled for the first time that when Graceffo rejected her request to test the student he remarked, "laws were meant to be broken."

Graceffo did not recall an incident in 1994 involving D.M. and denies ever telling Musetti, "laws were meant to be broken." Respondent argues that the Board failed to meet its burden of proof. It presented no evidence by persons directly involved in the incident and no documents to support Musetti's allegation. Musetti claimed that she reported the incident to DeVries. DeVries denied having a conversation about D.M. Moreover, Musetti "didn't report it to Mr. Hall and Mr. Sudol when she met with them in February of 1999, didn't make reference to it in her statement which she signed in February of 1999, and which was made part of these tenure charges, and didn't remember it when she was deposed in September 1999." Respondent's Reply Brief at 25. Yet, at some point, she recalled the incident based on a note with the name of the referring teacher, the student, and the date. P-37. Respondent urges that the testimony be rejected because it is incredible, inconsistent with prior statements and "pure hearsay." Respondent's Reply Brief at 26. Respondent further argues that the absence of any documentation in any of Graceffo's performance evaluations casts doubt upon Musetti's credibility. Additionally, respondent challenges Musetti's credibility through inconsistencies between her testimony and the prior statements she made regarding Graceffo's repeated failure to properly enforce the drug policy.

Some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. *United Stations of N.J. v. Getty Oil Co.*, 102 *N.J. Super.* 459 (Ch. Div. 1968). The testimony must be such that the trier of fact can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

Proof of the allegation against Graceffo involving D.M. depends largely on the credibility of several witnesses and the believable evidence. Petitioner has the burden

of proof to establish the charges against Graceffo. Moreover, the quantum of proof is by a fair preponderance of the evidence. *In re Polk, supra*, 90 *N.J.* at 560. Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis*, 67 *N.J.* 47 (1975). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div. 1959).

In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v. Murdoch*, 73 *N.J. Super.* 511 (App. Div. 1962). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, bias or prejudice of a witness may affect his credibility and justify [the trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

The record consists of testimony from twenty-one witnesses presented during fifteen hearing days, more than 100 exhibits and 200 pages of post-hearing briefs, and almost 3,000 pages of transcripts. Many of the witnesses were seasoned educators and their demeanor persuades me that they were committed to their profession and to the students whose safety and training were in their charge. However, they differed on opinion and understanding with regard to implementing the drug policy. For example, DeStefano, a Core Team member who received training on the drug policy testified that generally, the teacher or the vice principal referred the student to the nurse for an

assessment. Sometimes, the student who was referred by the teacher, came to the health office unaccompanied. Moreover, many teachers were reluctant to specifically request that the student to be tested. Instead, they merely described the symptoms that lead them to suspect that the student was under the influence. During DeStefano's employment with the District, she has assessed about forty students who were suspected of being under the influence. A majority of the referrals were made after N.L.'s death.

Confusion among District employees about Board Policy No. 5331.6 is also evident in two memoranda circulated among building principals and vice principals. On October 14, 1997, Eileen Gangi, president of the Wayne Education Association, distributed a memorandum to principals and vice principals that explained the implementation of the Board's drug policy. P-14. On October 16, 1997, Gary Hall, the District's human resource specialist, circulated another memo which corrected some statements made by Gangi. P-15. Hall instructed the building principals and vice principals that "to the extent the two memoranda may differ, the contents of this memorandum should take precedence." *Ibid.*

In many instances the witnesses' objectivity was overshadowed by their strong feelings about Graceffo's implementation of the policy; some in support of Graceffo, others in opposition. Indeed, Dr. Raymond V. Kwak, superintendent of the Wayne School District, acknowledged that this proceeding "has split some of our staff . . . pitted administrator against teacher, teacher against teacher, union member against union member." DeVries believed that "Dr. Kwak hated Joe" and recalled a meeting in which Dr. Kwak addresses Graceffo in an abrasive manner.

Acrimony among these colleagues was visible at the hearing. For example, DeVries was a member of the Core Team and attended most of the meetings. He recalled the complaint from the Core Team about Graceffo's refusal to test A.F. P-25. DeVries testified that Musetti was the only member of the Core Team who complained about Graceffo. Thus, he believed that Musetti wrote the complaint and expressed her

personal views. DeVries also believed that a complaint filed by Charles Tucker, president of the Wayne Education Association, was actually triggered by Musetti. Although he did not remember specific names, DeVries maintained that he had no discussions with Graceffo about the "rage" incident in 1991 or the D.M. incident in 1994. He recalled investigating all complaints against Graceffo made by Musetti. He was "satisfied" that the policy was not violated. Under cross-examination, DeVries acknowledged that on his own performance evaluation he received several "needs improvement" ratings in areas of supervision and implementing rules and procedures and school policy.

Charles Tucker has been employed by the District for thirty-six years and candidly testified about his experiences with Graceffo, Musetti and the policy. Tucker attended workshops on the policy and understood that the vice principal must test a student upon a referral by a staff member. Tucker believed that Musetti was committed to her position as the student assistant specialist. She performed her duties as if "it was the most important job in the building . . . she pursued it with vigor, effectiveness, concern . . . she had a passion for this work." Tucker received complaints from teachers and Musetti that Graceffo did not test students upon referral. During one discussion about the drug policy, Graceffo said that he believed he had leeway in determining to test a student, on a case-by-case basis. He also received a copy of the complaint from the Core Team but did not discuss it with Graceffo. Tucker did not recall receiving a complaint from Musetti involving an incident in 1991 or 1994. Tucker also worked with Graceffo and believed that he was a good vice principal who fairly administered student discipline. Tucker rated Graceffo in the top three vice principals among the six to eight administrators in the District.

Mary Jane Tierney has been employed by the District for thirty-three years and is currently the principal of an elementary school in the Wayne School District. Since 1993, Musetti complained that Graceffo was not implementing the drug policy "her way." Further, Musetti informed Tierney that she was keeping a file on Graceffo and that one day she would "get him." On rebuttal, petitioner revealed some personnel

issues between Tierney and the Board. However, there is nothing in the record to suggest that Tierney might be biased or hold any grudges against Musetti. Tierney's testimony was credible.

DeStefano candidly testified about her observations at the Core Team meeting she attended on February 4, 1999. Ammerman was very upset and spent the entire period, forty-two minutes, talking about Graceffo's conduct and his refusal to test N.L. However, Ammerman never expressed that N.L. was "at risk". DeStefano described Ammerman's demeanor towards Graceffo as personal, negative and unprofessional. DeStefano also described Musetti's response to Ammerman's statements as "very vocal". Further, Musetti appeared "agitated" and began "pontificating" against Graceffo.

In the absence of documentation of the D.M. incident, the question of whether Graceffo failed to test D.M. and, thus, violated drug-testing procedures, is wholly dependent on the credibility of Musetti's testimony. In *Johnson v. Barton*, 251 *F. Supp.* 474, 476 (W.D. Va. 1966), the court stated that:

> [T]he term "burden of proof" refers to the "burden of persuasion" . . . . The burden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the party who has the burden of persuasion on the particular issue in question.

To assess the credibility of the witness, I have considered the nature, character and scope of the testimony, the circumstances of the creation of the testimony, and its reliability. Musetti's presence at the hearing provided the safeguards of in-person testimony under oath, the opportunity for respondent to cross-examine the witness and the opportunity for the trier of fact to observe the witness's demeanor. Considering that six years have passed since the alleged D.M. incident, the testimony need not be flawless to be believable. However, Musetti's failure to document Graceffo's inaction may have diminished her ability to adequately recount what happened in October 1994. Indeed, she provided critical information to Hall regarding Graceffo's repeated failure to drug test students. However, D.M. was not mentioned until the hearing. "[T]estimony

to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954).

The evidence presented by the parties on the alleged 1994 incident involving D.M. is in a state of equilibrium with respect to whether certain facts exist. Thus, the decision must go against the party who has the burden of persuasion on the issue in question. *Johnson v. Barton, supra*, 251 *F. Supp.* at 476.

Therefore, I **FIND** and **CONCLUDE** that there is insufficient evidence that Graceffo neglected his drug-testing duties with respect to the 1994 D.M. incident.

1995 A.F. Incident

The Board contends that Graceffo violated the drug-testing procedures by drug testing A.F. on October 24, 1995, rather than on October 23, 1995, the day of the referral. The Board alleges that by waiting until the following day, Graceffo violated the immediacy requirement of the testing procedures. Petitioner's Brief at 80. The Board acknowledges that the term "immediate" is not defined in either the policy or the statute, but argues that it should be given its ordinary meaning of "without delay." *Ibid.* This interpretation is consistent with the school safety concerns evident in other provisions of the drug-testing policy. For example, the policy provides that a student suspected of using drugs must be removed from the school environment for a 24-hour medical dismissal. *Ibid.*

Respondent counters that he was not guilty of any misconduct during this incident because there is nothing in the statute concerning a timeline for when a drug test must take place. Respondent's Brief at 76. Further, respondent emphasizes that the Board exhibited no prior concern about this incident, implying that it was only raised now because of the death of N.L. in an unrelated incident. *Id.* at 77.

A statute is to be construed in its entirety "to clear up any obscurities and ambiguities in the law and to make the whole of the law and every part of it harmonious and effective." *In re N.*, 96 *N.J. Super.* 415, 421-22 (App. Div. 1967), quoting McCaffrey, Statutory Construction, § 44, at 86 (1953). A sensible application of the law "is to be gathered from its object and the nature of the subject matter, the contextual setting, and the statutes *in pari materia.*" *Id.* at 422, quoting *State v. Brown*, 22 *N.J.* 405, 415 (1956).

While carrying out the day-to-day duties of his position, a school administrator may find the need for accommodations. In the case of A.F., Graceffo waited until the following day in order to accommodate the student's mother. I am persuaded by the whole of the evidence that Graceffo exhibited poor judgment in waiting one day to test A.F. Although there is nothing in the statute or policy requiring that a student suspected of drug use be tested within a 24-hour period, the word "immediately" implies a same-day test. Indeed, DeVries acknowledged that delayed testing could result in negative test results or the student could "fall through the cracks." Here, the delay violated the essential spirit and underlying purpose of the policy and law.

Although Graceffo arranged for A.F. to be tested the next day, I **FIND** and **CONCLUDE** that Graceffo violated *N.J.S.A.* 18A:40A-12 and Board Policy No. 5131.6. I **FIND** and **CONCLUDE** that Graceffo was guilty of unprofessional and unbecoming conduct.

1996 J.B. Incident

The Board alleges that Graceffo's failure to test J.B. on November 6, 1996, violated drug-testing procedures. As with the A.F. incident, the Board contends that any delay in testing a student suspected of drug use constitutes a violation. Petitioner's Brief at 82. The Board further contends that the five-hour delay in testing J.B. was aggravated by the fact that J.B. was a known drug abuser. *Id.* at 84. Although

Graceffo was the sole administrator in the building on the morning of November 6, 1996, the Board argues that testing J.B. should have been his top priority. *Id.* at 82.

Respondent argues that as the only administrator in the building, Graceffo did what he was supposed to do. He remained visible and free to deal with emergencies or situations as they arose. Respondent's Brief at 75. Graceffo maintains that by having Tierney test J.B. as soon as she came in, he satisfied his responsibility. *Ibid.*

Similar to the A.F. incident, here there is no allegation that J.B. was not tested, only that the student was not tested soon enough. Unlike other provisions of the statute which requires "immediate" action, the statutory directive that the "student shall be examined as soon as possible" implies that extenuating circumstances may be taken into account. Here, the referring teacher waited until the end of the school day to report her suspicions about J.B. Although the Board noted that J.B. "had a history of drug abuse" no explanation is given for the delay in referring the student under the policy. Indeed, the law and policy require that "the teaching staff member . . . shall report the matter as soon as possible." Moreover, the policy requires that "the student shall not be left alone." After J.B. left the building, the parents were not contacted. Instead, "Musetti contacted Brabston and Graceffo's office to make arrangements to have J.B. chemically screened the following morning." *Id.* at 37.

All staff members who were involved in this incident, including the referring teacher, Musetti, Tierney and Graceffo, contributed to the delay in testing J.B. for drugs. However, Graceffo was the only administrator in the building when J.B. returned to school the next day. Although J.B. was under Tierney's charge and it may have been difficult for Graceffo to implement the drug test on J.B. any sooner than the time he was actually tested, it was not logistically impossible.

I **FIND** and **CONCLUDE** that Graceffo violated *N.J.S.A.* 18A:40A-12. I **FIND** and **CONCLUDE** that Graceffo was guilty of unprofessional and unbecoming conduct.

CONCLUSIONS

I have considered all of the incidents included in the tenure charges. I **CONCLUDE** that the Board has established by a preponderance of the evidence that Graceffo violated the statute and Board Policy 5131.6 in charges 1 and 2, the N.L. incident.

I **CONCLUDE** that the Board has established by a preponderance of the evidence that Graceffo violated the statute and Board Policy 5131.6 in charges 3 and 4, the A.F. incident and the J.B. incident. I **CONCLUDE** that the Board has not established by a preponderance of the evidence that Graceffo violated the statute and Board Policy 5131.6 in charges 3 and 4, the 1991 "rage incident" and the 1994 D.M. incident.

While the combined weight of all the incidents referenced in tenure charges 3 and 4 reflects poorly on Graceffo's application of the drug-testing policy, the evidence does not amount to a pattern of unbecoming conduct. Graceffo served as vice principal at Wayne Valley High School from 1991 to 1998, and at Wayne Hills High School from 1998 to 1999. The evidence shows that from 1994 to 1999, Wayne Valley High School conducted approximately 189 drug tests on students. R-19. During the same period, Wayne Hills High School conducted about 184 drug tests. *Ibid.* The Board has demonstrated that from 1995 to 1999, Graceffo failed to properly implement the policy and the law with three students. Even assuming, *arguendo*, that Graceffo is guilty of the 1991 and 1994 incidents, the Board did not take disciplinary action against Graceffo for any of these incidents until the death of N.L. On the other hand, Graceffo has consistently received positive performance evaluations during the period of the charges. These factors weigh against finding a pattern of unbecoming conduct. Thus, I **CONCLUDE** that the Board failed to establish that Graceffo's conduct constituted a postion of unbecoming conduct.

PENALTY

Under *N.J.S.A.* 18A:6-10, a person under tenure in the public school system may be dismissed or reduced in compensation for unbecoming conduct. Factors to be considered in assessing an appropriate penalty include the nature and gravity of the offense, any extenuating or aggravating circumstances, and maintaining discipline and proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 420-22 (App. Div. 1967). The Board contends that Graceffo's conduct warrants dismissal from the Wayne School District. Dismissal is invariably the penalty for egregious acts of unbecoming conduct by educators. *See, e.g., Morris Sch. Dist. Bd. of Educ. v. Brady*, 92 *N.J.A.R.*2d (EDU) 410 (special education teacher's conduct, which included tolerance of and participation in gross sexual dialogue in classroom, constituted unbecoming conduct and warranted dismissal); *In re Cooke*, 92 *N.J.A.R.*2d (EDU) 220 (series of incidents of sexual contact and improper touching of junior high school students constituted unbecoming conduct and warranted dismissal of seventeen-year veteran teacher); *In re Smith*, 93 *N.J.A.R.*2d (EDU) 729 (1993), *adopted*, 94 *N.J.A.R.*2d (EDU) 317 (dismissal of teacher was warranted for unbecoming conduct that involved physical and mental abuse of children).

Lesser penalties are imposed, however, where the unbecoming conduct is mitigated by other circumstances. In *Hudson County Area Vocational-Technical School v. Smith*, 96 *N.J.A.R.*2d (EDU) 903, for example, the Commissioner adopted the decision of the administrative law judge (ALJ) that a teacher's inappropriate physical contact with students warranted a pay reduction, not termination, when such inappropriate action was provoked by the students and not intended to harm them.

In *In the Matter of the Tenure Hearing of Boyd*, 93 *N.J.A.R.*2d (EDU) 445, the Commissioner similarly adopted the decision of the ALJ, who concluded that dismissal was too harsh a penalty for a teacher who was found to have inappropriately used corporal punishment. The ALJ reasoned that the teacher had already paid a "very heavy penalty" as a consequence of the charges, including the loss of 120 days' salary as well as professional and personal embarrassment. 93 *N.J.A.R.*2d (EDU) at 452.

The decision not to dismiss the teacher in this case did not condone any of the acts in the case but "[r]ather recognize[d] 25 years of unblemished service." *Ibid.*

In *In the Matter of the Tenure Hearing of Charles Motley*, EDU 7421-97, Initial Decision (May 5, 1999), *modified*, Comm'r (Aug. 4, 1999) http://lawlibrary.rutgers.edu/oal/search.html, a teacher found guilty of unbecoming conduct, including belittling a new teacher in front of her students, and neglect of duty, also received a penalty short of dismissal. The original penalty imposed by the ALJ included the withholding of 120 days' salary and the permanent reduction of one step on the salary guide. The Commissioner increased the penalty by imposing forfeiture of an additional two months' salary.

In *Woodbridge Township School District v. Rumage*, 1 *N.J.A.R.* 381 (1980), a guidance counselor with a distinguished career and an unblemished record, who pled guilty to conspiracy and bookmaking charges and served a three-month prison sentence, was penalized by a reduction in salary and the forfeiture of two months' salary.

The facts of the present case are analogous to those cases where a lesser penalty than dismissal was imposed. Graceffo is an experienced administrator who exhibited poor judgment by not promptly testing A.F. and J.B. and by not testing N.L. after receiving a referral from Ammerman and Flower. Except for the pending charges, Graceffo's record is unblemished. He has served the District for thirty-four (34) years in many positions including teacher, director and coordinator of several departments and vice principal. He has also been active in school and community activities. These mitigating factors outweigh Graceffo's failure to implement the drug policy referenced in the charges.

I have considered the Board's argument that any penalty short of dismissal will be futile, because if Graceffo is allowed to return to the District he will continue to live by his purported philosophy of "laws were meant to be broken." Petitioner's Brief at 100. The argument is unpersuasive. I have observed Graceffo's demeanor and the demeanor of all the witnesses who appeared at the hearing. I am persuaded that

Graceffo is remorseful over the death of the student who attended his school and that he has learned a lesson from all the embarrassment and humiliation that he has suffered from having to endure this protracted ordeal. Moreover, Graceffo's employment record does not square with the image of a reckless lawbreaker that is portrayed by the Board.

I **CONCLUDE** that a reduction in salary along with a suspension is an appropriate penalty. Based on the whole of the record, I **CONCLUDE** that a one-step reduction in compensation and a 120-day suspension is an appropriate penalty.

ORDER

It is **ORDERED** that Graceffo suffer a permanent reduction of one step on the salary guide.

It is further **ORDERED** that Graceffo forfeit all salary and all benefits that would otherwise have accrued during the first 120 days of his suspension.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 2000
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6-21-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner

Eugene Sudol
Deborah Cordo
Marilyn DeStefano
Charles Tucker
Dr. Raymond Kwak
Robert Allen Flower
Linda Remolino
Gary Hall
Victoria Musetti
Howard Weinberg
Judith Bradley
Mary Donovan-Zipf
Susan Ammerman

For Respondent

Joseph Graceffo
Nancy J. Przetak
Robert Reis
Charles Stein
Mary Jane Tierney
Joseph Modica
Robert Santangelo
Russell DeVries

Exhibits:

Petitioner

P-1 Tenure Charges against Joseph Graceffo

P-2 Affidavit of Dr. Ray V. Kwak

P-3 Affidavit of Eugene J. Sudol

P-4 Correspondence dated March 23, 1999

P-5 Certificate of Determination

P-6 Board Resolution

P-7 Correspondence dated May 14, 1999

P-8 Certification and Affirmation dated April 7, 1999

P-9 Answer dated May 26, 1999

P-10 Statement of Sue Ammerman dated February 12, 1999

P-11 Statement of Deborah Cordo dated February 18, 1999

P-12 Statement of Marilyn DeStefano dated February 9, 1999

P-13 Addendum to Statement of Marilyn DeStefano dated February 12, 1999

P-14 Memo of Eileen M. Gangi dated October 14, 1997

P-15 Memo of Gary P. Hall dated October 16, 1997

P-16 Statements of Robert Flower dated February 8 and 12, 1999

P-17 Statement of Victoria Musetti dated February 10, 1999

P-18 Memo of Eugene J. Sudol dated February 5, 1999

P-19 Note of Eugene J. Sudo dated February 11, 1999l

P-20 Note of Respondent dated January 21, 1999

P-21 Memo by Sudol dated February 11, 1999

P-22 Letter of Ray V. Kwak dated February 11, 1999

P-23 Board Policy No. 5131.6 dated April 20, 1998

P-24 Letter of Russell DeVries dated October 24, 1995

P-25 Letter of Charles T. Tucker dated October 25, 1995

P-26 Correspondence of Victoria Musetti dated November 6, 1996

P-27 Letter of Victoria Musetti dated November 8, 1996

P-28 Statement of Robert Reis dated February 15, 1999

P-29 Memo of Robert Reis dated February 4, 1998

P-30 *N.J.S.A.* 18A:40A.12

P-31 Letter from Eileen M. Gangi dated March 5, 1999

P-32 Memo from Eileen M. Gangi dated October 5, 1998

P-33 Memo from Russell DeVries dated November 2, 1995

P-34 Statement of Robert L. Santangelo dated April 5, 1999

P-35 Notes of Eugene Sudol - undated

P-36 Memo of Eugene J. Sudol dated September 23, 1999

P-37 Note of Victoria Musetti dated October 17, 1994

P-38 Flowchart

P-39 NJPSA News Article dated April 1999

P-40 Respondent's Notice for Production of Documents – Identification Only

P-41 Statistical Summary

P-42 Statistical Summary

P-43 Work Schedule – Deborah Cordo

P-44 Interrogatories – Identification Only

P-45 Respondent's Answers to Interrogatories – Identification Only

P-46 Respondent's Supplemental Answers – Identification Only

P-47 Correspondence – Identification Only

P-48 *N.J.S.A.* 18A:6-10 *et seq.*– Identification Only

P-49 *N.J.A.C.* 6:24-5.1 *et seq.* – Identification Only

P-50 *N.J.A.C.* 1:6B-1.1–Identification Only

P-51 Board Policy No. 5131.6 dated July 15, 1993

P-52 Board Policy No. 5131.6 dated January 18, 1996

P-53 Board Policy No. 5131.6 dated June 24, 1999

P-54 CORE Team Tracking Sheet dated February 4, 1999

P-55 Evaluation – DeVries dated April 18, 1989

P-56 Evaluation – DeVries dated December 22, 1994

P-57 Evaluation – Devries dated December 22, 1995

P-58 Evaluation – DeVries dated May 8, 1995

P-59 Memo from Schwartz dated June 5, 1995

P-60 Deposition – Robert Reis dated September 9, 1999

P-61 Class Cut Report – N.L.

P-62 Class Cut Report – N.L.

P-63 Class Cut Report – N.L.

P-64 HSPT Report – N.L.

P-65 Grades – N.L. (first marking period)

Respondent

R-1 Evaluation for tenure, dated September 1969

R-2 Evaluation Report dated April 1980

R-3 Evaluation Report dated April 1981

R-4 Evaluation Report dated April 1982

R-5 Evaluation Report dated April 1983

R-6 Evaluation Report dated October 1985

R-7 Evaluation Report Dated April 1986

R-8 Evaluation Report dated April 1988

R-9 Evaluation Report dated April 1989

R-10 Evaluation Report dated February 1990

R-11 Evaluation Report dated February 1991

R-12 Evaluation Report dated May 1991

R-13 Evaluation Report dated March 1992

R-14 Evaluation Report dated March 1993

R-15 Evaluation Report dated March 1995

R-16 Evaluation Report dated March 1996

R-17 Evaluation Report dated March 1997

R-18 Evaluation Report dated March 1998

R-19 Statistical Summary and Correspondence, John R. Freeland Dated August 31, 1999 and September 13, 1999

R-20 Interrogatories – Identification Only

R-21 Drug and Alcohol Policy dated August 22, 1991

R-22 Drug and Alcohol Policy dated November 21, 1991

R-23 Drug and Alcohol Policy dated August 6, 1992

R-24 Drug and Alcohol Policy dated July 15, 1993

R-25 Drug and Alcohol Policy dated January 18, 1996

R-26 Drug and Alcohol Policy dated February 11, 1996

R-27 Drug and Alcohol Policy dated June 24, 1999

R-28 Correspondence/Commendations dated January 9, 1992 to February 27, 1996

R-29 Petition dated February 28, 1999

R-30 Letter of Fogarty dated October 20, 1999

R-31 Memo to Staff - 1999

R-32 Letter from Tucker – Identification Only

R-33 Military Honor – Identification Only

R-34 Military Honor – Identification Only

R-35 Newspaper Article – Identification Only

R-36 Middle School Evaluation

R-37 Middle State Evaluation

R-38 N.J. Monthly Magazine – Identification Only

R-39 USA Today – Identification Only

R-40 Congressional Record – Identification Only

R-41 Flag of USA – Identification Only

R-42 Newspaper Article dated February 10, 1999 – Identification Only

R-43 CORE Team Behavior Check List

R-44 CORE Team SAP – Guidance Counselor

R-45 CORE Team SAP – Vice Principal

R-46 CORE Team SAP - Nurse

R-47 CORE Team Grid Sheet

R-48 Drug Policy – Monroe School District – Identification Only

R-49 Drug Policy – Northern Valley Regional High School – Identification Only

R-50 Drug Policy – Northern Highlands Regulation – Identification Only

R-51 Drug Policy - West Windsor, Plainsboro – Identification Only

R-52 Drug Policy - Hamilton Township High School – Identification Only

OAL DKT. NO. EDU 5619-99
AGENCY DKT NO. 113-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH GRACEFFO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WAYNE, PASSAIC COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions, respondent's exceptions, and the replies[1] thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

BOARD'S EXCEPTIONS

In its exceptions, the Board objects to the findings of the Administrative Law Judge (ALJ) with respect to the 1991 and 1994 incidents and to the ALJ's recommended penalty. The Board argues that the ALJ's conclusion with respect to the 1991 incident is contrary to her finding that an administrator's duties are mandatory upon receipt of a referral by a teaching staff member who reports that a student may be under the influence of alcohol or other drugs. The Board submits that the ALJ, therefore, erred when she determined that respondent did not violate Board policy or State law by refusing to test the "rage" student in 1991, and that, respondent's conduct in that incident did not amount to unbecoming conduct. (Board's Exceptions at 9, 11)

[1] Although the record in this matter closed on May 3, 2000 and the Initial Decision was issued on June 19, 2000, respondent's Reply Exceptions included a June 22, 2000 article from the *Bergen Record* and references in the brief thereto. The *Bergen Record* article was not presented at the hearing and not previously made a part of the record. Therefore, in accordance with *N.J.A.C.* 1:1-18.4(c), the article and incorporated references thereto were not considered by the Commissioner.

With respect to the 1994 incident, the Board avers that the ALJ's determination concluding that there was insufficient evidence that respondent neglected his drug-testing duties because: (1) the Board relied exclusively on the testimony of Victoria Musetti, the District's Student Assistance Specialist, and did not present any evidence from anyone else directly involved, and (2) Musetti had not mentioned the incident until the time of the hearing, are not sufficient bases for the ALJ's assessment that the Board did not meet its burden of proof. (*Id.* at 13-14) While acknowledging that Musetti's conversations with teacher Bob Bishop and school principal DeVries are hearsay, the Board argues that hearsay evidence is admissible provided it is supported by other competent evidence, which the Board avers is present in Musetti's conversations with respondent, which are not hearsay. *See N.J.R.E.* 803(b)(1). (*Id.* at 15) Additionally, the Board proffers that, even if all the testimony in the 1994 incident was based upon pure hearsay, it would still constitute credible evidence for the purpose of demonstrating a pattern of unbecoming conduct. (*Id.* at 16) With respect to the ALJ's second concern, the Board disputes that Musetti did not mention the 1994 incident until the hearing, submitting that the incident was mentioned by Musetti during the Board's initial investigation, was one of the bases for its decision to certify tenure charges, is described in Musetti's written statement, and the incident is contained in the tenure charges and was the subject of the interlocutory appeal before the Commissioner. (*Id.* at 17)

Further, the Board advances the argument that the ALJ erred when she found that respondent's multiple violations, in 1995, 1996 and twice in 1999, did not constitute a pattern of unprofessional and unbecoming conduct. (*Id.* at 19) Although the four incidents in 1995, 1996 and 1999 were the only charges the Board was able to document by the time it certified tenure charges, the Board contends that the testimony at hearing indicates that there were additional incidents which the Board asks the Commissioner to consider as additional evidence that

respondent engaged in a pattern of unprofessional and unbecoming conduct from 1991 through 1999. (*Id.* at 20-22)

With regard to penalty, the Board urges the Commissioner to reject the ALJ's conclusion that respondent's conduct was just "poor judgment," which, in light of his unblemished record, warrants a lesser penalty than dismissal. Rather, the Board posits that the Commissioner should take into account the seriousness of respondent's conduct and the consequences of that conduct, and conclude that dismissal is the appropriate penalty. (*Id.* at 29-30) The Board further argues that, despite in-service training, respondent has shown a propensity for continually exercising discretion as to whether to chemically screen students referred to him for suspected drug and alcohol use in contravention of State law and Board policy and, thus, is likely to continue such conduct, putting the school community at risk, if he is permitted to continue in his position. (Id. at 33-35)

RESPONDENT'S EXCEPTIONS

In his exceptions, respondent argues that he has maintained from the outset that:

> *N.J.S.A.* 18A:40A-12 *** must be read in conjunction with the companion statute, *N.J.S.A.* 18A:40A-11, and the corresponding administrative code section, *N.J.A.C.* 6:29-6.3, all of which our (sic) grounded on the concept of *"reasonable suspicion"*. That this is the standard on which all drug tests are to be based, including those sanctioned by *N.J.S.A.* 18A:40A-12, and that *N.J.S.A.* 18A:40A-11 expressly states that "significant symptoms["] must be present to trigger the examination and treatment provisions in the statute, only underscores that the role of the principal or the designee is not as a passive bystander as the Board would have it, but as an active participant to ensure, as the Court said with regard to the 1991 incident, that the symptoms reported are sufficient to warrant testing and in addition, to ensure that the obligations of the Board are followed and the rights of the student are protected. (emphasis in text) (Respondent's Exceptions at 2-3)

With respect to the 1999 N.L. incident, respondent submits that the referring teacher did not request that he chemically screen N.L., so that the procedure in place was to

evaluate the student to corroborate the smell of marijuana to satisfy whether there was reasonable suspicion to test the student. Respondent submits that the Court's application of the statute in N.L. is inconsistent with the reasonable suspicion provision, arguing that the ALJ's finding in the N.L. incident can only be justified by the interpretation that a test must occur "*automatically*" upon a teacher's referral, thus rendering the role of a principal or designee to that of a passive bystander who cannot investigate or corroborate what occurred. (*Id.* at 4-5)

Additionally, respondent asserts that the ALJ erred in concluding that because respondent violated *N.J.S.A.* 18A:40A-12 that he had exhibited conduct unbecoming. Respondent avers that a violation of statute in and of itself does not constitute conduct unbecoming. To conclude that respondent is guilty of conduct unbecoming, respondent argues, there must be a finding that respondent deliberately disregarded the law and his obligations under the law, which did not occur in this instance, wherein the ALJ found respondent to have exhibited "poor judgment" in three incidents in the course of 34 years as an educator. There is nothing in case law, respondent maintains, that suggests that conduct unbecoming can be based on mere negligence, particularly in a situation such as herein where respondent's own immediate supervisors did not fault him for the actions he took. (*Id.* at 6) Respondent raises the question, that if other seasoned educators agreed with respondent's actions and if there was confusion as to when and how the policy and statute were to be triggered, as is evidenced in the testimony, then how can respondent's "poor judgment" somehow be raised to the level of conduct unbecoming. (*Id.* at 7)

Respondent asserts that Nurses Nancy Przetak and Marilyn DeStefano, Vice Principal Bob Santangelo, Core Team Members Susan Ammerman and Linda Remolino, and Principals Robert Reis and Russell DeVries testified that their understanding of the District's implementation of the Board's Policy 5131.6 and the statute was consistent with respondent's understanding; that is, if a teacher in the District requests a drug test, then the student is tested.

However, if a teacher reports that a students smells of alcohol or marijuana, without a request to test, the practice up to January 1999, was to leave it up to the nurse and administrator to determine whether a smell exists and whether anything further is required. (*Id.* at 10-11) In support of his contention that this was the practice, respondent points to a November 6, 1996 memo from Vicky Musetti and the Core Team to all staff which states *"we would like to remind you that you must be clear in your request that a student is to be tested ... it would be better to state your concern and be clear that you are requesting the drug policy be invoked."* (emphasis in text) (*Id.* at 16) Although the ALJ determined that "****communication to Mr. Graceffo was sufficient to trigger the mandatory testing requirement of the statute,*" respondent submits that the current principal of Wayne Valley High School, Mr. Reis, testified that if he receives a report that a student may smell of marijuana, "*you can certainly make a call for a test, but everything that I have been taught, previously policies, state assessment for Core Teams, everything I have been taught says that I have to have some suspicion, something stronger than just a smell. So, I would go after that. I would bring people in. I would have them look at the kid, talk to the kid. I would be smelling that kid like crazy. I would have the nurse take a look at his vitals. I don't know whether I would necessarily test."* (emphasis in text) (*Id.* at 25) Respondent avers that he, therefore, acted consistent with the District's practice since the referring teacher in the 1999 N.L. incident, Ms. Ammerman, only informed him that N.L. smelled of marijuana; she did not request a test. (*Id.* at 15)

Respondent also disputes the Board's claim that he was provided training with regard to the Board's Drug and Alcohol Policy or the State statute, stating that there was no organized training provided, a fact confirmed by fellow Vice Principal Santangelo, who testified that there was no training for administrators at Wayne Hills High School, and Nurse Przetak, who testified that the policy was only touched upon the day before school started. (*Id.* at 12)

At page 28 of the Initial Decision, the ALJ states that the evidence shows that from 1994 to 1999 Wayne Valley High School conducted approximately 189 drug tests, and that during the same period Wayne Hills High School conducted 184 tests. Respondent submits that these statistics were taken from an early report before the figures were revised and are, therefore, incorrect. Since the rigorousness of the enforcement of the school's Drug and Alcohol Policy at the school where respondent was assigned has some relevance, respondent maintains that it is important to correct the statistics embodied in the Initial Decision. According to the revised statistics presented to the Court in Exhibit R30, respondent maintains, from 1994 to 1999 Wayne Valley High School, where respondent was assigned, had an overall total of 193 drug and alcohol tests administered as compared to a total of 88 tests, 26 of which were administered after the N.L. incident, during the same period at Wayne Hills High School.[2] The number of tests administered at Wayne Valley High School, therefore, far exceeds those administered at the District's other high school. This, respondent argues, demonstrates that the administration at Wayne Valley High School, of which respondent was a part, was not lax in implementing the Board's Drug and Alcohol Policy. (*Id.* at 12-14)

With respect to the January 21, 1999 N.L. incident, respondent posits that he did what any other administrator in the District would have done at the time under similar circumstances. When Ms. Ammerman indicated to him that she smelled marijuana, he took N.L. to the nurse to be evaluated. Absent a request from the teacher to test, and absent a confirmation of smell by respondent, or Nurses DeStefano or Cordo, and Ms. DeStefano's statement that she found everything to be normal, respondent followed the practice in the District not to test. (*Id.* at 16-17) He did, however, call the parents to advise them of the situation. Further, although Ms. Ammerman apparently mentioned a request to test to the two nurses, both Ms. DeStefano

[2] Respondent provides a breakdown of the drug and alcohol screening tests performed at Wayne Valley High School as 137 tests performed in school and 56 tests administered privately. Wayne Hills High School reportedly had 83 tests performed in school and 5 tests conducted privately.

and Ms. Cordo testified that they did not tell respondent that Ms. Ammerman had requested a drug test. (*Id.* at 17) Respondent also disputes the ALJ's statement in the Initial Decision that Ms. Ammerman "*testified that she asked Mr. Graceffo to test N.L.*" Respondent argues that Ms. Ammerman actually testified that she reported to respondent as follows, "*to the best of my knowledge, that I smelled marijuana and I have a good nose.*" (emphasis in text) (*Id.* at 18) Further, although Ms. Ammerman testified that she had reported that N.L.'s pupils were dilated to Ms. Cordo, Ms. DeStefano, Mr. Graceffo, Mr. Flower, Chairperson for the Department of Art, Music and Physical Education, and Mr. Modica, respondent maintains that not one of the individuals to whom Ms. Ammerman allegedly reported the symptoms of dilated pupils recalled her making such a statement, and Ms. Ammerman acknowledged that she did not tell the Core Team that N.L.'s pupils were dilated when she met with them on February 4, 1999. (*Id.* at 18-20)

Respondent excepts to the ALJ's statement that Mr. Flower told respondent that he too "*suspected drug use by N.L.*," and that Mr. Flower suspected that N.L. "*might be under the influence.*" Respondent submits that Mr. Flower testified that he had told respondent that he smelled an odor on N.L. that he suspected might be of marijuana and that Ms. Ammerman had asked him to come over and let him know. (emphasis in text) (*Id.* at 20-22) Respondent also states he thought Mr. Flower was referring to Ms. Ammerman's incident the previous day when Mr. Flower told him that he thought he smelled marijuana on N.L. Respondent contends that his response to Mr. Flower, that he had taken care of the matter the previous day and had spoken to N.L.'s mother, substantiates that he thought they were talking about events of the previous day. (*Id.* at 43)

Respondent contends that the motivation of the Board and Ms. Musetti is about whom to blame for N.L.'s overdose on February 6, 1999. (*Id.* at 31) In support of this contention, respondent points to the testimony of the former principal of Wayne Valley High

School, Mr. DeVries, who stated that he believed the superintendent hated respondent, and to Ms. Tierney's testimony that Ms. Musetti told her that she was "*keeping a file on Graceffo and that one day she would get him.*" (emphasis in text) (*Id.* at 30-31) Respondent submits that Ms. Musetti's testimony was a work in progress with respect to the 1994 D.M. matter as her testimony had no resemblance to her prior statement. Respondent also faults the Board in this regard for choosing to rely solely on Ms. Musetti's testimony in the D.M. incident, rather than utilizing Mr. Bishop to testify, when it readily had him available and he was allegedly the individual directly involved in the incident. (*Id.* at 31)

In the 1996 J.B. incident, respondent points out that because he did not act to test J.B. between 7:30 a.m. and noon the same day, November 6, 1996, the ALJ found that respondent exhibited conduct that was unprofessional and unbecoming. (*Id.* at 33) Respondent counters that the evidence shows that, as his principal testified, the real concern here had to do with what occurred on November 5, 1996, before respondent was brought into the picture. (*Id.* at 36) According to Ms. Musetti, J.B. had twice tested positive for drugs. Yet, despite this knowledge, following an observation on November 5 by referring teacher, Ms. Curasco, that J.B. may have been under the influence, Ms. Musetti, and perhaps Vice Principal Tierney, as well, allowed J.B. to go home unattended and unsupervised, contrary to policy, without informing his parents. (*Id.* at 33) Respondent, therefore, finds no logic to the ALJ's conclusion that respondent's conduct on November 6 was unbecoming and unprofessional in view of the silence regarding the other participants' conduct of the matter the previous day. (*Id.* at 36)

In light of the fact that no one was found at fault in allowing J.B. to go home unsupervised and without parental notification, respondent disputes the ALJ's conclusion that his conduct was unprofessional and unbecoming by his handling of a similar incident in 1995. In the 1995 A.F. incident, respondent notified A.F.'s mother of the referral, and kept A.F. in his office for the remainder of the day since the student's mother was unable to come to the school

until the next day to sign the paperwork for A.F. to be tested. (*Id.* at 37-38) Respondent argues that neither the statute nor the policy requires that the examination take place within 24 hours, rather both state that the examination shall take place "*as soon as possible.*" (*Id.* at 44)

Respondent further argues that his understanding of the policy and the statute is that: 1) if a teacher requests a test, then the student must be tested; 2) a teacher must provide him with symptoms because he needs to explain to the parent and to the student why the drug policy has been invoked; and 3) that a drug test must be based on reasonable suspicion--discernable factors observed by the person making the referral and requesting the test. (*Id.* at 38)

Citing *Hedges v. Musco,* 33 *Fed. Supp.* 2nd 369, 378 (1999 U.S.D.C.N.J.) and *N.J.S.A.* 18A:40A-11, respondent maintains that students are to be referred to treatment only when they show significant symptoms of the use of drugs or alcohol. Respondent posits that the ALJ seems to say that the principal or principal designee may not try to discern whether the symptoms observed warrant testing, which is opposite to her findings with regard to the 1991 incident. (*Id.* at 39, 40) Arguing that the Board's position that the mere smell of marijuana, even if uncorroborated and without a request to test, must be tested, is not the understanding of the administrators charged with implementation of the policy. Respondent claims that both Mr. Reis and Mr. DeVries testified that they would investigate, and the other vice principal, Mr. Santangelo, testified that in investigating an incident with another student a week prior to the N.L. incident:

> *We concluded there was no reason to test. There was no smell. There was no behavior which indicated any kind of use. All the vitals checked out. So when the mother came in, I informed her there was no need for the test and we didn't test****. (emphasis in text) (*Id.* at 42, citing Tr. 2/29/00 at 13)

Respondent also avers that Mr. Santangelo did not test another student who was referred to him by the principal who thought he smelled marijuana around the student. (*Id.* at 42)

BOARD'S REPLY EXCEPTIONS

In its reply exceptions, the Board counters, *inter alia,* that respondent was well aware of his legal obligations in administering the Drug and Alcohol Policy under the statutes and school policy. Alleging that respondent was aware of his obligations, but chose to exercise discretion on referrals, the Board cites failed attempts by Ms. Musetti and Mr. Tucker, former President of the Wayne Education Association, to persuade respondent that he did not have discretion on the issue of testing students referred for suspected drug use. (Board's Reply Exceptions at 3, 4) Citing to testimony provided by the Board's witnesses on how the drug testing provisions are triggered in the District, the Board further submits that respondent's claim that there was a practice in the District which was different from the letter of the policy and statute has no merit. (*Id.* at 5) As to respondent's claim that he was not properly in-serviced, the Board underscores that respondent admitted attending a three-day Core Team training workshop. The Board points out that the trainer, Mary Donovan, testified that she clearly instructs attendees in her workshops that there is no discretion once a student has been referred. The Board contends that respondent also attended an in-service on this issue for teachers. (*Id.* at 9)

The Board stresses that the ALJ found Ms. Ammerman's testimony credible; and, thus, her testimony should be credited both with regard to her statement that she told respondent N.L.'s eyes were dilated, and that she specifically requested a test. (*Id.* at 14-16) The Board argues that even assuming, *arguendo*, that Ms. Ammerman did not mention dilated eyes to respondent or request a test to him in the N.L. matter, it was clear that she was making a referral. The drug test should, therefore, have been automatic as neither the statute nor the policy provides for administrator's discretion once a referral has been made. (*Id.* at 12, 13) Further, even if one assumes that respondent truly believed that Ms. Ammerman's suspicion had to be corroborated as respondent has argued, the Board submits that Ms. Ammerman's suspicion was, in fact,

corroborated by Mr. Flower's referral, especially if respondent really believed Mr. Flower was talking about the same day as respondent claims. (*Id.* at 18)

Additionally, the Board asks the Commissioner to discount the testimony of respondent's witnesses, Mr. Reis, Mr. DeVries and Ms. Przetak. The Board claims that: 1) respondent and Mr. Reis are close friends and his testimony is inconsistent with his deposition; 2) Mr. DeVries' testimony is vague, he was unable to recall anything relevant to the matter, and Mr. DeVries was discredited because he had been cited in his own evaluations for failing to enforce the smoking provisions of the same policy; and 3) Ms. Przetak vacations with respondent and his family. (*Id.* at 23, 24) Despite these affiliations with respondent, the Board asserts that all three testified that respondent had violated statute and policy by not testing the "rage" student in 1991. (*Id.* at 24) Further, the Board contends that respondent misrepresented his fellow Vice Principal Mr. Santagelo's testimony, as Mr. Santangelo testified that there is no discretion under the policy and that neither policy nor statute requires a specific request for a test. (*Id.*) Further, the Board explains, when faced with a similar issue, that is, a report based upon nothing more than the odor of marijuana, Santangelo contacted the student's parent and arranged for the student to be immediately tested. (*Id.* at 26)

The Board objects to respondent's criticism of the handling of the J.B. incident by Ms. Musettti and Ms. Tierney. The Board asserts that nothing could have been done by either Ms. Musetti nor Ms. Tierney before J.B. left the building because Ms. Curasco did not invoke the policy until school had been dismissed and the student had left. Ms. Tierney could have called J.B.'s parents, but it was not within Ms. Musetti's authority to make the notification call. The Board further claims that it has never taken the position that respondent was the only one at fault in this incident, and had the Board uncovered evidence that these individuals unknowingly neglected their obligations, and that they had done so on other occasions repeatedly, tenure charges would have been proffered against them, as well. (*Id.* at 32) The Board criticizes

respondent, however, for exercising absolutely no supervision over J.B. once Ms. Tierney requested that he test the student, whom the Board characterizes as a known drug user. The Board takes issue with the fact that respondent did have responsibility for J.B. for five hours without testing, even though J.B. had a voluntary urine screening form on file and could have been tested without the delay of obtaining parental consent. (*Id.* at 34)

With respect to the A.F. incident, the Board proffers that even if respondent kept A.F. in his office while awaiting the drug test, A.F. was a known drug user and the delay in testing could have put her at medical risk, or at least affected the accuracy of the test. (*Id.* at 34-36)

The Board repeats its arguments that an administrator has no discretion once a teaching member makes a referral and asserts that the discretion as to whether significant symptoms exist rests with the referring staff member. (*Id.* at 40)

Finally, the Board argues that respondent's conduct was deliberate and directly reflects on his fitness to serve as an administrator. The Board asserts that as early as 1991, Ms. Musetti informed respondent that he had an obligation to immediately drug test students referred to him and that this obligation was reinforced by complaints by Musetti and the Core Team in 1994 (D.M.), 1995 (A.F.) and 1996 (J.B.). The Board also submits respondent was approached by Mr. Tierney in 1993, Mr. DeVries in 1995, Mr. Reis in 1996 and Mr. Tucker in 1997, all of whom instructed him that he had no discretion on the issue of drug testing. (*Id.* at 43)

RESPONDENT'S REPLY EXCEPTIONS

In his reply exceptions, respondent repeats his arguments that a principal or his designee has the responsibility to investigate a referral by making an assessment, together with the nurse, in order to satisfy whether there are "significant symptoms" as specified in

N.J.S.A. 18A:40A-11 and "reasonable grounds" required by *N.J.A.C.* 6:29-6.3 for drug testing, which respondent contends, is a search. (Respondent's Reply Exceptions at 2-5) Respondent submits that in 1986 at hearings before the Senate Education Committee, Philip Brown, then statewide coordinator for drug and alcohol education, stated that the Department of Education was "*putting forth guidelines...which will give some specific parameters, in the kinds of things you are asking for, for school districts to use.*" However, no guidelines were issued. (emphasis in text) (*Id.* at 3-4)

In regard to the Board's contention that every student referred must result in a drug test, respondent points out that:

> *N.J.S.A.* 18A:40A-12 *** does not talk about drug testing. It speaks to the need of having the student examined by a physician. The statute states in relevant part that the principal or his designee "*shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor...*" While the Board seeks to apply a literal interpretation to the rest of the statute, it has a more flexible view of the statute's "*examination by a doctor*" requirement. Under the Board's interpretation having a drug test conducted by a lab satisfies the examination by a doctor requirement. (emphasis in text) (*Id.* at 2-3)

With regard to the 1991 "rage" incident, respondent asserts that the ALJ correctly determined that respondent was in a better position to assess whether the "rage" was drug related because he had met with the student and there may have been a logical explanation for the student's anger. (*Id.* at 4) Respondent avers that the Board's view that whether there is reasonable suspicion for the drug test of a student should be made by the referring teacher, not by the administrator, is neither sensible nor reasonable, as concluded by the ALJ, given the facts in the 1991 incident. In the Board's view, respondent argues, Ms. Musetti's referral based solely on her observation of an angry student leaving respondent's office, the student in the 1991 incident should have been tested, notwithstanding the fact that respondent was the one with the student, knew why he was angry, and knew what had transpired in his office. (*Id.* at 6)

Further, respondent objects to the Board's contention that alleged undocumented and unsubstantiated incidents related by some of the witnesses and not certified in the tenure charges should have been considered by the ALJ to establish a pattern of behavior. Respondent asserts that this is contrary to due process and fair play and to the process established in *N.J.S.A.* 18A:6-11. (*Id.* at 11)

With respect to the 1995 A.F. incident, respondent submits that he notified A.F.'s mother immediately upon her referral, but A.F.'s mother said she couldn't come in to pick her daughter up or sign any forms that day; she would take care of it the next day. A.F. spent the balance of the day in respondent's office. The following day, A.F. did not come into school until the afternoon when she came in with her mother. (*Id.* at 13) Respondent further avers that all the witnesses had testified that no student had been referred to the medical inspector. "This was not the way it was done in Wayne." (*Id.* at 14) Respondent notes that the policy in effect at that time was silent as to a situation where the parent is contacted but is unable to come into school that day. Therefore, respondent contends that he cannot be held to have violated the policy since it did not cover the facts of this particular incident. (*Id.* at 14) Respondent also takes exception that A.F. was a known drug user since her records were not introduced and the only context for classifying her as such were comments made by Ms. Remolino. (*Id.* at 15) Respondent also notes that neither his supervisor nor the Board faulted him at the time for his handling of the A.F. matter. (*Id.* at 16)

With respect to the 1996 J.B. incident, respondent repeats the arguments advanced in his exceptions. He also points out that his supervisor at the time was concerned with the fact that Ms. Musetti and the other people involved failed to notify J.B.'s parents to alert them as to what had occurred, but did not have any concern regarding respondent's actions in the matter. In retrospect, respondent suggests, the Board now maintains that his conduct was

so egregious and so violative of the law as to require a finding that respondent is guilty of unbecoming conduct and dismissal from its employ. (*Id.* at 18)

Citing extensively to the transcripts, respondent repeats the argument advanced in his exceptions and briefs that other professional staff members would have made a similar decision regarding the testing of N.L. given a similar situation.

Respondent disputes the Board's contention that he was told over and over by a number of staff members that he did not have discretion under the policy and statute. Respondent states that the only complaints he ever received were from Ms. Musetti. (*Id.* at 25) In rebuttal to the Board's arguments, respondent points to Mr. DeVries' testimony that respondent's actions complied with the policy, and Mr. Reis' testimony in regard to the 1996 J.B. incident in which he stated that "*I did not have a concern for what he did.*" (emphasis in text) (*Id.* at 24 citing Tr. 1/31/00 at 96) Further, respondent asserts that Mr. DeVries denied having received any complaints from Mr. Tucker or Ms. Remolino, or anyone else except Ms. Musetti. (*Id.* at 25 citing Tr. 1/11/00 at 82)

Respondent also disputes the Board's information concerning his training in the requirements of the policy and statute. Respondent denies attending in-service training on the Drug and Alcohol Policy, admits that he attended a workshop pertaining to Core Team training in 1992, but denies that the training was conducted by Ms. Donovan. Respondent notes that his training occurred two or three years before Ms. Donovan began training, since Ms. Donovan testified that she had only been training for five or six years. (*Id.* at 25)

Citing *Princeton Regional School District v. Campbell Board of Education*, 93 *N.J.A.R.*2d (EDU) 196 (1993); *Flemington-Raritan Regional School District v. VanGilson*, 93 *N.J.A.R.*2d (EDU) 378 (1998); *In the Matter of the Tenure Hearing of Charles Talley*, 94 *N.J.A.R.*2d (EDU) 395 (1994); *Morris School District Board of Education v. Brady*, 92 *N.J.A.R.*2d (EDU) 410 (1992); *In the Matter of the Tenure Hearing of Jacques L. Sammons*,

1972 *S.L.D.* 302; and *In the Matter of the Tenure Hearing of Eileen Johnston*, 95 *N.J.A.R.*2d (EDU) 439 (1995), respondent submits that in cases which resulted in a finding of conduct unbecoming, the conduct spoke of deliberate misconduct. (*Id.* at 26-28) Respondent proffers that:

> No cases have been found in which the Commissioner has determined that a teaching staff member has exhibited conduct unbecoming based on an alleged violation of statute or rule or policy, where the violation alleged is by no means certain or clear on its face, and where the evidence does not support a deliberate violation. (*Id.* at 28)

Finally, respondent urges the Commissioner to consider his glowing evaluations and his many years of unblemished service in education. Respondent points to the fact that both Ms. Ammerman and Ms. Remolino, who were witnesses for the Board, as well as virtually all the staff of Wayne Hills High School, signed a petition supporting him in this matter (*Id.* at 30-31) Respondent also points out that Mr. Tucker, a Board witness, testified that respondent was a very good vice principal, that his former principal, Mr. Reis, testified that respondent was the best vice principal he had ever worked with, and that another former principal, Mr. DeVries, wrote in his final evaluation that respondent was ready to serve as a high school principal. (*Id.* at 31, 32)

COMMISSIONER'S DETERMINATION

Upon an exhaustive review of the record, including transcripts of the 15 days of hearings, evidentiary documents and arguments advanced by the parties, the Commissioner determines to modify the conclusions of the ALJ for the reasons that follow.

At the very outset, the Commissioner stresses that the operative statute herein, *N.J.S.A.* 18A:40A-12, is part of a larger enactment intended to establish a comprehensive public school program for prevention of substance abuse and provision of assistance to students affected by it. Within this context, it is clear that *N.J.S.A.* 18A:40A-12 is intended to provide a

"safety net" for students through its requirement that the school system identify and obtain assistance for any student who may be under the influence of drugs, alcohol or other substances of abuse. By its own terms, the statute plainly envisions that not every student so identified will necessarily be found to be under the influence in fact, but the framework it establishes errs on the side of protecting the health and well-being of students by ensuring that no student falls through the cracks and that assistance is provided where needed, whether sought by the student or not.

The framework established by the Legislature for this purpose assigns clear and distinct roles to various staff members. *N.J.S.A.* 18A:40A-12 initially requires "any teaching staff member, school nurse or other educational personnel" to whom it appears that a student may be under the influence of drugs or alcohol to "report the matter as soon as possible" to the school nurse, medical inspector or substance awareness coordinator, and to the principal or designee. Thereupon, the principal shall immediately notify the chief school administrator and the parent or guardian, and shall arrange for immediate medical examination of the pupil by the doctor selected by the parent/guardian, or if unavailable, the medical inspector, or if unavailable, the emergency room of the nearest hospital.

Nowhere in the statute is the principal or designee given the authority to substitute his/her judgment for that of the referring staff member, *once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion.* As stated by the ALJ, "[t]he legislative intent behind the statute reflects a "zero-tolerance" attitude towards drug abuse and the statutory language leaves little room for interpretation." (Initial Decision at 13) There is nothing in the plain language of *N.J.S.A.* 18A:40A-12, nor in its legislative history, to indicate that the statutory provision requiring an immediate medical examination was not intended to be mandatory upon a staff report of a student who appeared,

based on specific observed indicators, to be under the influence of alcohol or other drugs.[3] The relevant portion of the statute reads as follows:

> Whenever it shall appear to any teaching staff member, school nurse, or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 [18A:40A-9] of this act, other than anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal or, in his absence, to his designee. *The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available.* (emphasis added) (*N.J.S.A.* 18A:40A-12)

Within this framework, the mandatory medical examination is, therefore, triggered upon referral from the teaching staff member based upon the *staff member's* observation of specific indicators and determination based upon them that the student appears to be under the influence of alcohol and/or drugs. There is nothing in *N.J.S.A.* 18A:40A-12 suggesting, much less authorizing, once a report has been made, that the designated administrator may first seek to validate the referring staff member's observations or judge the reasonableness of his or her conclusions before taking the actions required by statute. Instead, the administrator must act once the student has been reported, i.e., once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the basis for this conclusion so that the administrator may convey the necessary

[3] *N.J.A.C.* 6:29-6.5 (adopted, 1987; amended, 1989; effective, July 1, 1990) mirrors the statutory language. The Commissioner notes that the State Board of Education is currently considering recodification of this provision without change under *N.J.A.C.* 6A:16-4.3.

information to parents and medical providers when they are contacted as required by law.[4] Neither is there anything suggesting that the staff member must specifically request that the student be chemically screened or otherwise examined before the required medical examination is arranged. Additionally, while a nurse may examine the student and the principal may ask the referring staff member to more fully describe the observations leading to his or her report, it is the referral itself that, under *N.J.S.A.* 18A:40A-12 and *N.J.A.C.* 6:29-6.5, unequivocally requires the principal or his designee to arrange for an *immediate medical examination* of the student.

Since a mandatory medical examination is triggered upon report by a staff member to whom it appears that a student is under the influence of alcohol or drugs, it is essential that a district board provide the training necessary to enable appropriate district employees to be aware of, and equipped to fulfill, their responsibilities under the statute. In this regard, the district board is responsible for the training of all teaching staff members, school nurses and all other educational personnel so that they are thoroughly familiar with the symptoms and indicators of substance abuse. *See N.J.S.A.* 18A:40A-15(b). Such training is vital, so that symptoms of substance abuse can be readily identified, especially by those staff members most likely to be in the position to observe students directly. In this context, it must be emphasized that a staff member need not be certain that a student *is* under the influence of alcohol or drugs, but need only have made a reasonable judgment, based upon symptoms and indicators he or she has observed in the student and articulated to the designated administrator, that the student *appears* to be under such influence. Any staff member who refers a student pursuant to *N.J.S.A.* 18A:40A-12 ***in good faith, provided that the skill and care given is that ordinarily required and exercised by other such staff members,*** is held harmless for that action. *See N.J.S.A* 18A:40A-13 and *N.J.S.A* 18A:40A-14.

[4] The Commissioner notes that Board policy expands on the statutory directive for notification by also requiring the principal to "***verbally explain to the student's parent/guardian what the symptoms were that led to the reporting***." (Policy 5131.6)

Review of the Board's Drugs, Alcohol and Tobacco Policy 5131.6 reveals that the policy largely reflects, or is consistent with, the language of *N.J.S.A.* 18A:40A-12, except that the policy provides for the medical inspector to appoint a designee. The Board's current policy in pertinent part reads as follows:

> "If the school authorities are unable to contact the parent/guardian and/or if the doctor selected is not immediately available, the school medical inspector *or designee*[5] shall be immediately called upon to examine the pupil for the purpose of diagnosing whether or not the pupil is under the influence of alcohol or drugs pursuant to *N.J.S.A.* 18A:40A-12.

A medical inspector is a physician licensed to practice medicine and surgery within the State who serves under contract with the Board. *See N.J.S.A.* 18A:40-1. Although it would be permissible to interpret the Board's policy to permit the medical inspector to designate another physician so licensed to serve in his stead if he were not available, he may *not* designate any person *not* so licensed, including the school nurse. However, the testimony of *all* witnesses, currently or previously under the Board's employ, suggests that the medical inspector is never a part of the process in this District. The Board has apparently interpreted "or designee" to permit examination by the school nurse, followed by in-house collection of a sample of the student's urine that is evaluated by an outside laboratory, as satisfaction of the requirement that a pupil be examined by "the school medical inspector or his designee." (Tr. 10/4/99 at 50, 55; Tr. 12/7/99 at 25, 38, 129-131; Tr. 12/9/99 at 103 and Tr. 1/31/00 at 28) As stated above, the school nurse is not authorized to conduct the medical examination required by *N.J.S.A.* 18A:40A-12 to determine whether a student is under the influence of alcohol or drugs.[6] The Commissioner reiterates that under the mandated reporting, notification and examination procedures in

[5] Although the Board's Policy 5131.6 has undergone several revisions, this provision has remained the same throughout the policy revisions provided in the record.

[6] As the testimony of one of the District's school nurses suggests, when a student is reported as being under the influence of alcohol or drugs, the function of the school nurse is to make a clinical assessment of the student's vital signs to determine whether the student requires immediate intervention pending further medical assessment. (Tr. 10/25/99 at 77-99)

N.J.S.A. 18A:40A-12, schools must arrange an immediate *medical examination* for students reported as appearing to be under the influence of alcohol or drugs in school or at school-sponsored events. A physician selected by the parent or guardian, the school's medical inspector or the emergency room of the nearest hospital *must* conduct the examination and diagnose whether or not the student is under such influence. *N.J.S.A.* 18A:40A-12 and *N.J.A.C.* 6:29-6.5 are silent on the issue of student drug screening. Clearly, there is no basis in law for substituting such screening for the *required medical examination* of students who are reported as appearing to be under the influence of alcoholic beverages or other drugs. The Commissioner thus concludes that the Board's interpretation of its obligations under the law is erroneous and is not in compliance with the relevant statute, regulation or its own policy.[7]

Tenure Charges No. 1 and No. 2[8]

The ALJ concluded that respondent exhibited unprofessional and unbecoming conduct by his violation of *N.J.S.A.* 18A:40A-12 and the Board's Drug, Alcohol and Tobacco Policy 5131.6 when he decided not to "test" N.L. upon receiving reports from Ms. Ammerman and Mr. Flower that N.L. appeared to be under the influence of marijuana.

The Commissioner's review of the evidence supports the ALJ's conclusion that both Ms. Ammerman and Mr. Flower communicated to respondent that they detected an odor of marijuana on N.L. Further, when respondent informed Ms. Ammerman that N.L. was not going to be tested, Ms. Ammerman restated her belief that N.L. smelled of marijuana. Although the parties dispute whether Ms. Ammerman said "reeked of marijuana" or "smelled of marijuana," whether Ms. Ammerman told respondent N.L.'s pupils were dilated, and whether a drug test was specifically requested, it is undisputed that Ms. Ammerman and Mr. Flower articulated their

[7] The Commissioner notes that there is no testimony to confirm compliance with the provision that the Superintendent of Schools must be notified whenever a student is referred as appearing to be under the influence of alcohol or other drugs.

[8] Tenure Charge No. 1 addresses violation of the statute, *N.J.S.A.* 18A:40A-12, and Tenure Charge No. 2 addresses the Board's Drug, Alcohol and Tobacco Policy 5131.6. Since the policy essentially reflects the language of the statute, these charges are being considered simultaneously.

belief that N.L. "smelled of marijuana" to respondent, thus invoking *N.J.S.A.* 18A:40A-12 and Policy 5131.6. The Commissioner rejects respondent's argument that he has the discretion to confirm teachers' judgments that a student appears to be under the influence of alcohol or drugs. *N.J.S.A.* 18A:40A-12 and Policy 5131.6 squarely place the responsibility of making final judgment on the *medical* community.

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of N.L. pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

Tenure Charges No. 3 and No. 4[9]

The Board originally filed tenure charges alleging that during the 1995-96 and 1996-97 school years, respondent exhibited unprofessional and unbecoming conduct by failing to comply with *N.J.S.A.* 18A:40A-12 and Policy 5131.6. These charges were amended by the Commissioner's interlocutory order to include a 1991 incident and a 1994 incident. These charges, therefore, concern four separate incidents that occurred between 1991 and 1996, each of which will be considered separately.

1991 incident

Finding that respondent was in a better position than the Student Assistant Specialist, Ms. Musetti, who had no prior contact with the student, to understand the reasons behind the student's rage, the ALJ concluded that respondent's refusal to honor Ms. Musetti's request that the student be "tested" represented a "sensible rather than a literal" interpretation of the law and did not constitute a violation of statute or Board policy. The ALJ, therefore, concluded that respondent was not guilty of unprofessional and unbecoming conduct in the 1991 incident.

[9] Tenure Charge No. 3 addresses violation of the statute, *N.J.S.A.* 18A:40A-12, and Tenure Charge No. 4 addresses the Board's Drug, Alcohol and Tobacco Policy 5131.6. Since the policy essentially reflects the language of the statute, these charges are being considered simultaneously.

The Commissioner finds he cannot accept the ALJ's conclusion. As previously indicated, once a staff member has reported that a student appears to be under the influence of alcohol or other drugs, the principal or his designee *shall* arrange for an *immediate medical examination* for that student; the statute does not provide respondent discretion to substitute his/her judgment for that of the staff member. This incident, however, presents the unusual circumstance where a report was made by a teaching staff member, Ms. Musetti, who requested that the student be "tested" immediately after observing, and based solely upon, the same behavior also witnessed directly by respondent. Not inappropriately under the circumstances, respondent explained to Ms. Musetti that he believed the student was angry because respondent had just disciplined him, not because he was under the influence of drugs. Ms. Musetti, however, who is a trained and certified substance [awareness] coordinator serving in the position of Student Assistance Specialist (Tr. 12/7/99 at 5), persisted in her belief that the student exhibited indications of possible substance abuse. (Tr. 12/7/99 at 42-44) Once this occurred, respondent then had an obligation to arrange for the *immediate medical examination* required by law. Notwithstanding any concern respondent may have had as to whether Ms. Musetti's request that the student be "tested" might be unreasonable because she had no prior contact with the student, respondent's obligation to arrange for an immediate medical examination was mandatory under the statute and Board Policy.

Accordingly, the Commissioner must conclude that respondent is guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of the "rage" student in the 1991 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

1994 D.M. incident

The ALJ determined that there was insufficient evidence to conclude that respondent neglected his duties with respect to "drug testing" in the 1994 D.M. incident.

The Commissioner is unpersuaded by the Board's arguments that Ms. Musetti's testimony should be ascribed greater deference than it was accorded by the ALJ. Accordingly, the Commissioner determines that the Board has not proved by a preponderence of credible evidence that respondent neglected his duties under *N.J.S.A.* 18A:40A-12 and Policy 5131.6 for the reasons expressed in the Initial Decision.

1995 A.F. incident

Finding that respondent waited until the next day to "test" a student referred to him under *N.J.S.A.* 18A:40A-12 and Policy 5131.6, the ALJ determined respondent guilty of unprofessional and unbecoming conduct for the A.F. incident.

N.J.S.A. 18A:40A-12 and Policy 5131.6 require an *immediate medical examination* for a student reported as appearing to be under the influence of alcohol or drugs, and states that the student is to be taken to the nearest hospital emergency room if the parent's physician or the school's medical inspector is not available. In the A.F. incident, respondent deferred the "test" until the next day to accommodate A.F.'s parent. Clearly, respondent did not immediately respond to this incident as contemplated in the statute.[10]

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of A.F. in the 1994 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

1996 J.B. incident

The ALJ found that all staff members, including the referring teacher, Ms. Curasco, and Ms. Musetti, Ms.Tierney and respondent, contributed to the delay in "testing" J.B., but concluded that it was not logistically impossible for respondent to implement the "drug test" sooner than the time he was actually tested. Therefore, the ALJ concluded that respondent

[10] Ms. Musetti, the Student Assistant Specialist, testified in regard to the delay in "testing," and was echoed by other staff members, that a primary concern was compromising the drug test by such delay.

violated *N.J.S.A.* 18A:40A-12 and Policy 5131.6, and thus respondent was guilty of unprofessional and unbecoming conduct for the J.B. incident.

The record shows that *no one* involved with the J.B. incident proceeded as if J.B. needed an immediate medical examination. However, that does not excuse *respondent's* lack of prompt action once responsibility of J.B. was delegated to him. Even under the established practices of the District, respondent did not act appropriately. Respondent did not verify whether J.B. was in school on November 6, 1996, nor did he take J.B. to the nurse to assess whether J.B. was in a medical crisis, and respondent did nothing to assure that J.B. was not left alone while awaiting testing. Most importantly, respondent did not immediately arrange for J.B. to be medically examined as contemplated in the statute and specified in the Board's policy.

Accordingly, the Commissioner finds respondent guilty of unprofessional and unbecoming conduct for his failure to arrange for the *immediate medical examination* of J.B. in the 1996 incident pursuant to *N.J.S.A.* 18A:40A-12 and Policy 5131.6.

Penalty

In considering the penalty to be assessed respondent for his acts of unbecoming and unprofessional conduct noted above, the Commissioner has considered the nature and gravity of the offenses, the extenuating and aggravating circumstances and the necessity of maintaining discipline and proper administration of the school system. *In re Fulcomer,* 93 *N.J. Super.* 404, 420-22 (App. Div. 1967).

Respondent is an experienced administrator who has served the District for 34 years. During this time, respondent has received positive evaluations and his record is unblemished, except for the charges herein. The Commissioner takes specific notice of the fact that, prior to N.L.'s death in 1999, no action, *i.e.*, no mention in evaluations, no letter of reprimand, increment withholding, *etc.*, was taken to discipline respondent for what the Board now finds was respondent's egregious failure to properly "test" students in 1991, 1994, 1995,

1996. Further, it is noted that virtually all of those who testified in this matter, including most of the Board's witnesses, testified that respondent performed his job well and that they respected him. Two of the Board's witnesses, Ms. Ammerman and Ms. Remolino, as well as a significant number of other staff members, signed a petition in support of respondent. (Exhibit R29) Mr. Tucker, former president of the Wayne Education Association (WEA) and a Board witness, stated that he would rank respondent in the top three of all the vice principals he worked with during his 36 years in education. (Tr. 12/9/99 at 23-24) Further, respondent's former principals, Mr. Reis and Mr. DeVries, the vice principal with whom he served at the time of the J.B. incident, Ms. Tierney,[11] and Mr. Modica, WEA's grievance chairperson, testified on his behalf.

The Commissioner also cannot ignore that the Board has not properly implemented *N.J.S.A.* 18A:40A-12 and the Board's Policy 5131.6. As noted above, notwithstanding the requirement in statute and Board policy that a student reported as appearing to be under the influence of alcohol or drugs must be immediately examined by a physician, the Board has established a practice in the District which ignores that mandate and substitutes drug screening in its stead. Additionally, the Commissioner notes that the Board took no disciplinary action against any other staff members who failed to properly implement the statute and policy. The Commissioner finds that the Board's statement, that tenure charges were not filed against other staff members who similarly violated statute and policy because those individuals did not exhibit a pattern of non-compliance, sends a mixed message to District staff. (Board's Reply Exceptions at 32) The Board not only did not take action with regard to tenure charges against any other staff members, but also took no other disciplinary measures to impress upon staff

[11] The Commissioner notes Ms. Tierney's testimony that she received a *Rice* notification that her performance would be discussed by the Board at about the time of her agreement to testify on behalf of respondent. (Tr. 1/12/00 at 48) Board Member Howard Weinburg testified that the Board sent Ms. Tierney the *Rice* notification because it wanted to discuss some parental complaints the Board had received as to Ms. Tierney's actions in her school relative to her performance. (Tr. 3/2/00 at 58) Mr. Weinburg also testified that as far as he was aware Ms. Tierney was performing satisfactorily in December 1999 at the time of the parental calls to the Board, and he also stated that the *Rice* notice and Ms. Tierney's testimony in this case were not connected in any way. (Tr. 3/2/00 at 61, 65)

members violating the law, and upon District employees in general, the seriousness of non-compliance. Moreover, the record suggests that the Board's in-service training for staff members and administrators with respect to the statute and the Board's Policy on the treatment of students who are reported as appearing to be under the influence of alcohol or other drugs is woefully inadequate. Although the District's Core Team members apparently receive three days of training each year, there appears to be no organized training mechanism for other staff and administrators. Testimony by teaching staff, nurses and administrators in the District underscores the fact that, despite what appears to be a clear policy, there is considerable confusion in the District about its implementation. The Board argues that any penalty short of dismissal will be futile, because if respondent is allowed to return to the District, he will continue in his belief that he has the authority to exercise discretion as to whether to "chemically screen" students. The Commissioner finds this argument spurious in light of the Board's own erroneous assumptions with respect to implementation of statute and policy, and he concurs with the ALJ that the results of these proceedings should disabuse respondent of any belief that administrators have the discretion not to refer for medical examination any student reported as appearing to be under the influence of drugs or alcohol.

Respondent argues that he should not be held accountable for his actions because he did not *willfully* violate *N.J.S.A.* 18A:40A-12 and the Board's Policy 5131.6. The Commissioner notes that respondent is an experienced administrator who is responsible for keeping himself fully informed of the laws and policies that he must administer as a vice principal. By respondent's own admission, he was fully aware that Ms. Musetti, the Student Assistant Specialist and a member of the Core Team, strongly disagreed that the principal or his designee had discretion as to whether to "test" a student referred to him as appearing to be under the influence of alcohol or drugs. Nothing precluded respondent from seeking clarification once

this view was presented to him. As the ALJ observed, although respondent's employment record does not show respondent to be the reckless lawbreaker portrayed by the Board (Initial Decision at 31), there is evidence that respondent made conscious decisions which he knew, or should have known, contravened statute and the Board's policy.

Upon thoughtful consideration, the Commissioner finds it necessary to balance the totality of the record herein with the need to impress most emphatically upon respondent the seriousness of his conduct. The Commissioner agrees with the ALJ that, in view of the mitigating circumstances in this matter, the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also concurs that respondent's failure to arrange for an *immediate medical examination* for students reported to him by staff members as appearing to be under the influence of alcohol or other drugs is a serious infraction deserving a significant penalty, regardless of mitigating circumstances.

Accordingly, under all the circumstances of this matter, the Commissioner determines to adopt the ALJ's recommendation that the appropriate penalty to be levied on respondent is a permanent reduction of one step on the salary guide and forfeiture of all salary and benefits that would otherwise have accrued during the first 120 days of his suspension.

In adopting the ALJ's recommended penalty and conclusions as modified above, however, the Commissioner once again stresses that *a drug test does not equate to a medical examination* within the requirements of the statute as the Initial Decision suggests. Further, the statute's requirement for an *immediate medical examination* of a student who is reported as appearing to be under the influence of alcohol or drugs dictates that such examination must be conducted by a physician, not by any other person or means. Finally, the issues raised in this matter underscore the need for district boards of education to have clear policies in place, and to ensure that teaching staff members, school nurses and other educational personnel are well instructed with respect to their responsibilities under the statute and identification of symptoms

and behavioral patterns indicative of substance abuse.[12] The Commissioner, therefore, directs the Board to undertake such revisions of its policies and procedures as are necessary to reflect the requirements of *N.J.S.A.* 18A:40A-12 and implementing rule consistent with the decision herein, to institute a program of continuing education so that staff members will be able to fulfill their obligations under the law, and to submit such required revisions and plans to the County Superintendent for review and approval.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 21 2000

Date of Mailing: SEP 22 2000

[12] It is imperative that such training include instruction in the identification of *specific observable indicators* of substance abuse so that staff members are able to recognize and appropriately report students exhibiting these, in contrast to expressing general concerns about a student's health or behavior.

[13] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#311-00

311-00

F.H. AND A.H., on behalf of minor daughter,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

September 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10978-99
AGENCY DKT. NO. 358-12/99

F.H. AND A.H. ON BEHALF OF MINOR DAUGHTER,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,
Respondent.

F.H. and A.H., petitioners, *pro se*

Stephen J. Mushinski, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: August 3, 2000 Decided: August 3, 2000

BEFORE **M. KÀTHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 21, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to a settlement and have prepared a written stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug 3, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8-7-00
DATE

Debbie Antanatis/kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 8 2000
DATE

Jeff S. Main
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

File No. 05528-0003

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	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
	Agency Ref. No. 358-12/99 OAL Docket No. EDUOS-10978-99S
F.H. & A.H. o/b/o Minor Daughter, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, Respondent.	Civil Action STIPULATION OF SETTLEMENT

This matter having been opened to the Court upon the filing of a Petition of Appeal with the Commissioner of Education by the Petitioners, F.H. & A.H. on behalf of their minor daughter, and the Board of Education of The Borough of Audubon ("Board") having been represented by Stephen J. Mushinski, Esq. of the law firm of Parker, McCay & Criscuolo, PA; and the parties having appeared on May 13, 2000 for a settlement conference and having

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also participated in several telephone status conferences; and the parties having reached an agreement with respect to the selection process of the gifted and talented (A.P.P.L.E.) program provided by the Board, which was the subject matter of this litigation and the parties having agreed upon settlement of all matters set forth in the Petition, the parties hereby stipulate and agree to resolve all outstanding matters as follows:

1. The following shall constitute the selection and placement process of the A.P.P.L.E. Program and general operational guidellines to be effective with the commencement of the 2000-2001 school year.

A. Administer the Test of Cognitive Skills to third graders for placement in the A.P.P.L.E. Program if requested by parent(s).

B. Provide training for teachers and parents regarding the nomination process (through workshops, meetings, etc.).

C. Selection process: Placement in the A.P.P.L.E. Program is to be based on the candidate meeting two (2) of the following three (3) criteria:

(1) Recommendation by a teacher using the Renzulli-Hartman Rating Scale for Superior Students and/or a recommendation by a parent using the school district's parent nomination form;

(2) Terra Nova Standardized Test Total Battery Score between the 92nd and 99th national percentile;

(3) A score of 130 or higher on the Test of Cognitive Skills;

D. Continued placement of students performing successfully in the current A.P.P.L.E. Program.

E. Implementation of recommendations previously made by the Instructional Council (some of which are more specifically identified above) as follows:

(1) Administer nationally normed standardized tests in reading, math, social studies and science to all students in grades 1 through 6 in the spring of the school year.

-Previously, standardized tests were only administered to the students nominated for the gifted and talented.

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CRISCUOLO, P.A.

(2) Administer a nationally normed standardized test of cognitive ability to all district second graders in the spring of the school year in conjunction with the standardized tests.

-The standardized test of cognitive abilities would replace the Slosson. Previously the Slosson was administered to the gted and talented nominated students only.

(3) Identify students who are entering grade three.

-Students will be nominated in spring of grade two by the second grade teachers.

-Students will be screened in the fall of third grade when content area and cognitive abilities standardized test scores are available.

(4) Develop the nomination process for students in grades 3 through

-This will outline procedures for nominating students in any grade level at any time of the school year.

(5) Expand communication in regard to the gifted and talented (A.P.P.L.E.) program.

-It is suggested that information about the A.P.P.L.E program be communicated by:

-A.P.P.L.E. News
-school newsletter
-letters to parents
-presentations at Back to School Night and Children's Night
-parent handbooks
-brochures
-flyers

(6) Explore the expansion of the school-wide enrichment independent study groups.

-Subject area independent study groups for specific abilities to be recognized and enriched in a small group setting.

(7) Update curriculum thematic units.

-Thematic unites chosen for the program should align with the New Jersey Core Curriculum Content Standards and address skills in communication, technology, global awareness, research and economics.

F. Comply with all of the requirements of N.J.A.C. 6A:8-3.1.

2. For only those students entering Grade 3 for the 2000-2001 school year the minimum percentage for qualification under the Terra Nova Testing Scoring shall be the 87th national percentile rather than the percentile stated in Section 1C.(2) and the minimum score on the Test of Cognitive Skills shall be 112 rather than the score stated in Section 1C. (3) hereof.

3. The parties hereby waive and release each other from any other claims that each may have against the other with respect to any matter arising out of the Petition of Appeal and in the Answer to the Petition of Appeal.

4. The parties understand the terms of this Stipulation of Settlement and request the Court and the Commissioner of Education to approve the Stipulation of Settlement as an Order of the Court and a final decision of the Commissioner of Education.

Francis J. Hagarty, Petitioner

Anna B. Hagarty, Petitioner

Stephen J. Mushinski, Esquire
Attorney for Respondent

Dated: July 31, 2000

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CRISCUOLO, P.A.

OAL DKT. NO. EDU 10978-99
AGENCY DKT. NO. 358-12/99

F.H. AND A.H., on behalf of minor daughter,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms* and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 21 2000

Date of Mailing: SEP 25 2000

*The record in this matter indicates that counsel for the Board reported that the proposed amendments to the Board's A.P.P.L.E. (gifted and talented) Program contained in the Stipulation of Settlement will be approved by the Audubon Board of Education for implementation during the 2000-2001 school year.

312-00

#312-00R

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

September 21, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8797-99
(On Remand EDU 6586-97)
AGENCY DKT. NO. 275-7/97

WILLIAM BUCKLEY,
Petitioner,
v.
TRENTON BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

David L. Rosenberg, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: August 4, 2000 Decided: August 4, 2000

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 11, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to a settlement and have prepared a written settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 4, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8-7-00
DATE

Debbie Stefanelis
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 9 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

WILLIAM BUCKLEY, Petitioner, v. TRENTON BOARD OF EDUCATION, MERCER COUNTY, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : OAL DOCKET NO. EDUOR 08797-99S : (Remanded from EDUOR 06586-97S) : AGENCY DOCKET NO. 275-7/97 : : : : ***SETTLEMENT AGREEMENT***

William Buckley, Petitioner, residing at 5 Knights Court, RD1, Bordentown, New Jersey 08508, and the Board of Education of the City of Trenton ("Board"), Respondent, stipulate and agree that, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. In return for compliance with the Agreement, Mr. Buckley agrees to the dismissal, with prejudice, of the above-captioned litigation. The dismissal of this matter shall not be deemed a waiver of tenure or seniority rights which have accrued prior to its filing, or thereafter. Mr. Buckley releases and waives any and all claims to back salary and/or back benefits, including but not limited to leave days, except as provided in this Agreement.

2. In return for compliance with this Agreement, the Board agrees as follows:

(a) Within 30 calendar days of the approval of this settlement by the Commissioner of Education, the Board will pay Mr. Buckley mitigated back salary for the 1997-98 school year in the gross amount of $9,773.47. This amount shall be subject to all normal payroll deductions including, but not limited to, retroactive contributions to the Teacher's Pension

and Annuity Fund covering the 1997-98 school year. Said pension contribution shall be submitted by the Board to the Pension Fund with an explanation designating those contributions as relating to the 1997-98 school years.

(b) Within 30 days of the approval of this settlement by the Commissioner of Education, the Board will pay Mr. Buckley mitigated back salary for the 1998-99 school year in the gross amount of $7,091.40. This amount shall be subject to all normal payroll deductions including, but not limited to, retroactive contributions to the Teacher's Pension and Annuity Fund covering the 1998-99 school year. Said pension contribution shall be submitted by the Board to the Pension Fund with an explanation designating those contributions as relating to the 1998-99 school years.

3. The undersigned representatives of the Board hereby acknowledge that they h: been duly authorized to sign this Agreement and bind the Board to its terms.

4. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. This Agreement shall be subject to the laws of the State of New Jersey.

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by the parties. However, if it is determined in the future that there has been miscalculation of damages set forth in paragraph 2 above, the parties agree to correct any errors regardless of which party gained the benefit(s) thereof.

7. This Agreement is subject to the approval of Administrative Law Judge M. Kathleen Duncan and the Commissioner of Education and shall be of no force or effect unless such approval is received. In the event that such approval is not given, the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates specified.

FOR PETITIONER:

William Buckley
William Buckley

WITNESS:

David L. Rosenberg, Esq.

Dated: July 20, 2000

FOR THE RESPONDENT,

TRENTON BOARD OF EDUCATION:

Abdul-Malik R. Ali
Abdul-Malik R. Ali, Board President

WITNESS:

~~Angelia Ellis~~, Board ~~Secretary~~ Attorney
Thomas W. Sumners, Jr

Dated: July 31, 2000

OAL DKT. NOS. EDU 8797-99 AND EDU 6586-97 (ON REMAND)
AGENCY DKT. NO. 275-7/97

WILLIAM BUCKLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 21 2000

Date of Mailing: SEP 25 2000

313-00

BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNION COUNTY BOARD OF CHOSEN FREEHOLDERS, BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board challenged the legality of a magnet school operated by the Union County Vocational-Technical School District (UCVT), contending that the programs of the magnet school are outside the scope of vocational education as defined in *N.J.S.A.* 18A:54-1 *et seq.* and violative of federal law. The Board sought an order restraining the UCVT from accepting students residing within its district and from collecting tuition for such students enrolled in the magnet school. The Board contended that it is not liable for tuition because, as contemplated by N.J.A.C. 6:43-11, it offers a program at least comparable to that offered by the magnet school.

The ALJ granted partial summary decision to the UCVT. The ALJ concluded that 1) the Board was time-barred from attempting to avoid its obligation to pay tuition and transportation costs for resident students who attended UCVT's magnet school during 1997-98; 2) operation of a magnet school does not violate state constitutional and statutory law or the Perkins Act; and 3) that the matter (Count IV of the Amended Petition) should be referred to the Department to verify that the courses offered at the magnet school have received the required state approval and are not duplicative of the existing programs offered at the local level. (*Ramapo-Indian Hills*)

The Commissioner adopted findings and determination in Initial Decision as his own with modification. The Commissioner found that Count IV of the Amended Petition was properly dismissed on summary basis since the Board failed to set forth any specific allegations, and facts supporting them, which would constitute a basis for its position that it offers a comparable or superior vocational educational program nor did it allege that its program, to the extent that one exists, had been approved by the Department. The Commissioner summarily dismissed the Petition of Appeal and directed the Board to remit tuition costs to the UCVT for its resident students attending the Magnet High School for the 1997-98 school year and, thereafter, for any similarly situated students for whom tuition has not been paid.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7139-98

AGENCY DKT. NO. 54-3/~~90~~ 98

BOARD OF EDUCATION OF
SCOTCH PLAINS-FANWOOD,

Petitioner,

v.

UNION COUNTY BOARD OF CHOSEN
FREEHOLDERS, BOARD OF EDUCATION
OF THE UNION COUNTY VOCATIONAL-
TECHNICAL SCHOOL DISTRICT AND
NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

Casper P. Boehm, Esq., for petitioner

Christopher M. Howard, Assistant County Counsel, for respondent
Union County Board of Chosen Freeholders
(Carol Indursky Cohen, Union County Counsel, attorney)

Edward J. Kologi, Esq. for respondent
Board of Education of the Union County Vocational-Technical School District

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
New Jersey Department of Education
(John J. Farmer Jr., Attorney General of New Jersey, attorney)

Record Closed: June 21, 2000 Decided: August 4, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a challenge by a local school district to the legality of a magnet school operated by a county vocational school district. Petitioner seeks an order restraining the county vocational school from accepting students residing within petitioner's district and from collecting tuition for such students enrolled in the magnet school. In amended pleadings, the petitioner also seeks to have the state agency rescind all approvals given to the magnet school and to halt the flow of federal and state funds for use by that school.

Basically, petitioner alleges that the establishment of a magnet school exceeds the statutory authority of a county vocational school under *N.J.S.A.* 18A:54-1 to –37, that operation of a magnet school contravenes the provisions of the Carl D. Perkins Vocational & Applied Technology Act ("Perkins Act"), 20 *U.S.C.A.* §§ 2301 to 2471, and that payment of tuition by the local school district constitutes a gift of public funds for a private purpose. Alternatively, if the legality of the magnet school is upheld, petitioner contends that it is not liable for tuition because, as contemplated by *N.J.A.C.* 6:43-11, it offers a program at least comparable to that offered by the magnet school. Prior to hearing, the state agency moved to dismiss the petition for untimeliness and lack of standing and the county vocational school moved for summary decision on the underlying merits.

Procedural History

Petitioner Board of Education of Scotch Plains-Fanwood ("Scotch Plains-Fanwood") filed its original petition with the Commissioner of Education ("Commissioner") on March 2, 1998 and its amended petition on April 6, 1998. Each respondent filed a timely answer to the petition and amended petition. Subsequently,

on July 27, 1998, the Commissioner transmitted the matter to the Office of Administrative Law for hearing.

Meanwhile, on May 5, 1998, respondent New Jersey Department of Education ("Department") filed a notice of motion, together with supporting brief, to dismiss the petition as against all parties for untimeliness and as against the Department alone for lack of standing. Scotch Plains-Fanwood filed opposing papers on June 5, 1998 and the Department filed a reply on June 19, 1999.

Additionally, on May 21, 1999, respondent Board of Education of the Union County Vocational-Technical School District ("Union County Vo-Tech") filed a notice of motion for summary decision, together with supporting brief. Respondent Union County Board of Chosen Freeholders ("Freeholders") joined in that motion and the Department took no position. Scotch Plains-Fanwood filed opposing papers on June 18, 1999.

Both motions were argued before the OAL on June 21, 1999.[1] Prior to issuance of the initial decision, the State Board of Education ruled that it is improper to take official notice of the Department's *Directory of Verified Occupational Educational Programs* ("*Directory*") without notifying the parties and affording them an opportunity for objection.[2] *K.B. v. Bd. of Educ. of Rancocas Valley Reg. High Sch. Dist.*, EDU 6974-97 Initial Decision (Nov. 12, 1997), *adopted* (Comm'r Dec. 29, 1997), *remanded* (St. Bd. March 20, 2000) (slip op. at 5) http://www.state/nj.us.njded/legal/index.html> Consequently, the OAL notified the parties of its intention to take official notice of the

[1] Two other motions were argued and decided on that same date. By order entered on July 8, 1999, the OAL granted the Freeholders' motion to dismiss the petition against them on the ground that they were merely a source of funding and that the Department of Education has statutory responsibility for control and supervision of county vocational schools. By order entered on July 9, 1999, the OAL denied the Department's discovery motion because Scotch Plains-Fanwood had furnished missing answers to the Department's interrogatories.

[2] This *Directory* is readily available to the general public at the Department's website. http://www.state.nj.us/njded/noc/pubvoc.xls

Directory and afforded them an opportunity for comment. By letter dated June 21, 2000, Scotch Plains-Fanwood objected on the ground that the *Directory* should not be deemed conclusive evidence of statutory compliance and that the existing record fails to disclose how a program in included in the *Directory*.

Factual Findings

Since none of the parties filed affidavits or certifications in connection with these motions, the relevant facts must be derived solely from the pleadings, admissions during oral argument, and official notice of information contained in the Department's public records.[3] For purposes of the summary decision motion, **I FIND** the following facts:

Scotch Plains-Fanwood is a regional K-to-12 school district charged with the education of all pupils living within the geographic boundaries of the Township of Scotch Plains and the Borough of Fanwood. It operates five elementary schools, two middle schools and a high school. At the high-school level, it provides "a comprehensive program of instruction in all curricular areas." Although Scotch Plains-Fanwood does not have a school devoted primarily to vocational studies, it offers several vocational courses as part of its comprehensive curriculum. According to the Department's *Directory*, rows 1540 to 1542, Scotch Plains-Fanwood offers three approved vocational programs, designated by Classification of Instructional Program or CIP code numbers.[4]

Union County Vo-Tech is a county vocational school organized pursuant to *N.J.S.A.* 18A:54-11 *et seq.* The Commissioner, with the advice and consent of the State Board, must approve courses of study to be pursued in every county vocational

[3] Rule 201 of the New Jersey Rules of Evidence authorizes a court to take judicial notice of "specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned." This rule is incorporated in the Uniform Administrative Procedure Rules applicable to administrative proceedings. *N.J.A.C.* 1:1-15.2(a).

[4] General, Marketing Operations (CIP No. 080708), Computer Applications (CIP No. 521201) and Accounting Technician (CIP No. 520302).

school.[5] Compared to Scotch Plains-Fanwood, Union County Vo-Tech offers a much broader variety of vocational programs. The *Directory*, rows 1520, 1523 to 1529, 1531 to 1532, 1535 and 1536, identifies twelve approved programs available at Union County Vo-Tech.[6] Only one of the programs at Union County Vo-Tech, *i.e.*, Computer Applications (CIP No.521201), coincides with what is available Scotch Plains-Fanwood.

Among its facilities, Union County Vo-Tech operates a school known as the Magnet High School of Science, Mathematics and Technology. Apparently Union County Vo-Tech has distributed promotional material referring to its magnet school as designed "for students interested in pursuing a four-year baccalaureate degree after graduation from high school."[7]

In general, Scotch Plains-Fanwood pays tuition and transportation costs for students residing in its district who are enrolled at Union County Vo-Tech. During the 1997-98 academic years, six students residing in Scotch Plains or Fanwood were attending Union County Vo-Tech's magnet school. Annual tuition for the magnet school was $6,000 per student or a total of $36,000 for all six students. Commencing in October 1997, Scotch Plains-Fanwood withheld payment of tuition and transportation costs for students attending the magnet school, although it continues paying tuition and transportation costs for students from its district enrolled at other Union County Vo-Tech facilities.

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[5] *N.J.S.A.* 18A:54-24.

[6] Graphic Design & Commercial Art (CIP No. 150803), Horticulture (CIP. No. 010601), Computer Applications (CIP No. 521201), Office Systems Technology (CIP No. 520401), Nursing Assistant (CIP No. 511614), Child Care & Guidance Worker (CIP No. 200201), General Selling Skills and Sales Oper. (CIP No. 080706), Automotive Body Repairer (CIP No. 470603), Baker/Pastry Chef (CIP. No. 120501), Supermarket Technology (CIP No. 0806012), Automotive Servicer (CIP No. 460401) and Electrician (CIP No. 460302).

[7] At oral argument, counsel for Scotch Plains-Fanwood represented that an announcement to that effect had been published in a local newspaper. Counsel for Union County Vo-Tech did not dispute that characterization.

Conclusions of Law

Based on the existing record, **I CONCLUDE** that operation of a magnet school does not violate state constitutional and statutory law or the Perkins Act, but that the matter should be referred to the Department to verify that the courses offered at the Magnet High School of Science, Mathematics and Technology have received the required state approval and are not duplicative of the offerings at Scotch Plains-Fanwood.

Taking the issues in reverse order, this decision will deal first with Union County Vo-Tech's motion for summary decision. Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5(a) authorizes entry of summary decision "if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." Traditionally, the standard applicable to a summary judgment motion was that the absence of undisputed material facts must appear "palpably." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75 (1954). In *Brill v. Guardian Life Ins. Co. of America*, 142, *N.J.* 520, 541 (1995), the Supreme Court relaxed the standards in an effort to encourage granting of summary judgment motions in appropriate cases. While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." *Brill,* at 540.

Many of the issues raised by Scotch Plains-Fanwood are purely questions of law that have been previously considered by the Commissioner. Recently, in *Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist v. Bd. of Educ. of Bergen Cty. Vo-Tech.*, Initial Decision EDU 3130-00 (May 22, 2000), http://lawlibrary.rutgers.edu/oal/search.html *modified* (Comm'r July 10, 2000), http://state.nj.us/njded/legal/index.html a regional

school district mounted a comparable attack against paying for attendance of resident students at magnet schools operated by a county vocational school district. Rejecting the argument that operation of a magnet school exceeds the statutory authority for operation of a county vocational school, the Commissioner espoused the view that vocational education may properly prepare students for continuing education at an advanced level. Similarly, the Commissioner determined that the types of programs offered at a magnet school are fully compatible with the purposes of the Perkins Act, which envisions "concentrating resources on improving educational programs leading to academic and occupational skill competences needed to work in a technologically advanced society." (slip op. at 19.) The reasoning in *Ramapo-Indian Hills* applies with equal force to the present situation and requires partial summary decision in Union Vo-Tech's favor dismissing petitioner's claims that its programs are beyond the scope of its statutory authorization or contrary to federal law.

Although not directly involved in *Ramapo-Indian Hills*, the question of whether a magnet school violates the constitutional prohibition against a gift of public funds for a private purpose may also be disposed of summarily. Art. 8, §3, ¶3 of the New Jersey Constitution forbids the appropriation of public money "to or for the use of any society, association or corporation whatsoever." That constitutional provision is designed to insure that public money is used for public purposes. *Mt. Laurel Tp. v. Public Advocate of N.J.*, 88 *N.J.* 522, 534 (1980). What constitutes a public purpose is broadly construed to encompass any activity "which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government." *In re Charter Sch. Application of Englewood on Palisades Charter Sch*, 320 *N.J. Super.* 174, 228 (App. Div. 1999), *modified on other grounds*, __ *N.J.* __ (2000). Provision of public education is clearly a legitimate function of state government and county vocational schools are public bodies created to promote that purpose. The choice to include vocational schools among the array of public entities providing educational services to pupils is one appropriately left to the Legislature. *In re Charter Sch. Application*, __ *N.J.* at __.

Unlike *Ramapo-Indian Hills,* where both parties filed extensive documentation in support of their factual positions, the record in this case is relatively uninformative. Specifically, the record lacks any explanation of the approval process, any identification of the particular courses of study that form the foundation for Union Vo-Tech's magnet high school, and any analysis of the apparent overlap between the approved course offered by both districts. Given the state of the proofs, it is premature to resolve the remaining issue of whether Scotch Plains-Fanwood offers a "comparable program" within the meaning of *N.J.A.C.* 6:43-11. Rather than litigate this issue in a vacuum, the preferred course of action is to return the matter for further administrative review by the governmental agency that possesses the "staff, resources and expertise to understand and solve these specialized problems." *In re Amendment of N.J.A.C.* 8:31B-3.31, 119 *N.J.* 531, 543-44 (1990). For the reasons mentioned in *Ramapo-Indian Hills*, slip op. at 10, such review should be conducted administratively by Department experts without the trappings of a full administrative hearing.

In light of return of this case to the Department for further review, it is unnecessary to reach the additional grounds for dismissal urged by the Attorney General's Office. Nonetheless, the concerns voiced by the Deputy deserve respectful attention. First, the Deputy argues that the suit is time-barred by *N.J.A.C.* 6:24-1.3(c), which mandates that appeals to the Commissioner must be filed no later than ninety days "from the date of receipt of the notice of a final order, ruling or other action" by a board of education. Since Scotch Plains-Fanwood knew about the planned enrollment of its students in Union Vo-Tech's magnet school in September 1997 and waited nearly six months before instituting its appeal in March 1998, the Department contends that petitioner is out of time to challenge the requirement that it pay their tuition.

Imposition of a ninety-day limitation period has been approved by our highest court as a reasonable procedural requirement designed to achieve finality in educational matters. *Kaprow v. Bd. of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 583 (1993). Generally, the ninety-day rule is strictly enforced. *Balwierczak v. Bd. of Educ. of the Twp. of Berkeley Heights,* EDU 11247-97 (Comm'r Dec. 8, 1999), aff'd (St. Bd. May 3, 2000). http://state.nj.us/njded/legal/index.html Due to reliance by six students, their

parents, and the vocational school district on the apparent acquiescence by Scotch Plains-Fanwood, it is too late to disturb placement arrangements made for the 1997-98 academic year. It does not follow, however, that Scotch Plains-Fanwood is permanently precluded from challenging the enrollment of future students, who have not yet finalized their academic plans.[8] At most, the affirmative defense interposed by the Department might postpone, but not avoid, addressing the underlying question. For the sake of uniformity, educational continuity and predictability, it is best to resolve the substantive issues once and for all.

Lastly, the Deputy maintains that Scotch Plains-Fanwood has no standing to bring this litigation because "it has no direct stake in the outcome." Litigation is confined to those situations where the litigant's concern with the subject matter evidences sufficient stake and real adverseness, giving due weight to the interests of individual justice and to the public interest. *Crescent Park Tenants Ass'n v. Reality Equities Corp of N.J.,* 58 *N.J.* 99 (1971). If students residing in petitioner's district are allowed to attend the magnet school, Scotch Plains-Fanwood will be required to foot the bill and will have fewer funds available to educate children who stay in the district. Moreover, the Commissioner has emphasized the importance of "the State's legitimate interest in avoiding duplication of programs and costs." *Ramapo-Indian Hills* (slip op. at 18). Therefore, petitioner has sufficient economic interest to bring the current challenge.

In sum, Scotch Plains-Fanwood is time-barred from attempting to avoid its obligation to pay tuition and transportation costs for resident students who attended Union Vo-Tech's magnet school during 1997-98. Its various claims that Union Vo-Tech exceeded its statutory authority, violated the Perkins Act, and violated the constitutional prohibition against use of public funds for a private purpose are dismissed as a matter of law. However, the matter will be returned to the Department for administrative review to assure that programs offered by the magnet school are approved and do not

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[8] *But see, contra*, *North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587, 595, (1984), suggesting that the claim of a continuing violation, which is associated with the assertion of discrimination in employment, has little or no relevance in an educational context.

duplicate existing programs offered at the local level. The OAL does not retain jurisdiction.

Order

It is **ORDERED** that partial summary decision is granted in favor of Union Vo-Tech dismissing Counts I, II, III, V, and VI of the petition.

It is further **ORDERED** that partial summary decision is granted in favor of the Department dismissing petitioner's claims insofar as they relate to tuition and related costs incurred by the six resident students who attended Union Vo-Tech's magnet school during the 1997-98 academic year. Scotch Plains-Fanwood will make full payment to Union Vo-Tech within forty-five days.

And it is further **ORDERED** that this matter be returned to the Department for administrative review of the allegations set forth in Count IV of the petition that approved programs offered by Union Vo-Tech are comparable to those offered by the local district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 4, 2000
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8-8-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 7139-98
AGENCY DKT. NO. 54-3/98

BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNION COUNTY BOARD OF CHOSEN FREEHOLDERS, BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed exceptions, as did respondents Union County Vocational Technical School District (UCVT) and the Department of Education, in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, petitioner contends that: 1) this matter is not appropriate for summary decision, in that "there is an abundance of factual issues" which have not been brought to the record, particularly with respect to a comparability analysis. (Petitioner's Exceptions at 1); 2) the Initial Decision is inconsistent with the State Board's remand in the matter entitled *K.B. v. Board of Education of the Rancocas Valley Regional High School District, Burlington County, State Board Decision,* March 1, 2000; 3) the Administrative Law Judge (ALJ) erroneously dismissed petitioner's contention that the UCVT is not a vocational school within the statutory definition of same; 4) the ALJ failed to consider §2471 of the Perkins Act when he found that the

programs offered by the UCVT Magnet School of Science, Mathematics and Technology (hereafter, "Magnet School") are compatible with the purposes of that Act; and 5) the ALJ improperly found that the Magnet School does not violate the Constitutional Prohibition against a gift of public funds for a private purpose. (Petitioner's Exceptions at 3-7)

The UCVT takes exception to that portion of the Initial Decision wherein the ALJ returns this matter to the Department of Education "for further administrative review" relative to the "comparable program" issue. (UCVT's Exceptions at 1) This referral, the UCVT contends, "usurps the very function of the Administrative Law Judge as the trier of fact and law in this matter." (*Ibid.*) The UCVT reasons that if the ALJ could not make his comparability determination on the record before him, additional submissions could have been provided or a full evidentiary hearing conducted. (*Id.* at 2)

Similarly, the Department of Education excepts "to the portion of the Administrative Law Judge's recommendation *** that [this matter] be returned to the Department for administrative review of the allegations set forth in Count IV of the petition that approved programs offered by the Union County Vocational-Technical School *** are comparable to those offered by the Scotch Plains-Fanwood school district." (Department of Education's Exceptions at 1) Here, the Department submits that it need not conduct the reviewed ordered by the ALJ since the very purpose of the *Directory, supra*, is to identify the various approved programs, thereby rendering unnecessary a course-by-course comparison. Moreover, the Department continues, the burden of proof was on petitioner to submit documentation in opposition to the motion for summary decision; however, it elected not to provide any such evidence in support of its position that it offers comparable courses.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision, with modification as set forth herein. Initially, the Commissioner underscores that the Department of Education does not approve or

regulate the *format* of vocational and technical education programs. As such, vocational and technical education programs may be offered through a magnet school format, a career academy format or through a traditional program format. (*Board of Education of the Ramapo-Indian Hills Regional School District, Bergen County v. Board of Education of the Bergen County Vocational Technical School District,* Commissioner Decision July 10, 2000, slip. op. at 4, footnote 5) Yet, "every magnet school and career academy must be based on an approved vocational *program.*" (emphasis in text) (*Id.*, slip op. at 5, citing to the testimony of Dr. Thomas A. Henry, Director of the Office of School–to-Career and College Initiatives at the New Jersey State Department of Education) Thus, although the format of the program herein may be different from that at issue in *Ramapo,* petitioner alleges no facts which, if true, would establish that the Magnet School is *not* a "vocational education program" in accordance with the State and Federal statutes and definitions, as per the analysis in *Ramapo.* [1] (*Id.*, slip. op. at 6-8) Moreover, the Commissioner concurs with the ALJ's finding that petitioner's claim that the Magnet School violates the constitutional prohibition against a gift of public funds for a private purpose may be summarily dismissed.

Finally, the Commissioner finds that Count IV of the Amended Petition is properly dismissed on summary basis. Petitioner apparently seeks to invoke *N.J.A.C.* 6:43-

[1] Although petitioner points to a definition of "vocational education" found in §2471 of the Perkins Act which, it asserts, was not considered in *Ramapo, supra,* the Commissioner finds that the definition cited by petitioner at that section is not substantially different from that found at §2302, as cited in *Ramapo.* That is, §2302 defines "vocational and technical education" as educational activities that: "(A) offer a sequence of courses that provides individuals with the academic and technical knowledge and skills the individuals need to prepare for further education and for careers (other than careers requiring a baccalaureate, master's, or doctoral degree) in current or emerging employment sectors; and (B) include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, of an individual." *Ramapo, supra,* slip. op. at 11. Whereas, petitioner asserts that §2471 defines "vocational education" as "organized educational programs offering a sequence of courses which are directly related to the preparation of individuals in paid or unpaid employment in current or emerging occupations requiring other than a baccalaureate or advanced degree. Such programs shall include competency-based applied learning which contributes to an individual's academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, and other occupational-specific skills necessary for economic independence as a productive and contributing member of society...." (Petitioner's Exceptions at 6)

3.11(a) to prevent its students from attending the Magnet High School; in so doing, it claims that it offers a comparable or superior program to that offered by the Magnet School (Amended Petition of Appeal at 8). Yet, in support of this claim, petitioner avers, in pertinent part, that:

> 3. The Union County Magnet School has a staff of seven teachers, and certainly, the limited number of teachers on the faculty *** will not provide the professionally enriched, day-to-day diversity of experiences that the staff of the Scotch Plains-Fanwoood High School can offer.
> 4. The Union County Magnet School offers no facilities for the fine and practical arts, nor is there a media or an all purpose gymnasium.
> 5. The Union County Magnet School does not offer a world language program with the depth and breadth of the program as delivered in the school district of the Petitioner.
> 6. The curriculum of the Union County Magnet School offers no courses in art, music, business or practical arts.
> 7. The health and physical education program of the Union County Magnet School is offered through a fitness facility and is not [as] comprehensive in scope as [that] provided by the Petitioner.
> 8. The Union County Magnet School does not have a fully completed curriculum in the Core Curriculum Content Areas, unlike the curriculum developed by the Petitioner in its high school.
> 9. The Union County Magnet School does not offer interscholastic athletic or co-curriculum programs ***.
> 10. The academic and co-curricular programs at Scotch Plains-Fanwood High School, including mathematics and science education, are superior in depth and breadth to what is offered at the Union County Magnet School. (*Id.* at 8-9)

Thus, petitioner fails to set forth any specific allegations, and facts supporting them, which would constitute a basis for its position that it offers a comparable or superior *vocational educational program*. Nor does petitioner allege that its vocational education program, to the extent one exists, has been approved by the Department of Education. *See D.F. on Behalf of Minor Child, E.F. v. Board of Education of the Borough of Roselle Park*, Commissioner Decision, July 9, 1999.

Moreover, in response to the UCVT School District's Motion for Summary Decision, petitioner fails to bring to the record any documentation in opposition to the UCVT

School District's claim that *N.J.A.C.* 6:43-3.11(a) should not control the outcome in this matter. To the contrary, in its response to the motion, petitioner simply contends that "if the education provided by the Union County Magnet School is a 'Vocational Education', then the Scotch Plains-Fanwood High School also provides the same 'Vocational Education'." (Petitioner's Response to Motion to Dismiss, June 17, 1999, at 4)[2]

Accordingly, the Commissioner finds that the within Petition of Appeal may be summarily dismissed.[3] Petitioner is directed to remit tuition costs to the respondent UCVT for its resident students attending the Magnet High School for the 1997-98 school year and, thereafter, for any similarly situated students for whom tuition has not been paid.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 26 2000

[2] Upon a motion for summary decision, "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." *N.J.A.C.* 1:1-12.5(b)

[3] Additionally, in accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Orders of July 8, 1999 dismissing the Petition of Appeal as against the Union County Board of Chosen Freeholders and July 9, 1999 denying the Department's motion to dismiss for failure to provide answers to interrogatories.

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

314-00

IN THE MATTER OF THE TENURE HEARING	:	
OF COREY YOUNGER, STATE-OPERATED	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
JERSEY CITY, HUDSON COUNTY.	:	

September 22, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT ON REMAND
OAL DKT. NO. EDU 11161-99
AGENCY DKT. NO. 142-5/98

IN THE MATTER OF THE TENURE HEARING OF COREY YOUNGER, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY

Charlotte Kitler, for petitioner, Jersey City School District

Philip Feintuch, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: August 1, 2000 Decided: August 3, 2000

BEFORE **IRENE JONES**, ALJ:

On May 14, 1998, the Jersey City School District (District), Hudson County certified charges of unbecoming conduct against the respondent, Corey Younger (Younger). Younger is a tenured teacher employed by the District. On May 4, 1998, the District filed the written charges with the Commissioner of Education. The matter was transmitted to the Office of Administrative Law on June 25, 1998 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and 52:14F-1 to 13. After three days of hearings, the parties agreed to settle the matter. After the receipt of the

settlement agreement an Initial Decision Settlement was issued on July 20, 1999. (I/M/O the Tenure Hearing of Corey Younger, OAL Dkt. No. EDU 5698-98).

On September 7, 1999, the Commissioner of Education issued a Decision wherein he disapproved the settlement, finding that the Initial Decision did not sufficiently explain how the settlement met the standards of *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842. Thus, the matter was remanded to the OAL on October 6, 1999 for disposition pursuant to the *Cardonick* standards.

On March 7, 2000, a conference was held and the parties agree to submit a revised Stipulation of Settlement consistent with the terms in the Commissioner's decision.

The settlement agreement was filed on August 1, 2000 and which is attached hereto.

In accordance with the decision of the *State Board of Education in Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. See *Cardonick* at 850-51.

In this matter, the District filed charges alleging that Younger, a Health and Physical Education teacher engaged in unbecoming conduct. Specifically, the charges alleged that while on a field trip Younger had allowed another adult, unaffiliated with the District, to engage in sexually suggestive conduct towards one of Younger's students. Further, it was alleged that during this same trip, Younger put his tongue in a student's ear and made suggestive remarks to her.

During the hearing, the District was unable to locate a key witness to corroborate the alleged touching by Younger. However, it was able to present sufficient evidence that an another adult was present on the trip and had indeed engaged in sexually suggestive conduct towards a student. While this conduct was totally inappropriate, it did not rise to conduct that would have involved criminal charges or that would inflict any permanent or emotional harm on the student. Younger's conduct, here, was passive because he failed to avert the circumstances in the first place and failed to intervene by not ejecting his guest.

It was further established at the hearing that Younger did not have any prior disciplinary history. Given the absence of a prior disciplinary history, the likelihood of a dismissal and or revocation of his teacher's license was remote. Rather, it appeared that a period of suspension might have been sustainable.

Thus, given the District's difficulties with its proofs and the probable outcome of this matter, it was concluded that the acceptance of Younger's resignation was in the public interest.

Consequently, Younger was carefully examined by his attorney wherein he was advised that the settlement agreement was subject to the approval of the Commissioner of Education. *Cardonick v. Brookline Board of Education*, 1990 .*S.L.D.* 842. Further, that the Commissioner could refer this matter to the State Board of examiners for further action. Thereafter, Younger acknowledged that he fully understood the charges and the consequences of this settlement.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save legal expenses as well as time expended looking for witnesses. I further **FIND** that Younger had full opportunity to consult with legal counsel prior to entering into the agreement. He is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Younger

was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/3/00
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

8-8-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

AUG 1 3 27 PM '99

IN THE MATTER OF THE TENURE HEARING OF	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	OAL Dkt. No. EDUTH 11161-99
COREY YOUNGER	Agency Ref. No. 142-5/98
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY	STIPULATION OF SETTLEMENT

WHEREAS, Corey Younger has been employed as a full-time teacher of health and physical education with the Jersey City School District since September 16, 1991; and

WHEREAS, the District filed charges with the Commissioner of Education on May 18, 1998, to terminate the employment of Mr. Younger for unbecoming conduct; and

WHEREAS, the parties wish to resolve the matter without further litigation and without any payment of monies by the District to Mr. Younger other than salary as required by statute, N.J.S.A. 18A:6-14, during the pendency of these proceedings through June 20, 1999; and

WHEREAS, the public interest would best be served by resolving the present controversy because of certain difficulties in proving the charges and sustaining the penalty of termination, in that: (a) it has been extremely difficult to locate a witness who was a senior at the time of the alleged incidents in April 1998 and has since graduated, thereby making it unlikely that the District could prove the allegation in paragraph 11 of the tenure

charges that Mr. Younger beckoned the particular student to come to his table at a restaurant, put his tongue in her ear and made suggestive remarks to her; (b) the remaining allegations may be found to establish only passive conduct on the part of Mr. Younger, such as, a failure to stop the actions of another adult; and (c) there is no record of any discipline of any nature in Mr. Younger's history of employment with the District prior to the filing of the tenure charges; and

WHEREAS, Corey Younger testified under oath before the Administrative Law Judge on June 16, 1999, that he clearly understood the terms of the settlement agreement, that he entered into the settlement agreement voluntarily, that he was advised and understood that the Commissioner of Education had to approve the settlement agreement and that he was also advised and understood that the Commissioner could refer the matter to the State Board of Examiners for possible revocation of his teaching certificate;

NOW, THEREFORE, the parties have agreed to the following terms of settlement:

1. The respondent Corey Younger resigns from employment with the Jersey City School District, effective June 30, 1999.

2. The petitioner Jersey City School District agrees to accept Mr. Younger's resignation, and agrees to withdraw the tenure charges bearing the OAL Docket Number EDUTH-05698-98 and the Agency Reference Number 142-5/98.

COREY YOUNGER

Charlotte Kitler, General Counsel,
State-Operated School District of
Jersey City

DATED: 7/28/00

Feintuch, Porwich & Feintuch
Attorneys for Respondent Corey Younger

DATED: 7/25/00

OAL DKT. NOS. EDU 5698-98 AND EDU 11161-99 (ON REMAND)
AGENCY DKT. NO. 142-5/98

IN THE MATTER OF THE TENURE HEARING	:	
OF COREY YOUNGER, STATE-OPERATED	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
JERSEY CITY, HUDSON COUNTY.	:	

The record, Settlement Agreement and Initial Decision on Remand issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See, In re Cardonick,* 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 26 2000

316-00

#316-00

FRANCISCO J. CUESTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

September 22, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11302-96

AGENCY DKT. NO: 418-9/96

FRANCISCO J. CUESTA,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

Wayne Oppito, Esq., for petitioner

David A. Rapuano, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: July 28, 2000 Decided: August 7, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 1, 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/7/00
DATE

JEFFREY ANDERSON,
Administrative Law Judge

Receipt Acknowledged:

8-8-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

SETTLEMENT AGREEMENT

FRANK CUESTA

AND

ELIZABETH BOARD OF EDUCATION

---

1. This Agreement is being entered into to resolve pending litigation in the United States District Court and before the Office of Administrative Law involving Frank Cuesta ("Cuesta") and the Elizabeth Board of Education ("Board").

2. The Board agrees to appoint Cuesta as a twelve month principal for the Elizabeth Board of Education effective July 1, 2000. The Board further agrees to permit Cuesta to commence using his 2000-2001 vacation time in July, 2000.

3. Cuesta acknowledges that this Agreement is in settlement of disputed issues of fact and law, that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

4. In consideration for this Agreement, Cuesta hereby irrevocably and unconditionally releases the Board, Board members, Tom Dunn, Jr., and any other employee and/or administrator of the Board from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Cuesta, his heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII

of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. § 1983, all claims arising under the public policy of the State of New Jersey, all claims arising under Title 18 and 18A of the New Jersey Statutes, all tortuous claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions.

5. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise. Neither party admits any liability.

6. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

7. Cuesta, in consideration for his appointment, withdraws his appeal and request for hearing before he Commissioner of Education and Office of Administrative Law, and lawsuit before the United States District Court.

8. This Agreement is subject to ratification by the Elizabeth Board of Education.

Frank Cuesta

FRANK CUESTA, Appellant and Plaintiff Dated: 7/17/2000

WAYNE OPPITO, ESQ.
On Behalf of Cuesta Dated:

DAVID F. CORRIGAN, ESQ.
On Behalf of the Elizabeth Board of Education Dated: 7-20-2000

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• MEMBER OF N.Y. BAR
•• MEMBER D.C. & N.Y. BARS
△ MEMBER OF PA. BAR
△△ MEMBER OF GA. BAR

July 25, 2000

Honorable Jeffrey Gerson, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102-3011

Re: Francisco J. Cuesta v. City of Elizabeth Board of Education
OAL Docket No. EDUOA 11302-96N
Our File No. 30,312

Dear Judge Gerson:

Our firm represents the Board of Education of the City of Elizabeth with regard to the above matter.

I am pleased to report that the above matter has been settled and I enclose the Settlement Agreement executed by the parties which has resolved this case, as well as the pending Federal Court proceedings.

Under such circumstances, the hearing scheduled for August 15, 2000 is no longer necessary.

Thank you for your attention to this matter.

Respectfully submitted,

MURRAY, MURRAY & CORRIGAN

DAVID F. CORRIGAN

DFC/lms
Encls.
cc: Wayne Oppito, Esq.
Thomas Dunn, Jr., Superintendent
Frank Trocino, Esq., Board Attorney

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OAL DKT. NO. EDU 11302-96
AGENCY DKT. NO. 418-9/96

FRANCISCO J. CUESTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement* and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 26 2000

* The Settlement Agreement was approved by the Board on July 13, 2000.

#317-00

317-00

LILLIAN BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 22, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 10741-97

AGENCY DKT. NO: 414-10/97

LILLIAN BROWN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Robert T. Pickett, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: July 28, 2000 Decided: August 7, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 15, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/7/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

8-8-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

SILLS CUMMIS RADIN TISCITMAN
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Attorneys for State Operated
School District of the City of Newark

JUL 20 2 [illegible] '00

COMMISSIONER OF EDUCATION
OAL Docket No. **EDUOR 10741-97N**
Agency Ref. No.414-10/97

Lillian Brown,

Petitioner,

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

—vs-

State-Operated School District for the City of Newark,

Respondent.

The State-Operated School District of the City of Newark ("Newark" or "District") and Lillian Brown ("Petitioner" or "Brown") agree to the following terms in full resolution of this matter:

WHEREAS, Brown disputes the basis for the increment withholding for the 1997-1998 school year, and

WHEREAS, Brown received a satisfactory Summary Evaluation on or about June 7, 1998, for the 1998-1999 school year; and

WHEREAS, the parties further agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation,

NOW, THEREFORE, the parties agree as follows:

1. Effective September 1, 1999, on a prospective basis only, the District will restore the increment withholding from the 1997-98 academic year, so that Brown will be placed on the appropriate level of the salary guide for 1999-2000 as if the 1997-1998 increment had not been withheld.

2. Upon approval of this Agreement, Brown will withdraw her appeal of the 1997-1998 increment withholding, with prejudice.

3. This agreement is subject to the approval of the State District Superintendent.

4. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Robert T. Pickett, Esq., ~~Attorney~~
For Petitioner LILLIAN BROWN
Dated:

State-Operated School District
of the City of Newark
By:
Dated:

OAL DKT. NO. EDU 10741-97
AGENCY DKT. NO. 414-10/97

LILLIAN BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 26 2000

318-00

G.L. on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4559-00

AGENCY DKT. NO. 200-6/00

G.L. o/b/o D.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF MILLVILLE,
CUMBERLAND COUNTY,

Respondent.

G.L., on behalf of petitioner, **D.L.**, *pro se*

Russell Paul, Esq., for respondent

Record Closed: July 10, 2000 Decided: August 8, 2000

BEFORE **JOSEPH LAVERY**, ALJ:

Petitioner, G.L., on behalf of her daughter, D.L., moved for emergent relief requesting that D.L. be permitted to march in procession with her class at graduation on Tuesday, June 20, 2000. By emergent order of the Administrative Law Judge (ALJ), dated June 19, 2000, that appeal was denied. The Commissioner of Education affirmed the order of the ALJ and returned

the matter to the Office of Administrative Law for any further proceedings that would be necessary to bring this matter to conclusion.

Both parties were contacted and advised that the matter would be dismissed unless they advised our office by July 10, 2000, that there were further issues in this matter. No response was received by either party.

Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 8, 2000
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

8-10-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

OAL DKT. NO. EDU 4559-00
AGENCY DKT NO. 200-6/00

G.L. on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent review, the Commissioner concludes that, because neither party has indicated that there are any unresolved issues remaining in connection with this case, as directed by the Administrative Law Judge, this matter is no longer deemed to be a contested case before the Commissioner of Education.

Accordingly, the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 25 2000

Date of Mailing: SEP 26 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

319-00

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. CHARLES KASKA,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION
	:	

September 25, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08172-99S

AGENCY DKT. NO. 264-8/99

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Petitioner,

v.

CHARLES KASKA,

Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Michael J. Herbert, Esq., for respondent (Herbert, Van Ness, Cayci and Goodell, attorneys)

Record Closed: August 7, 2000 Decided: August 9, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of tenure charges with the Commissioner of Education on August 31, 1999, by The Trenton Board of Education ("petitioner") against Charles Kaska ("respondent") alleging unbecoming conduct, excessive absenteeism, insurobdination and other just cause. The allegations are contained in a Statement of Tenure Charges filed with the Commissioner of Education dated August 10, 1999. The matter was transmitted to the Office of Administrative Law on September 20, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement. Although this matter involves tenure, given the nature of the allegations and the circumstances surrounding same, the disposition appears to be reasonable and in the best interest of all parties and the public.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy in this administrative forum and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 9, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

8-10-DL
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

SUMNERS GEORGE & DORTCH
A Professional Corporation
209 East Front Street
Trenton, New Jersey 08611
(609) 393-6604
Attorneys for Petitioner, Board of Education of the City of Trenton, Mercer County

IN THE MATTER OF THE TENURE HEARING OF DR. CHARLES KASKA, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY DOCKET NO. 264-8/99 OAL DOCKET NO.EDUTH 8172-99S

SETTLEMENT AGREEMENT

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton, Mercer County ("Board"), and the Respondent, Charles Kaska ("Respondent").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 264-8/99, OAL Docket No. EDUTH 8172-99S; and

WHEREAS, the tenure charges allege conduct unbecoming by the Respondent during the 1998-99 school year as follows:

1. Excessive absenteeism, totaling 53 days;

2. Failure to attend scheduled Child Study Team Roundtable Meetings covering the time period December 1998 to June 1999;

3. Failure to prepare psychological evaluations; and

4. Psychological examination reports were prepared by another member of his Child Study Team who is a certified School Psychologist.

WHEREAS, the Respondent has denied all of the allegations against him and has physician letters excusing him from work and attending Child Study Team Roundtable Meetings;

WHEREAS, the parties recognize that there are strengths and weaknesses with resp to their respective positions; and

WHEREAS, the parties have agreed to an expeditious resolution of this matter intended to save both parties the cost and uncertainty of continued litigation;

NOW, THEREFORE, in consideration of the foregoing, the parties agree to resolve the within matter based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against the Respondent.

2. Respondent shall not be reimbursed any salary withheld from him during his 120 days suspension without pay following certification of these tenure charges.

3. Respondent agrees not to be returned to the payroll following the expiration of the 120 days suspension without pay following the certification of these tenure charges.

4. Respondent agrees to submit a letter of retirement effective September 1, 200(

5. Respondent will be entitled to any benefits afforded to retirees under the collective bargaining agreement between the Board and the Trenton Education Association including, but not limited to, health insurance benefits and payment of 55 sick days (one-third of his accumulated personal business and sick days), unless expressly waived by Respondent in this agreement.

6. The parties agree and covenant that neither they, nor any person, organization, or other entity on their behalf will file any charge, claim, and/or lawsuit against the other based upon any facts set forth in the tenure charges or any facts arising from the tenure charges.

7. Petitioner and Respondent expressly acknowledge that they have agreed to each and every term of this agreement, that each of the terms and conditions of this agreement have been fully explained and that the execution of this agreement is being made voluntarily, knowingly, and with the advice of counsel.

8. All the terms of this agreement are deemed material.

9. The parties understand that this agreement is contingent upon the approval of Administrative Law Judge ~~Beatrice Tylutki~~ Jeff S. Masin and the Commissioner of Education, and if such approval is denied. the terms and contents of this agreement shall not be admissible in any legal administrative proceeding of any nature, and will be without prejudice to their positions in such proceedings, and that in such event, the parties may again attempt to settle this matter in a manner which is satisfactory to the Commissioner of Education.

10. The parties request that the tenure hearing be held in abeyance in order to obtain the approval of this settlement agreement by Administrative Law Judge ~~Tylutki~~ Masin and the Commissioner of Education.

IN WITNESS WHEREOF, the parties have caused this agreement to be duly executed on this 31 day of July, 2000.

Abdul-Malik R. Ali
Abdul-Malik R. Ali, President
Trenton Board of Education

Thomas W Summers
~~Angelia Ellis~~, Board ~~Secretary~~ Attorney
Thomas Summers Jr.
Trenton Board of Education

Charles Kaska, psyD.
Charles Kaska, Ph.D.
Respondent

Michael J. Herbert
Michael J. Herbert, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 08172-99S
AGENCY DKT. NO. 264-8/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. CHARLES KASKA,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon such review, the Commissioner is compelled to reject the proposed agreement as presently written, in that it fails to comport with the *Cardonick* standards for review of settlements in tenure matters. *In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983. Specifically, neither the agreement nor the underlying record indicates respondent's understanding of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer this matter to the State Board of Examiners for its consideration of possible action against respondent's certificate. While the Commissioner does not take issue with the parties' settlement terms, he must be assured that any settlement is consistent with established standards for setting aside of tenure matters.

Accordingly, the Initial Decision recommending acceptance of the settlement agreement is reversed and this matter remanded to the OAL for revision of such agreement consistent with the requirements set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 25 2000

Date of Mailing: SEP 26 2000

320-00

S.G., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, the parent of a child who attended a magnet school operated by the Bergen County Technical School District, challenged the determination of the student's local district not to allow the student to apply for or receive scholarships donated to the district and administered by Fair Lawn High School.

After the case was transmitted to the Office of Administrative Law, the parties moved for summary decision. The ALJ granted summary decision in favor of the district, concluding that: 1) the case is moot because petitioner's child graduated from high school and is attending Rice University on full scholarship; 2) petitioner has no standing to prosecute the matter because petitioner's son cannot be affected by the decision in any way; and 3) the Board's policy regarding the administration of scholarships is not arbitrary, capricious or unreasonable.

The Commissioner affirmed the ALJ's grant of summary decision and dismissed the petition, concluding that, even assuming *arguendo* that petitioner has standing and that the case is not moot, the policy of the Board restricting the grant of scholarship funds it administers to students attending Fair Lawn High School is not arbitrary, capricious or unreasonable.

September 25, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO: EDU 7469-99

AGENCY DKT. NO: 131-5/99

S.G., on behalf of minor child R.G.,

Petitioner,

v.

FAIR LAWN BOARD OF EDUCATION,

Respondent.

S.G. *pro se*, petitioner

Jacob Green, Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: June 5, 2000 Decided: August 8 , 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF FACTS

During the 1994-95 school year, petitioner's (S.G.) son (R.G.) applied to and was accepted by the Academy for the Advancement of Science and Technology (AAST). AAST is a magnet school run by the Bergen County Technical School District. The Fair Lawn School District paid for R.G.'s tuition, and transportation in accordance with *N.J.S.A.* 18A:54-20.1.

During the 1998-99 school year, S.G. asked for scholarship applications from the Fair Lawn High School guidance office. Ms. Genny Kruiningen, the guidance office secretary responsible for the administration of scholarship applications, told S.G. that R.G. did not qualify to participate in the awards for scholarships donated to the District and administered by Fair

Lawn High School (FLHS) because nominations for scholarships were made by guidance counselors and faculty at FLHS.[i]

On April 14, 1999, S.G. wrote to the Fair Lawn Superintendent of Schools, Dr. Robert Byrne, asking for an explanation of scholarship eligibility. On May 10, 1999, Dr. Byrne responded explaining that scholarship funds are received and administered through the District's student accounts and have always been applied, as with all student funds, for the benefit of pupils enrolled in the Fair Lawn Public School District.

Respondent's decision regarding the distribution of scholarship monies was based on Board Policy #3280, Community Gifts and Student Group Purchases. The policy states, "all items of property...donated or purchased shall, upon receipt, belong to and be the property of the Fair Lawn Board of Education...", and that "upon receipt of an item of property thus donated or purchased, the Superintendent of Schools shall assign it for use..." The Fair Lawn Board of Education takes the position that it has the authority to determine, pursuant to Board Policy #3280,[ii] where donated scholarship monies are directed.

On May 17, 1999, a petition was filed with the Commissioner of Education requesting that R.G., and others similarly situated, be permitted to apply for Fair Lawn scholarships during the next available scholarship period. Petitioner requested that an additional member be added to the scholarship selection committee and also asked to have the FLHS guidance office mail the same scholarship information provided to FLHS to students attending school outside of the District.

On February 13, 2000, petitioner moved for summary decision and respondent, on February 25, 2000 cross-moved.

Presently, R.G. is a freshman on full scholarship at Rice University in Houston, Texas. R.G. received a National Merit Scholarship from AAST and an award from the *Bergen Record*.

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[i] Ms. Genny Kruiningen did explain to S.G. that R.G. was eligible for scholarships determined by application to individual outside organizations, and that these applications were available to R.G. at the FLHS guidance office. Also, the FLHS principal told S.G. that she should ask the guidance officer at AAST about scholarships designated for AAST students. R.G. did apply for AAST scholarships, ultimately qualifying for and receiving awards in the amount of $690.

[ii] Board Policy #3280 has been in existence for over 30 years.

DISCUSSION

Summary Decision Standard

The New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-1.1 *et seq.*) provide that a party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(a). In considering the parties' motion for summary decision, a determination whether "the papers and discovery...together with the affidavits...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). This language is substantially similar to the standard for summary judgment found at R. 4:46-2(c);[iii] therefore, this standard may be relevant to resolving motions for summary decision.[iv]

In this regard, the New Jersey Supreme Court has stated, "[S]ince there are pronounced similarities in the exercise of judicial and quasi-judicial powers . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). Additionally, the Court has recognized that the OAL performs many "quasi-judicial" or "adjudicative" functions and that in doing so, "[j]udicial rules of procedure and practice are transferable to administrative agencies when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." *Matter of Tenure Hearing of Onorevole*, 103 *N.J.* 548, 554-55 (1986).

Recently, the Supreme Court of New Jersey held that when deciding a motion for summary judgment under R. 4:46-2,

> . . . [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the

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[iii] In pertinent part, R. 4:46-2(c) provides:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. [R. 4:46-2(c)]

[iv] See 37 New Jersey Practice, Administrative Law and Practice § 194, at 90 (Patricia Prunty, Anthony Miragliotta and Steven L. Lefelt) (1997 Pocket Part), where the authors stated:

> Since the UAPR on summary decision, N.J.A.C. 1:1-12.5, closely tracks the court rules, it is anticipated that this standard will be applied by ALJ's in deciding summary decision motions.

> alleged disputed issue in favor of the non-moving party.[*Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995)]

The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law". *Id.* at 533. See also *N.J.A.C.* 1:1-12.5(b). "[A]n adverse party [to a summary decision motion] in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding."

Ripeness

Under the authority of *N.J.S.A.* 18A:6-9, the Commissioner of Education is vested with the jurisdiction to "hear and determine . . . all controversies and disputes arising under the school laws..." *N.J.S.A.* 18A:6-9. Implicit in this jurisdiction is the notion that a controversy or dispute must be viable or ripe before it may be heard by the Commissioner. See *Bott, et. al. v. Middletown Twp. Bd. of Educ*, OAL DKT. EDU 4124-81 (Oct 30, 1981), adopted Comm. Ed. (Dec. 21, 1981) (where ALJ held that matter was not ripe for adjudication when petitioners had not yet been harmed or could "predetermine" exact nature of harm flowing from board's action.) In *Bott*, the ALJ based this holding on the proposition that "[a] mere assertation of future harm renders the claim premature." *Bott*, at p.3. See also *Brodie v. Saddle Brook Twp Bd. of Educ.*, 93 *N.J.A.R.* 2d (EDU) 694, 700, where a challenge to the Saddle Brook Township Board's decision to close a school was dismissed as not ripe since the Department of Education had not yet given final approval.

In the instant case, there is a "controversy or dispute" that is ripe for determination due to the denial of petitioner's participation in the FLHS scholarship process. However, because petitioner's case has been rendered moot, discussed *infra*, and there are no factual issues for dispute, summary decision for respondent's will be granted.

. . .

Arbitrary and Capricious

In general, a board of education's actions "are entitled to a presumption of lawfulness and good faith. . . . Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. *Schuster v. Bd. of*

Educ. Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676 (*citing Schnick v. Westwood Bd. of Educ.*, 60 N.J. Super. 448 (App. Div. 1960), and *Quinlan v. North BeR.G.en Bd. of Educ.*, 73 N.J. Super. 40, 46(App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. . . . Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgement for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [*Piccoli v. Bd. of Educ. of Ramapo Indian Hills Regional School District*, OAL DKT. EDU 1839-98 (January 22, 1999) (*citing, Bayshore Sewage Co. v. Dept. of Envir. Protection*, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

. . . "absent a clear showing of abuse of discretion," the Commissioner will not "substitute his own judgment for that of the Board of Education." *Massaro v. Bd. of Educ of the Borough of BeR.G.enfield*, 1965 *S.L.D.* 84, 85. *In Kopera v. Bd. of Educ. of West Orange,* 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "the well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." *See also G.M. v. Roselle Park Borough Bd. of Educ.*, 95 *N.J.A.R.* 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "it is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis.")

As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be upheld. *See e.g. Red Bank Teachers Ass'n v. Bd. of Educ. of Red Bank*, OAL DKT. EDU 5328-80 (April 30, 1981) adopted Comm.Ed. (June 15, 1981) (where the ALJ upheld a board's approval of a new "Mastery Learning" curriculum as a "valid exercise of managerial prerogative" that was rationally determined.); G.M., 95 *N.J.A.R.* 2d

(EDU) 107 (where the ALJ found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority).

Here, petitioner claims respondent's policy is discriminatory, yet all students are subject to the same policy which has been consistently applied to all out of district students over the years.[v] For over 30 years, the Board, in an effort to streamline the process of administering scholarships, has followed Board Policy #3280 in limiting scholarship donations to FLHS students only.

Petitioner relies upon *G.W.S., on behalf of A.F.S. v. William Petrino*, OAL DKT. EDU 9797-99 (November 29, 1999) in support of her argument. In *G.W.S.*, A.F.S. was a minor attending a magnet vocational high school and was denied participation on the swimming team at her local district high school. The Commissioner of Education ruled that students who resided in Rahway and attended the Union County Vocational School or Magnet School were to be permitted to participate in sports and extracurricular activities at Rahway High School. However, petitioner oversimplifies the significance of *G.W.S.* Originally, students who resided in Rahway and attended the Union County Vocational School or its magnet school had been allowed to participate in sports or extracurricular activities at Rahway High School. The Board subsequently changed this practice, but only as to 9th grade students who attended the magnet school. The Board permitted 10th, 11th and 12th grade magnet school students to continue to participate in those activities, as well as all students who attended the Vocational School on a shared-time basis. The Rahway Board did not offer any reason for excluding the 9th grade magnet school students. The Commissioner held that on its face the exclusion appeared to be discriminatory, because no rational explanation could be offered for its creation. The Commissioner even listed some factors such as scheduling constraints, transportation costs, or logistical difficulties that the Board could have considered, but did not. *Id.* at 9. Yet, the Commissioner also stressed that a board is not required to take unreasonable or extraordinary steps to accommodate the participation of a county vocational school's students in the extracurricular activities at the local board's high school. *Id.* at 9, n.2.

[v] The Bergen County Vocational School has been in existence for nine years.

In the case *sub judice*, there is a sound, rational basis for the Board policy which has been applied to all Fair Lawn residents who attend high schools outside of the district. The scholarship awards at FLHS are made by the nominations of counselors and faculty who have personal knowledge of the nominees. The Awards Committee depends upon the fact that the nominations are based upon personal knowledge of the students, and utilizes this knowledge in making its final determinations. Such information could only be obtained from the nominees by the FLHS guidance counselors and faculty who work closely with these students on a day-to-day basis. If the FLHS Guidance Office and Awards Committee were required to obtain student records, details on personal characteristics and conduct of students, and any other personal information from high schools outside of the district, the process by which the awards were made would become burdensome. Nomination forms are distributed to and completed by guidance counselors and faculty based upon the eligibility requirements of each individual scholarship. The Guidance Office provides the Awards Committee with student records and pertinent data. If students from other schools were allowed to participate, all of this information would have to be requested and received, along with extensive follow-up. Additionally, data would have to be processed, as well as verified, in a way so as to allow comparison and authenticity of ranking, grades, and similar achievements between students at different schools with different grading systems. Opening the scholarship process to students outside of FLHS would create an additional administrative burden. The process is already an intricate and time-consuming task. Thus, the Fair Lawn District has demonstrated a rational basis for limiting scholarship monies to FLHS students only.

Petitioner requests that her son be permitted to apply for scholarships with the 2000-2001 pool of applicants. Notwithstanding that this issue is moot since R.G. is presently a college sophomore, *see infra*, this request would disrupt the nomination and awards process by taking away an award opportunity from an otherwise deserving candidate.

Petitioner also requests that an additional member be added to the scholarship selection committee to ensure no prejudice against non-FLHS students in the selection process. Not only does this request unfairly presume that the nomination process is prejudicial, it also infringes upon the Board's managerial prerogative to select the participants for its committees.

Finally, petitioner requests that the guidance office mail the same scholarship information provided to FLHS students to students outside of the District. Again, this requirement would also provide an unnecessary burden upon the FLHS administration.

Mootness

"An action is considered 'moot' when it no longer presents a justiciable controversy because the issues have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Victoria v. Bd. of Educ. of the Twp. of Woodbridge,* 1982 *S.L.D. 1.* "[F]or reasons of judicial economy and restraint," courts will not usually hear moot cases. *Anderson v. Sills,* N.J. Super. 432, 437-38 (Ch. Div. 1976) (courts will not decide cases where the issue is hypothetical, where judgment cannot grant effective relief, or where parties lack concrete adversity of interests).

Likewise, the Commissioner does not consider moot issues. *J.B. and P.B. v. Bd of Educ of Asbury Park*, OAL DKT. EDU 7940-87 (Oct. 12, 1988), adopted Comm. Ed. (Nov. 23, 1988). *See, Feldman v. Bd. of Educ. Of Lindwood*, OAL DKT. EDU 1665-94 (Oct. 14, 1994), adopted Comm. Ed., where the petitioners argued that their child was deprived of the opportunity to participate in a gifted and talented program as required by *N.J.A.C.* 6:8-4.5(4), because the school district did not have an honors program for first graders. After petitioners transferred their child to a private school, the ALJ held:

> . . . the removal of A.F. from the policies and dictates of the Linwood school system destroys the concrete, immediate adversity necessary to sustain a justiciable controversy. Accordingly, I FIND that the removal of A.F. from the Linwood school system renders the matter moot and as a result, petitioner's complaint is herein dismissed.
>
> [*Id.* at 5. *See also Hulej v. Keyport High School, et. al.,* OAL DKT EDU 0893-79 (Mar. 25, 1980), aff'd Comm. Ed. (May 12, 1980)(where petition challenging school's behavior code was dismissed for mootness when it was revealed that petitioner had removed child from school).]

In *Spivak v. Bd. of Educ. of the Westwood Regional High School District*, 97 *N.J.A.R.* 2d (EDU) 270, petitioners contended their daughter was improperly denied admission to respondent's sixth grade honors program. More specifically, petitioners alleged that their daughter was a "gifted and talented" child for whom special programs must be provided consistent with *N.J.A.C.* 6:8-4.5(4). However, petitioners removed their child from the school

district prior to bringing their claim. The ALJ in *Spivak*, finding that petitioners lacked the adversity of interest necessary to sustain a justiciable controversy after the enrollment of their daughter into another school district, relied upon prior similar administrative decisions in reaching a decision:

> In *Pinkham v. Bd. of the Borough of South River,* 74 S.L.D. 1103, the petitioner failed a physical education course and consequently did not graduate. Petitioner sought relief seeking a diploma, alleging a school requirement that female, but not male, physical education students take written exams constituted sex discrimination. This issue was held moot because the petitioner attended summer school and received her diploma. *See Polskin v. North Plainfield Bd. of Ed.*, 1968 S.L.D. 217, (mooted because of changed circumstances, where the conclusion of the tennis season mooted a student's challenge of his exclusion from the team); *Oxfeld v. N.J. State Bd. of Ed.*, 68 N.J. 301 (1975) (mooted by the New Jersey Supreme Court because the students had already graduated and were not subject to the regulation). *In Prout v. Erickson,* OAL Dkt. No. EDU 6980-80 (March 4, 1981), (the petitioner demanded that the alleged harassment of her children while in school be stopped. The matter was held moot because her children were no longer enrolled in the school.) *In Hulej v. Keyport High School*, OAL Dkt. No. EDU 0893-79 (March 25, 1980), a (petition challenging respondent's "student behavior code" was dismissed for mootness when it was revealed at the hearing that petitioner removed her son from the public high school). [*Spivak v. Bd. of Educ. of the Westwood Regional High School District*, 97 *N.J.A.R.* 2d at 272.]

In the present matter, the relief requested is no longer available because petitioner's son has graduated from high school and attends Rice University on a full scholarship.

Standing

Standing is a jurisdictional concept that means a particular litigant has a sufficient interest in the subject matter of the litigation that a genuine clash between opposing viewpoints will be presented. *Kenwood v. Montclair Board of Education,* OAL DKT. EDU 8858-81, p. 2 (April 23, 1982), adopted, Comm'r (June 14, 1992), aff'd, St. Bd. (September 8, 1982). Generally, two prerequisites must be present to establish standing: First, petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and, second, his or her position must be truly adverse to the opposing party. *Home Builders League of So. Jersey, Inc. v. Berlin Twp.*, 81 N.J. 127, 132 (1979). The first requirement has often been described in terms of "substantial likelihood of harm" to the complainant if the requested relief is not granted. In a case of great public interest, "any slight additional private interest" will be sufficient to afford standing. *Salorio v. Glaser*, 82 N.J. 482, 491 (1980). However, some courts still continue to look for some measurable amount of detrimental impact on the complaining party's personal rights. *D.K. v. Clifton Board of Education*, 93 *N.J.A.R.*2d (EDU) 71, 73. Therefore, in spite of

petitioner's attempt to seek relief for other students who attend high school outside of the District, petitioner must also continue to demonstrate a detrimental impact on her own son.

In *Lobis v. Bd. of Ed of Maple Shade*, OAL DKT EDU 3630-79 (June 11, 1980), adopted, Comm'r (August 11, 1980), aff'd St. Bd. (November 5, 1980), petitioner filed a petition alleging, *inter alia*, that respondent was not providing equal educational opportunities under the Public School Education Act of 1975. At the prehearing conference it came to light that petitioner no longer resided in the Township of Maple Shade and that his son attended school in another school district. *Id.* at 2. The ALJ held that the petitioner did not meet the definition of "interested person" as set forth in *N.J.A.C.* 6:24-1.1 "since he has not shown a direct and substantial interest in the subject matter nor has he shown that his right or status will be affected by a determination in the matter." *Id.* at 3 See also *D.K. v. Bd. of Ed. Of Clifton*, 93 N.J.A.R. 2d (EDU) 71 (parent had no standing to appeal the school discipline of someone else's child); *Delaney v. Bd of Ed of Woodbridge*, OAL DKT. EDU 382-78 (December 12, 1979) adopted, Comm'r (June 11, 1980) (suit by resident and taxpayer challenging board's appointments was rejected since the petitioner was neither a candidate for appointment nor a representative of the candidates); *Riccardelli v. Bd. of Ed. of Newark*, OAL DKT. EDU 1904-79 (September 26, 1979), adopted, Comm'r (November 16, 1979) (taxpayer and resident of the school district does not have standing to challenge the legality of a decision by the board to transfer personnel).

In the present matter, the determination of the issues presented will not affect the petitioner in any way. He is now a sophomore in college and no longer eligible to participate in the FLHS scholarship process. Furthermore, notwithstanding the failure to have shown evidence that other students have suffered an adverse impact from Board policy, petitioner does not have standing to voice the complaints of other students.

CONCLUSION

Respondent's policy regarding the administration of scholarships is not arbitrary, unreasonable, or capricious. Even if petitioner was able to prove otherwise the matter is moot and the petitioner lacks standing. Since there are no genuine issues of material fact in dispute, respondent is entitled to prevail as a matter of law. Accordingly, respondent's motion for

summary decision is granted, and petitioner's motion for summary decision is denied. Petitioner's case is **dismissed**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/8/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

8-11-00
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 15 2000
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 7469-99
AGENCY DKT NO. 131-5/99

S.G., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner disagrees with the Administrative Law Judge's (ALJ) conclusion: 1) that the Board's denial of eligibility for magnet school students' participation in scholarship programs which it administers is not arbitrary and capricious; 2) that the within matter is moot; and 3) that petitioner lacks standing to pursue this case. In so doing, petitioner essentially recasts and reiterates her arguments advanced below.

In reply, the Board recapitulates its position on each of these issues plead before the ALJ and urges that the Initial Decision be affirmed without modification.

Upon his careful and independent review of the record, the Commissioner determines to affirm the Initial Decision since, even assuming, *arguendo,* that petitioner has standing and that this matter is not moot, he agrees with the ALJ that the Board's restriction of

its scholarship funds to students attending Fair Lawn High School is not arbitrary, capricious or unlawful for the reasons stated in the Initial Decision.

Accordingly, the recommended Initial Decision is affirmed. Summary decision is hereby granted to the Board[1] and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: SEP 25 2000

Date of Mailing: SEP 26 2000

[1] It is noted that the parties are in agreement that no genuine issue of material fact exists with respect to this matter and, therefore, summary decision is appropriately granted.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#321-00

321-00

MANIBHAI PATEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 22, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 10743-97

AGENCY DKT. NO: 419-10/97

MANIBHAI PATEL,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Robert T. Pickett, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: July 28, 2000 Decided: August 7, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 15, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/7/00
DATE

JEFFREY R. GERSON
Administrative Law Judge

Receipt Acknowledged:

8-8-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

SILLS CUMMIS RADIN TISCITMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07~02-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

JUL 20 2 [illegible]

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 10743-97N
Agency Ref. No.419-10/97

Manibhai Patel,

Petitioner,

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

—vs-

State-Operated School District for the City of Newark,

Respondent.

The State-Operated School District of the City of Newark ("Newark" or "District") and Manibhai Patel ("Petitioner" or "Patel") agree to the following terms in full resolution of this matter:

WHEREAS, Patel disputes the basis for the increment withholding for the 1997-1998 school year, and

WHEREAS, Patel received a satisfactory Summary Evaluation on or about June 7, 1999, for the 1998-99 school year; and

WHEREAS, the parties further agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation,

NOW, THEREFORE, the parties agree as follows:

1. Effective September 1, 1999, on a prospective basis only, the District will restore the increment withholding from the 1997-98 academic year, so that Patel will be placed on the appropriate level of the salary guide for 1999-2000 as if the 1997-1998 increment had not been withheld.

2. Upon approval of this Agreement, Patel will withdraw his appeal of the 1997-1998 increment withholding, with prejudice.

3. This agreement is subject to the approval of the State District Superintendent.

4. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Robert T. Pickett, Esq., Attorney
For Petitioner MANIBHAI PATEL
Dated:

State-Operated School District
of the City of Newark
By:
Dated:

OAL DKT. NO. EDU 10743-97
AGENCY DKT. NO. 419-10/97

MANIBHAI PATEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 27 2000

322-00

#322-00

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (SUPPLEMENTAL FUNDING),	:	
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 8086-99
AGENCY DKT. NO. 242-8/99

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (SUPPLEMENTAL FUNDING),	:	
RESPONDENT.	:	

The record of this matter and Consent Order of Settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: SEP 28 2000

Richard E. Shapiro, Esquire
Richard E. Shapiro, LLC
Carnegie Executive Center – Suite 206
212 Carnegie Center
Princeton, New Jersey 08540
(609) 919-1888
Attorneys For Petitioner

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK v. NEW JERSEY DEPARTMENT OF OF EDUCATION (SUPPLEMENTAL FUNDING)	OAL DOCKET NO. EDUOT 08086-99S Agency Ref. No. 242-8/99 CONSENT ORDER OF SETTLEMENT

Petitioner, Board of Education of the City of Asbury Park ("Petitioner"), through its Attorney, Richard E. Shapiro, LLC (Richard E. Shapiro, appearing) and Respondent, New Jersey Department of Education ("DOE"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Michelle Lyn Miller, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about August 9, 1999, Petitioner filed a Verified Petition of Appeal ("Verified Petition") with the Commissioner of Education seeking review of the DOE's determinations with respect to Petitioner's requests for supplemental funding for the 1999-2000 school year under the Abbott v. Burke decisions and DOE regulations. The Verified Petition was subsequently transferred to the Office of Administrative Law.

2. The parties subsequently entered into discussions to amicably resolve this matter in the public interest.

3. Based on those discussions, and the Petitioner's demonstration of needs,

the DOE agreed that the Petitioner needed $2,058,000 in additional funds for the 1999-2000 school year.

4. The DOE's determinations with respect to Petitioner's supplemental funding for the 1999-2000 school year were memorialized in a letter dated September 22, 1999, from Assistant Commissioners Mike Azzara and Barbara Anderson, to Dr. Antonio Lewis, Interim Superintendent of Schools, Asbury Park Board of Education.

5. On May 19, 2000, the DOE awarded certain supplemental funding to Petitioner for the 2000-2001 school year. In early June 2000, the DOE represented to Petitioner that the supplemental funding aid awarded by the May 19, 2000, letter is intended to be separate from, and in addition to, $2,058,000 in State supplemental aid for the 1999-2000 school year, which had been approved in the DOE's September 22, 1999, letter.

6. The FY 2001 Appropriations Act, A 1001 and S 2001, P.L. 2000, c. 52, includes an appropriation to the Asbury Park School District in the amount of $2,058,000 in State supplemental aid for the 1999-2000 school year.

7. On or about July 14, 2000, the $2,058,000 in supplemental funding for the 1999-2000 school year was transmitted to the Petitioner in accordance with the DOE's representations in the September 22, 1999, letter.

8. The Petitioner agrees to dismissal with prejudice of the Verified Petition of Appeal by the Office pending before the Office of Administrative Law and the Commissioner of Education.

9. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

JOHN J. FARMER, JR.

Attorney General of the State
Of New Jersey

By: _____
MICHELLE LYN MILLER, D.A.G.

DATED: 7/31/2000

RICHARD E. SHAPIRO, LLC

Attorneys For Petitioner Board
of Education of the City of Asbury
Park

By: _____
RICHARD E. SHAPIRO, ESQ.

DATED: July 28, 2000

SO ORDERED THIS _____ DAY OF _____ 2000

_____
HONORABLE STEVEN C. REBACK, ALJ

#323-00

323-00

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (WHOLE SCHOOL REFORM FUNDING),	:	
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 6974-99
AGENCY DKT. NO. 236-8/99

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (WHOLE SCHOOL REFORM FUNDING),	:	
RESPONDENT.	:	

The record of this matter and Consent Order of Settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: SEP 28 2000

Richard E. Shapiro, Esquire
Richard E. Shapiro, LLC
Carnegie Executive Center – Suite 206
212 Carnegie Center
Princeton, New Jersey 08540
(609) 919-1888
Attorneys For Petitioner

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK v. NEW JERSEY DEPARTMENT OF OF EDUCATION (WHOLE SCHOOL REFORM FUNDING)	OAL DOCKET NO. EDUOT 06974-99S Agency Ref. No. 236-8/99 CONSENT ORDER OF SETTLEMENT

Petitioner, Board of Education of the City of Asbury Park ("Petitioner"), through its Attorney, Richard E. Shapiro, LLC (Richard E. Shapiro, appearing) and Respondent, New Jersey Department of Education ("DOE"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Michelle Lyn Miller, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about August 3, 1999, Petitioner filed a Verified Petition of Appeal ("Verified Petition") with the Commissioner of Education seeking review of the DOE's determinations with respect to Petitioner's requests for funding for the Success For All programs at the three elementary schools in the Asbury Park School District. The Verified Petition was subsequently transferred to the Office of Administrative Law.

2. The parties subsequently entered into discussions to amicably resolve this matter in the public interest.

3. Based on those discussions, and the Petitioner's demonstration of needs,

the DOE agreed that the Petitioner needed $2,058,000 in additional funds for the 1999-2000 school year for, among other things, the whole school reform programs at the aforementioned elementary schools in the Asbury Park School District.

4. The DOE's determinations with respect to Petitioner's supplemental funding for the 1999-2000 school year were memorialized in a letter dated September 22, 1999, from Assistant Commissioners Mike Azzara and Barbara Anderson, to Dr. Antonio Lewis, Interim Superintendent of Schools, Asbury Park Board of Education.

5. On May 19, 2000, the DOE awarded certain supplemental funding to Petitioner for the 2000-2001 school year. In early June 2000, the DOE represented to Petitioner that the supplemental funding aid awarded by the May 19, 2000, letter is intended to be separate from, and in addition to, $2,058,000 in State supplemental aid for the 1999-2000 school year, which had been approved in the DOE's September 22, 1999, letter.

6. The FY 2001 Appropriations Act, A 1001 and S 2001, P.L. 2000, c. 52, includes an appropriation to the Asbury Park School District in the amount of $2,058,000 in State supplemental aid for the 1999-2000 school year.

7. On or about July 14, 2000, the $2,058,000 in supplemental funding for the 1999-2000 school year was transmitted to the Petitioner in accordance with the DOE's representations in the September 22, 1999, letter.

8. The Petitioner agrees to dismissal with prejudice of the Verified Petition of Appeal by the Office pending before the Office of Administrative Law and the Commissioner of Education.

9. Resolution of this matter on the terms set forth herein shall not be

construed as precedent in other pending or future litigation.

JOHN J. FARMER, JR.
Attorney General of the State
Of New Jersey

By: _____
MICHELLE LYN MILLER, D.A.G.

DATED: 7/31/00

RICHARD E. SHAPIRO, LLC
Attorneys For Petitioner Board
of Education of the City of Asbury
Park

By: _____
RICHARD E. SHAPIRO, ESQ.

DATED: July 29, 2000

SO ORDERED THIS _____ DAY OF _____ 2000

_____
HONORABLE STEVEN C. REBACK, ALJ

#324-00

324-00

LOIS KENKARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 27, 2000

OAL DKT. NO. EDU 6171-98
AGENCY DKT. NO. 118-4/98

LOIS KENKARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

#325-00

MARY BETH MACCHIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 27, 2000

OAL DKT. NO. EDU 1834-98
AGENCY DKT. NO. 19-1/98

MARY BETH MACCHIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

John M. Sheeran

ASSISTANT COMMISSIONER OF EDUCATION

326-00

#326-00

JAMES D. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

September 27, 2000

OAL DKT. NO. EDU 6585-97
AGENCY DKT. NO. 263-7/97

JAMES D. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

327-00

#327-00

NANCY J. DI COMO,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner asserted tenure and seniority entitlement to a supervisory position and sought reinstatement to tenured vice principal position with back pay. The District contended that although petitioner was tenured as a teacher, she was not tenured as a vice principal or supervisor. The District challenged petitioner's assertion that under *N.J.S.A.* 18A:7A-44, a central office employee hired in a position subsequent to a reorganization immediately acquires tenure in that position regardless of whether he or she served in that position previously.

The ALJ concluded that while petitioner would not be entitled to tenure as a vice principal under the transfer provisions of *N.J.S.A.* 18A:28-6, these provisions were superseded by the plain language of *N.J.S.A.* 18A:7A-44 which states that individuals hired after the State takeover will be hired with tenure if they had tenure in their prior position. As such, petitioner was hired with tenure when she was appointed to the position of vice principal after the State takeover. Thus, petitioner could only be removed from this position or reduced in compensation pursuant to the provisions of the Tenure Employees Hearing Law. The ALJ determined that these provisions were not followed when petitioner was demoted from vice principal and, as a result, petitioner's tenure rights were violated. The ALJ ordered reinstatement of petitioner to the position of vice principal and awarded her back pay to cover the difference in petitioner's salary as vice principal and what she received as a classroom teacher since the date of her demotion.

The Commissioner rejected the ALJ's recommended decision and remedy in this matter. The Commissioner found that this matter presented for the first time the circumstance wherein a central office administrative/supervisory employee, whose position was abolished pursuant to *N.J.S.A.* 18A:7A-44, was not, upon reorganization, either terminated or returned to an "other than central office" position to which he or she was entitled by virtue of tenure and/or seniority rights, but rather, was placed in a school-based administrative position in which the individual had not previously attained tenure. The Commissioner determined that the provisions of *N.J.S.A.* 18A:7A-44 *solely* address *central office* administrative and supervisory positions and the reorganization of the central office and do not apply to the hiring of staff to the *non-central office* administrative or supervisory positions. The Commissioner found that petitioner herein, whose central office supervisory position was abolished, was not hired by the State superintendent, upon reorganization of the State-operated District, to fill a *central office* administrative or supervisory position. Thus, the Commissioner determined that the disputed wording of the statute herein did not, as concluded by the ALJ, bestow tenure on petitioner upon her hiring to fill the *school-based* position of vice principal, a position in which she never served and in which she never acquired tenure by operation of either *N.J.S.A.* 18A:28-5 or 6. The Commissioner noted that a vice principal position is, pursuant to *N.J.S.A.* 18A:28-5, separately tenurable from that of supervisor; it requires an endorsement different from that of supervisor; and it constitutes a *school-based* rather than a *central office* position. Petition was dismissed.

October 2, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO: EDU 1157-99

AGENCY DKT. NO: 520-11/98

NANCY J. DI COMO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Kelly A. Guariglia, Esq., for respondent
(Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: April 6, 2000 Decided: August 16, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

BACKGROUND

Nancy J. DiComo, an employee of the Newark Board of Education alleges she is entitled to be a tenured vice principal, the State Operated School District of Newark contends that though she is tenured as a teacher, she is not tenured as a vice principal or supervisor. All necessary facts for a summary decision were stipulated.

JOINT STIPULATION OF FACTS

1. Nancy J. DiComo (hereinafter DiComo) was hired as an elementary school teacher in the Newark School District (hereinafter District) in September 1964.

2. DiComo possesses the following endorsements Elementary (Teacher of Reading), Principal, Principal/Supervisor, Reading Specialist, and Learning Disability Teacher Consultant. She has a B.A. from Caldwell College, an M.A. from Newark State (now Kean University) in Reading and an M.A. from Montclair State University in Learning Disabilities.

3. From 1964 through June 1972, DiComo taught elementary school.

4. From 1972 through June 1979, DiComo was a Remedial Reading Resource Teacher.

5. For the school years 1980 to 1982, DiComo was the Central Office Supervisor of Reading. At that time, she no longer was school-based, but worked out of central administration at 2 Cedar Street, Newark, New Jersey.

6. For the school years 1982-84, DiComo worked in the Central Office, but her title was changed to Supervisory Monitor.

7. For the school years 1984 to 1996, DiComo worked in the Central Office. Her title was Central Office Supervisor of Special Projects with K-12 responsibility.

8. For DiComo's first 15 years in the district, she was building based. For the next 17 years, she was assigned to the central office. There are no unsatisfactory evaluations of Ms. DiComo's performance from her initial employment until the State takeover.

9. When the State took over the Newark School district, a re-organization occurred. DiComo was appointed Vice Principal at Dr. William Horton School, where she worked from September 1996 until May 1997, at which time she was requested to fill in for a Vice Principal at Rafael Hernandez Elementary School.

10. For the months of May and June 1997, DiComo served as Vice-Principal under Michael Schiavo as Acting Principal.

11. In September 1997, DiComo remained at Rafael Hernandez School as Vice Principal. Her new Principal was Mrs. Vivette Peacock.

12. On February 20, 1998, DiComo received formal written notification that she was appointed as Vice Principal of Rafael Hernandez School.

13. On April 27, 1998, DiComo received a "Mid-Year Review."

14. By letter dated May 11, 1998, DiComo was advised that she would not be renewed as Vice Principal for the 1998-99 school year.

15. By letter dated June 4, 1998, DiComo was advised by the State District Superintendent, Beverly L. Hall, that as a "tenured supervisor, you will return to a supervisor position."

16. By letter dated July 8, 1998, the State District Assistant Superintendent, Randall N. Kanter, asserted that as a result of the abolishment of the supervisor's position due to the district reorganization, DiComo had tenure rights to a teacher's position. The letter specifically stated that it was to serve as a correction to the June 4, 1998 letter of Dr. Hall.

17. Both DiComo and her attorney wrote the Assistant Superintendent protesting her reassignment. Mr. Kanter forwarded a response to Mr. Oxfeld on or about July 28, 1998.

18. The instant Petition of Appeal was filed with the Commissioner of Education on or about November 18, 1998.

19. For the 1998-99 school year DiComo was assigned as an elementary school teacher at the Luiz Munoz Marin Middle School.

20. Exhibit A attached hereto contains all documents referenced in the joint stipulation of facts.
21. Exhibit B attached hereto contains documents which the Board of Education contends are relevant and which DiComo acknowledges are authentic.
22. Exhibit C attached hereto contains documents which DiComo contends are relevant and which the Board of Education acknowledges are authentic.

PROCEDURAL HISTORY AND DISPUTED FACTS

On November 18, 1998, a petition of appeal was filed with the Commissioner of Education. The seventh paragraph of this petition alleged that individuals with less seniority than petitioner had been hired as Supervisors or other equivalent positions. The tenth paragraph alleged that by employing someone other than petitioner as a Supervisor after September 1, 1998, the Board of Education violated school laws.

This petition asked the Commissioner of Education to enter an order directing that petitioner be reinstated to her position as a Supervisor in the Newark School District with full back pay.

On December 9, 1998, the State-Operated School District of Newark filed an answer to the petition. The District denied the allegations and requested that the petition be dismissed. Four defenses were asserted: 1) the Petition is barred by the Statute of Limitations, 2) the Petition fails to state a claim upon which relief can be granted, 3) petitioner was appropriately assigned in accordance with her tenure and seniority rights and 4) all actions taken by respondent were based upon legitimate educational reasons.

On December 30, 1998, this matter was transmitted to the OAL as a contested case. Stipulated facts were subsequently filed, followed by motions for summary decision by both sides.

LEGAL DISCUSSION

Standard for Summary Decision

> When considering a motion for summary decision, this tribunal must determine whether pleadings, the answers to interrogatories, and affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to

> an order as a matter of law. *N.J.A.C.* 1:1-12.5(b); *R.*4:46-2. "It is the movant's burden to exclude reasonable doubt as to the existence of any genuine issue of material fact." *Judson Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

In order for the non-movant to prevail, a responding affidavit must be offered setting forth specific facts which indicate that there is a genuine issue that can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Should the non-moving party fail to respond, however, an absence of material factual dispute may be presumed and the movant will prevail if the law supports the movant's position. *37 New Jersey Practice, Administrative Law and Practice § 194* at 202 (Lefelt) (1988). The relevant inquiry regarding a motion for summary decision is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 540 (1995).

Tenure Law

Tenure of educational personnel is authorized by the Tenure Act, *N.J.S.A.* 18A:28-1 to 18. It is a status in a particular position created by statute, not the agreement of the parties, *Zimmerman v. Board of Education*, 38 *N.J.* 65, 72 (1962), *cert. denied* 371 *U.S.* 956 (1963), and serves to provide a measure of security to teachers and other school employees who faithfully serve for the requisite period. *Barnes v. Bd. of Ed. of Jersey City*, 85 *N.J. Super.* 42, 45 (App. Div. 1964), *certif. denied*, 43 *N.J.* 450 (1964). A regularly employed educator in a public school must normally hold "...a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of ...pupils in such public schools." *N.J.S.A.* 18A:26-2. He or she may hold any or all of three possible certificates: instructional, administrative and educational services. *N.J.A.C.* 6:11-2.3. There can be "special endorsements" under each of these certificates, which identify subjects or assignments. *Ibid.* There are four separate endorsements under an administrative certificate: 1) school administrator; 2) principal; 3) supervisor and 4) school business administrator. *N.J.A.C.* 6:11-9.3.

Tenure is not transferable across separately tenurable administrative positions. *N.J.S.A.* 18A:28-5 states in relevant part:

> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to *N.J.S.A.* 18A:28-6 in a position which the individual actually served.[*N.J.S.A.* 18A:28-5].

It has been uniformly recognized by both the State Board of Education and the Commissioner that the positions specifically enumerated under *N.J.S.A.* 18A:28-5 are separately tenurable and not transferable across certificates. *Nelson v. Bd. of Educ. of Tp. of Old Bridge*, 148 *N.J.* 358, 365 (1997). *See also, Kaprow v. Bd. of Educ.*, 255 *N.J. Super.* 76, 92 (App. Div. 1992), *aff'd.* 131 *N.J.* 572 (1993) (agreeing that "Assistant Superintendent" is separately tenurable). The *Nelson* Court reiterated the State Board's responsibility for and weighty authority over tenure matters because of the complexity and specialized nature of the subject of teacher tenure. *Nelson, supra,* 148 *N.J.* at 364.

Not only is tenure not transferable between certificates, it is also not transferable between endorsements for separately tenurable positions within a single certificate. *Id.* at 367-68. An administrative certificate can have any of four separate endorsements and there are nine different positions available under the four separate endorsements: principal, assistant principal, vice principal, supervisor of instruction, superintendent, assistant superintendent, finance manager, director and superintendent of curriculum. *N.J.A.C.* 6:11-9.3. If tenure were transferable, a tenured finance manager, regardless of experience, would be transferable to a position of principal. Each of these positions, however, requires actual experience in the position before tenure can be achieved in the position. Thus, tenure accrues only as a result of actual work experience in the positions specifically enumerated in *N.J.S.A.* 18A:28-5, including all positions which require appropriate certificates and endorsements.

N.J.S.A. 18A:28-6 addresses the accrual of tenure when a teaching staff member is transferred or promoted to another position. Under this statute, a tenured teacher staff member who is transferred earns

tenure in the new position on expiration of a period of employment for either two consecutive calendar years or two academic years in the new position, along with employment at the beginning of the next calendar or academic year. *N.J.S.A.* 18A:28-6.

Effect of State-Takeover of Public Schools on Tenure Rights

Tenure law is subject to statutorily imposed limitations and restrictions. *N.J.S.A.* 18A:7A-44 requires the abolishment of all positions of central administrative and supervisory staff upon the reorganization of a state-operated school district and its provisions expressly supercede all other laws. For the purposes of the present case, the relevant part of this statute is *N.J.S.A.* 18A:7A-44(c), which provides that:

> Notwithstanding any other provision of law or contract, the positions of central administrative and supervisory staff, instructional and non-instructional, other than those positions abolished pursuant to subsection a. of this section, shall be abolished upon the reorganization of the State-Operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of *N.J.S.*18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days pays. The notice of payment shall be in lieu of any other claim or recourse against employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. Any employee whose position is abolished by the operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. [*N.J.S.A.* 18A:7A-44(c)].

Respondent's Arguments in Support of Motion for Summary Decision[i]

In arguing in support of its motion for summary decision, the State-Operated School District of the City of Newark ("respondent") does not define the applicable standard for such a motion. Respondent asserts that there are no factual issues in the dispute here and that Nancy DiComo ("petitioner") is not entitled to a supervisory position within the District.

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[i] Rb refers to respondent's brief

Respondent first analyzes the impact of the reorganization of a state-operated school district on the tenure rights of teachers. Citing *Van Dyke v. State-Operated School District of the City of Jersey City*, 91 *N.J.A.R.*2d (EDU) 43, respondent states that the only "bumping rights" retained by central office supervisors whose positions were abolished after a state takeover related to non-supervisory positions to which their tenure or seniority entitled them. (Rb4). Respondent further argues that both the public interest and sound pedagogy must also be considered in determining whether tenure achieved through service in one supervisory position entitles an employee to tenure in another supervisory position. (Rb5).

In applying the tenure laws to the present case, respondent argues that petitioner, who achieved tenure in the Central Office position of Supervisor, was transferred in accordance with *N.J.S.A.* 18A:7A-44 upon the reorganization of the District. Respondent contends that petitioner does not retain any claim to tenure or seniority in her abolished positions nor does she hold a preferment to other supervisory positions in the District. (Rb5). Respondent asserts that petitioner's claim for a supervisory position within the District must fail because she only held tenure in a teaching position within the District and "was thus entitled to placement as a teacher within the District." (Rb5).

Petitioner's Arguments in Opposition to Motion for Summary Decision[ii]

Petitioner after reviewing the impact of the state takeover statute on the tenure rights of teachers, concedes that her 1996 transfer from central administration to the position of vice principal was done in conformity with the State takeover statute.

Petitioner argues, however, that the following three sentences of *N.J.S.A.* 18A:7A-44(c) are controlling with regard to her tenure claim:

> The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individuals and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of *N.J.S.A.* 18A:28-6. [Pb4].

[ii] Pb refers to petitioner's brief

According to petitioner's interpretation of this language, if she had tenure in a prior position, then she was entitled to tenure when she was transferred to the position of vice principal. Petitioner points out that she had acquired tenure in her position of Central Office Supervisor/ Special Projects at the time of her appointment to the position of vice-principal. Petitioner's thus concludes that, "With her hire into the position of Vice Principal, since the statute specifically states that individuals such as Ms. DiComo shall be hired with tenure, she was, by operation of law, a tenured Vice Principal". (Pb6).

Petitioner also argues that the May 11, 1998 letter advising her that she would not be renewed as a vice principal was *ultra vires* because, as a tenured employee, petitioner could only be removed from her tenured position as a vice principal pursuant to the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10. (Pb7). Petitioner notes that none of the requirements of the Tenure Hearing Law have been met, such as a due process hearing, a statement of charges and a determination made by the Commissioner of Education that just cause existed to remove her from her position. (Pb7).

In arguing for her restoration to the position of vice principal, petitioner notes that Yvette Peacock, the principal who recommended that she not be renewed to the position of vice principal, was herself not renewed, and for the third time in as many districts was found to be unsatisfactory as a principal. (Pb8). This was, however, not a stipulated fact.

Petitioner seeks to be returned to her position as a tenured vice principal, along with all back pay retroactive to September 1, 1998, i.e. the difference in salary between her vice principal salary and what she actually received as a classroom teacher since the date of her demotion. (Pb9).

Respondent's Reply Brief[iii]

As a preliminary point in its reply brief, respondent points out that in her original petition, petitioner limited herself to requesting an order reinstating her to a position of supervisor. In her brief,

[iii] Rrb refers to respondent's reply brief

however, petitioner now argues that she was entitled to a vice principal's position within the District. Respondent argues that she is entitled to neither position.

Respondent challenges petitioner's assertion that under *N.J.S.A.* 18A:7A-44, a central office employee hired in a position subsequent to a reorganization immediately acquires tenure in that position regardless of whether he or she served in that position previously. (Rrb2-3). Respondent argues that such an interpretation directly contradicts the established law of tenure accrual. Rather, respondent contends, *N.J.S.A.* 18A:7A-44 must be read *in pari materia* with the tenure statutes, *N.J.S.A.* 18A:28-5 and 6, both of which assert that tenure is acquired in a statutorily enumerated position only if an employee has served the requisite period of time in that position. (Rrb3).

Respondent also quotes the New Jersey Supreme Court in *Nelson v. Board of Education of the Township of Oldbridge*, 148 *N.J.* 358 (1997), in which the Court asserted that it would reflect educationally unsound policy to permit the award of a position to a tenured staff member with no service in that position. (Rrb3). Respondent points out that *N.J.S.A.* 18A:28-6 addresses transfer in tenure cases and states that "a tenured teaching staff member who is transferred earns tenure in the new position on expiration of a period of employment for either two consecutive calendar years or two academic years in the new position, along with employment at the beginning of the next calendar or academic year". (Rrb4, quoting *N.J.S.A.* 18A:28-5).

Respondent further argues that petitioner's interpretation of *N.J.S.A.* 18A:7A-44 is inappropriate because it yields a meaning contrary to legislative intent. Under respondent's reading of the statute, even a tenured employee must serve in a new tenurable position for the statutorily mandated period of time prior to accrual of tenure in the individual's new position. (Rrb4). Since petitioner did not meet the requisite service as vice principal, respondent argues she is not tenured in that position.

Finally, respondent describes the second part of petitioner's brief, in which she discusses the unsatisfactory performance of petitioner's principal along with a series of other complaints not included

in the original petition, as being "irrelevant to the Court's determination of the Motions for Summary Judgment". (Rrb5).

Petitioner's Reply Brief[iv]

Petitioner argues that the cases cited by respondent do not actually support its argument. First, petitioner points out that while respondent relies on the decision in *Van Dyke v. State-Operated School District of the City of Jersey*, 91 *N.J.A.R.*2d (EDU) 43, the substantive issue in that case, according to petitioner, was whether employees retained any tenure rights in positions abolished pursuant to a state takeover. (Prb2). Petitioner concedes that she had no tenured rights to her central office administration position but argues that her case is distinguishable from *Van Dyke* because she was appointed to the position of vice principal after the reorganization and thus acquired tenure rights in that position.[v] (Prb2).

Petitioner also challenges respondent's reliance on *Nelson v. Board of Education of the Township of Old Bridge*, 148 *N.J.* 358 (1997). This case was litigated by petitioner's law firm and petitioner maintains that a full review of the decision reveals that the school takeover statute is not implicated anywhere in that decision. (Prb3).

Petitioner concedes once again that she retained no tenure rights relating to her central office position. She maintains, however, that once the School District, in the exercise of its discretion, appointed petitioner to the position of vice principal, she acquired tenure in that position from the first day she worked there under *N.J.S.A.* 18A:7A-44. (Prb4). As a result, according to petitioner, she did not have to obtain tenure through the route of *N.J.S.A.* 18A:28-5.

[iv] Prb refers to petitioner's reply brief

[v] Respondent also relies on the decision in *Leong, et. al v. State Operated School District of the City of Newark*, EDU 10921-96, Initial Decision, (April 27, 1999) *adopted*, Comm'r. (June 14, 1999) http://lawlibrary.rutgers.edu/oal/search.html. Petitioner asserts that as the decision in this case was premised on the *Van Dyke* decision, petitioner's reliance on the case is similarly misplaced. (Prb3-4).

Analysis:

The issue in the present case appears to be one of first impression. Respondent argues that the Commissioner of Education and the State Board of Education have twice previously interpreted and applied *N.J.S.A* 18A:7A-44(c) in contexts identical to that of petitioner's but a review of those cases reveals that both are distinguishable.

The first case cited by respondent is *Van Dyke v. State-Operated School District of the City of New Jersey*, 91 *N.J.A.R.*2d (EDU) 43. The petitioners in *Van Dyke* held supervisory positions with the Jersey City School District which were abolished under a reorganization of the District's central administrative and supervisory staff, pursuant to *N.J.S.A.* 18A:7A-44(c). The petitioners filed an appeal when they were transferred to their prior tenured positions instead of being offered supervisory positions. In deciding this appeal, ALJ Ospenson interpreted *N.J.S.A.* 18A:7A-44(c) to mean that the petitioners were not entitled to claim "tenure or seniority rights (1) to their former abolished supervisory positions or (2) to preferment in supervisory positions not abolished or (3) in supervisory positions to which present incumbents have been rehired by the district superintendent under *N.J.S.A.* 18A:7A-44(c)." *Id.* at 45. The Commissioner of Education adopted the ALJ's decision, reiterating the finding that the petitioners retained no tenure or seniority rights to a supervisor position. *Id.* at 46.

Transferability of tenure between positions was thus the issue in *Van Dyke*. A similar issue was involved in *Leong, et. al v. State Operated School District of the City of Newark*, EDU 10921-96, Initial Decision, (April 27, 1999) *adopted*, Comm'r. (June 14, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. Here, the petitioners were central office supervisors whose positions were abolished after a State takeover of the Newark School District. The petitioners argued that while displaced central administrative and supervisory personnel had no rights to their former supervisory positions they did have rights to other supervisory positions in the district. ALJ Reiner rejected the petitioners' claim and reiterated the same principles espoused in *Van Dyke*, that when a central office supervisory position is abolished pursuant to *N.J.S.A.* 18A:7A-44, all tenure and seniority rights to and originating from that

position are also abolished.

In the present case, by contrast, petitioner is not relying on the tenure she had in the supervisory position that was abolished. Instead, petitioner argues that under the plain meaning of the statute, she is entitled to tenure in the position of vice principal because she was appointed to the position after the state takeover of the district.

The facts of the case and the relevant statutory language support this proposition. The stipulations of facts indicate that petitioner had tenure in her prior supervisory position. *N.J.S.A.* 18A:7A-44 required the abolition of this position upon the takeover of the district by the State. The stipulations of facts also indicate that petitioner was appointed to the position of vice principal after the state takeover. While petitioner would not be entitled to tenure as a vice principal under the transfer provisions of *N.J.S.A.* 18A:28-6, these provisions are superceded by *N.J.S.A.* 18A:7A:44(c). This set of facts appears to fit squarely within that component of *N.J.S.A.* 18A:7A-44(c) which states that individuals hired after the state takeover will be hired with tenure if they had tenure in their prior position. Respondent's argument that the transfer provisions of *N.J.S.A.* 18A:28-6 are controlling here is without merit as *N.J.S.A.* 18A:7A-44(c) expressly states that those provisions only apply if the individual did not have been tenure in his or her prior position. In the present case, respondent had tenure in her prior supervisory position.

When statutory language is "plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject," the statute should be construed and applied as enacted. *In re Jamesburg High Schl. Closing*, 83 *N.J.* 540, 547-48 (1980). The plain language of *N.J.S.A.* 18A:7A-44(c) governs this case and, as a result, petitioner appears to be entitled to tenure as a vice principal.

Respondent implies that because petitioner did not argue that she was entitled to the position of vice principal in her original petition, she is barred from raising the issue now. While it might have been preferable for petitioner to formally amend her pleadings to include a claim of entitlement to the position

of vice principal, there is no such requirement under the Uniform Administrative Procedure Rules. In administrative law, generally, pleadings may be freely amended since detailed pleading, sometimes necessary in courts, is not usually required in contested cases. *37 New Jersey Practice, Administrative Law and Practice § 134* at 157 (Lefelt 1988).

Under the plain language of *N.J.S.A.* 18A:7A-44(c), petitioner appears to be entitled to tenure as a vice principal.

Remedies

As a tenured employee, petitioner could have only been removed from her position pursuant to the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10. This law provides that any board of education wishing to dismiss or reduce in compensation a tenured employee must file written charges with the secretary of the board and a sworn statement of evidence supporting the tenure charges must be presented to the board. *N.J.S.A.* 18A:6-11. If the Board decides that certification of a tenure charge to the Commissioner is warranted, the board may suspend the teacher with or without pay. *N.J.S.A.* 18A:6-14. The Commissioner would then receive the charges to determine if they are sufficient to warrant dismissal or reduction in salary. The Commissioner will then dismiss the charges or conduct a hearing after his examination of the charges. *N.J.S.A.* 18A:6-16.

As none of these procedures were followed, petitioner's rights as a tenured educator were violated. The proper remedy for such a violation is reinstatement to the proper position and the awarding of back pay. *See Sparacio v. New Jersey Department of Corrections*, 95 *N.J.A.R.*2d (EDU) 364, 366 (ordering the restoration of a tenured educator to his former position as an Assistant Supervisor of Education together with back pay upon a finding that his seniority rights had been violated). In the present case, the back pay due amounts to the difference in petitioner's salary as vice principal and what she received as a classroom teacher since the date of her demotion.

CONCLUSION

Under *N.J.S.A.* 18A:7A-44, petitioner was hired with tenure when she was appointed to the position of vice principal after the state takeover. As a tenured educator, petitioner could only be removed from this position or reduced in compensation pursuant to the provisions of the Tenure Employees Hearing Law. These provisions were not followed when petitioner was demoted from vice principal to teacher. As a result, petitioner's tenure rights were violated. The proper remedy for this violation is the reinstatement of petitioner to the position of vice principal and the awarding of back pay to cover the difference in petitioner's salary as vice principal and what she received as a classroom teacher since the date of her demotion. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/16/00
DATE

JEFFREY R. GERSON, ALJ

Receipt Acknowledged:

8-18-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1157-99
AGENCY DKT. NO. 520-11/98

NANCY J. DI COMO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's (District) exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Initially, the District's exceptions reiterate petitioner's employment history, noting that for employment years 16-36, she served as a central office staff administrator, and that her tenure as a central office Supervisor of Special Projects K-12 is not at issue in this matter. The exceptions next address the provisions of *N.J.S.A.* 18A:7A-44 and the legal conclusions reached by the ALJ with respect to this statute under the facts of this matter. *N.J.S.A.* 18A:7A-44 reads in pertinent part:

> Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a. of this section [the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel] shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so

> abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of N.J.S. 18A:28-6.***Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.

The District avers that, in accordance with the above statutory provisions, petitioner's tenure in her central administrative supervisory position was abolished and she retained no tenure or seniority rights to any administrative/supervisory positions. See *Van Dyke, supra*, in which it was determined that former district supervisors whose positions were abolished under reorganization did not retain a right to tenure and seniority in supervisory positions, and that their bumping rights extended only to non-supervisory positions to which they were entitled based upon their tenure and seniority.[1]

It is the District's contention that when the State took over the District and petitioner was appointed to a building position as vice principal, no tenure rights accrued to that position pursuant to *N.J.S.A.* 18A:28-6 because the statute requires an employment period of more than two academic years and the beginning of the next succeeding academic year -- a period of service petitioner did not attain. As such, the District argues that petitioner is wrong in her legal argument with respect to *N.J.S.A.* 18A:7A-44, *i.e.*, "that if she 'had tenure in a prior position, she was transferred to the position of vice-principal with tenure.'" (District's Exceptions at 4, quoting Petitioner's Post-hearing Brief) As to this claim, the District

[1] As indicated at page 10 of the Initial Decision, petitioner argues that her claim is distinguishable from those in *Van Dyke* because she was appointed to the position of vice principal after reorganization and thus acquired tenure rights in that position.

emphasizes that it was asserted for the first time by petitioner in her brief submitted to the OAL dated January 5, 2000, and the Administrative Law Judge (ALJ) erroneously accepted it when determining that petitioner achieved tenure under *N.J.S.A.* 18A:7A-44 on her first day of employment as a vice principal. With respect to this, the District argues:

> The State of New Jersey Department of Education presently recognizes four (4) separate endorsements for holders of administrative certificates. These distinctions are set forth in N.J.A.C. 6:11-9.3, which establish separate credentials for school administrator, principal, supervisor and school business administrator. As such, distinctions between school building administrators and central staff administrators are established. While Petitioner held the credentials for service as both central administration staff and as a school based principal or vice-principal, she never served in any school based category. To grant Petitioner automatic tenure on the first day of appointment contravenes other provisions of law which require her to serve the required two years and a day in that position. *** The "Take Over" statute expressly requires tenure provisions to be governed by those provisions set forth in N.J.S.A. 18A:28-5 or 6, which make a distinction between tenure within the District, and tenure within a job title. Indeed, the statute itself [*N.J.S.A.* 18A:28-5] expressly established that "tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position." Consequently, while Petitioner may hold tenure within the District as an appropriately credentialed instructional employee, she failed to hold tenure within the vice principal position to which she was transferred, and indeed, had never served a day in any school based administrative assignment. (District's Exceptions at 6-7)

The District also argues that the legislative history of the takeover statutes demonstrates that the Legislature intended central administrative staff not rehired in the central office to return to those former school based positions to which they have existing tenure and seniority rights, and that *res judicata* requires a determination that petitioner was not entitled to school-based administrative/supervisory position when her central administrative position was abolished. As to this, the District contends that the ALJ's determination of automatic tenure as a

vice principal runs counter to long-standing tenure laws within the State of New Jersey which establish that, for any and all transfer positions, employees must serve the requisite statutory period under the new endorsement before tenure in that position can accrue and that tenure as a vice principal may not be achieved without actual service as a vice principal for the statutory time period. Thus, the District avers, "petitioner cannot attain through Reorganization of a district taken over by the State more than she could attain through any tenure statute." (*Id.* at 13) As to the *res judicata* argument, the District avers that petitioner's situation is not unique and is similar to the petitioners in *Leong, supra,* wherein it was determined that when a central office supervisory position is abolished pursuant to *N.J.S.A.* 18A:7A-44, all tenure and seniority rights to, and originating from, that position are abolished and petitioners retained only tenure and seniority rights which were attained in connection with their former central office supervisory positions.[2] More specifically, the District argues with respect to this point that:

> Having the same fact pattern, and having determined that Petitioner did not statutorily earn tenure as a vice-principal, the holding must be identical. Petitioner is not entitled to enhanced tenure protections. Petitioner was properly bumped to her tenured teaching position. Although the ALJ incorrectly applied the statutory formula for the calculation of tenure in an administrative position, his opinion is not based upon whether Petitioner had tenure rights that were transferable by endorsement, by "tacking" or any other legally recognized method, but rather that Petitioner earned tenure as a school based vice principal after one day of service. Clearly this determination exceeds any protection afforded by the legislature.
>
> The ALJ erred in his determination that *Nelson v. Old Bridge, supra,* is not applicable in the case at bar. [Initial Decision] at 10. While the parties acknowledge that *Nelson* established that tenure accrued only as a result of actual work experience in separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5,

[2] At page 14 of its Exceptions, the District maintains, *inter alia,* that what distinguishes petitioner from those in *Leong, supra,* is the fact that Di Como was offered a school-based vice principal position within the District, which was not based upon tenure and seniority rights; thus, petitioner's bumping rights were only implicated when she was not renewed in the vice principal position.

> the ALJ ignores the fact that Petitioner failed to earn tenure in a separately tenurable vice principal position, and could not "tack" experience from her prior position. Petitioner['s] allegation that "she acquired tenure in that position from the first day she worked as (a vice-principal) under *N.J.S.A.* 18A:7A-44 has no legal or factual merit. Moreover, petitioner offered no factual or legal substantiation for her claim of exemption under *N.J.S.A.* 18A:28-5. Moreover, the ALJ specifically referenced that Petitioner "conceded once again that she retained no tenure rights relating to her central office position." [Initial Decision] at 10. Prior case law demands that the ALJ's decision be overturned and that the Commissioner recognize that Petitioner's tenure and seniority rights were properly applied by the District***. (*Id.* at 16-17)

Upon review of the record and the Initial Decision, the Commissioner rejects the ALJ's legal conclusions and recommended remedy in this matter for the reasons set forth below. Initially, the Commissioner would point out that the ALJ is correct when he states at page 11 of the Initial Decision that this matter appears to be a case of first impression. Contrary to the District's assertion that petitioner's situation is not "unique" and that it is similar to the petitioners in *Leong, supra*, this matter does present for the first time in a contested case the circumstance wherein a central office administrative/supervisory employee, whose position was abolished pursuant to *N.J.S.A.* 18A:7A-44, was not, upon reorganization, either terminated or returned to an "other than central office" position to which he or she was entitled by virtue of tenure and/or seniority rights, but rather, is placed in a *school-based* administrative position in which the individual has not previously attained tenure. Hence, this particular circumstance is a critical factor which distinguishes the instant matter substantively from prior matters cited by the District.

Having thoroughly considered the provisions of *N.J.S.A.* 18A:7A-44 in dispute herein, the Commissioner does not agree with the conclusion of the ALJ that petitioner attained

automatic tenure as vice principal when, upon reorganization of the State-operated District's central office, she was hired in that position in the Dr. William Horton School.

In the Commissioner's judgment, the provisions of *N.J.S.A.* 18A:7A-44 *solely* address central office administrative and supervisory positions and the reorganization of the central office: Section a. deals with the abolishment of the chief school administrative position and executive administrators responsible for curriculum, business and finance and personnel, each of which is a central office position; Section b. mandates that the State district superintendent prepare, within one year of takeover, a reorganization of the district's central office administrative and supervisory positions; and Section c. deals with the abolishment of all central office administrative and supervisory positions other than those set forth in Section a., which, unlike Section a., authorizes the State district superintendent to hire an individual who held an abolished position to fill an administrative/supervisory position in the reorganized central office, if so determined by the State district superintendent upon evaluation of the individual and staffing needs. Further, the Commissioner concludes that Section c., the specific portion of *N.J.S.A.* 18A:7A-44 under dispute herein, refers *solely* to the hiring of such individuals to fill *central office administrative/supervisory staff* in the newly *reorganized central office* and does not apply to the hiring of such staff to *non-central office* administrative or supervisory positions.

In the instant matter, petitioner, whose central office supervisory position was abolished, was not hired by the State superintendent, upon reorganization of the State-operated District, to fill a *central office* administrative or supervisory position. Consequently, the Commissioner determines that the disputed wording of the statute herein did not, as concluded by the ALJ, bestow tenure on petitioner upon her hiring to fill the *school-based* position of vice principal, a position in which she never served and in which she never acquired tenure by

operation of either *N.J.S.A.* 18A:28-5 or 6. In so holding, the Commissioner is in full agreement with the District that a vice principal position is, pursuant to *N.J.S.A.* 18A:28-5, separately tenurable from that of supervisor; it requires an endorsement different from that of supervisor; and it constitutes a *school-based* rather than a *central office* position. Under applicable statutes and decisional law, tenure accruing to a vice principal position cannot be achieved without actual service in the position for the requisite statutory length of time. *Nelson, supra.* Further, as argued by the District, the Commissioner concludes that petitioner cannot attain, through the reorganization of a state-operated district, tenure status in a *school-based* administrative position.

Accordingly, the recommended decision of the ALJ is rejected and petitioner's motion for summary judgment denied and for reasons expressed herein, the petition is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 02 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

329-00

EILEEN RUCKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

October 2, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3170-97
AGENCY DKT. NO. 25-1/97

EILEEN RUCKI,
Petitioner,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Mary E. Hennessy, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: August 11, 2000 Decided: August 11, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 3, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to a settlement, as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 11, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8-16-00
DATE

Debbie Antamis/sp
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 17 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

al

BERGMAN & BARRETT
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MONTGOMERY KNOLL
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(609)921-1502
Attorney for Petitioner

EILEEN RUCKI Petitioner, vs. ELIZABETH BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NUMBER: EDU 3170-97 AGENCY REFERENCE NUMBER: 25-1/97 SETTLEMENT AGREEMENT

1. This Agreement is being entered into between the Elizabeth Board of Education (hereinafter "Board") and Eileen Rucki (hereinafter "Rucki") to resolve all the litigation pending between them before the Commissioner of Education, Agency Docket No. 25-1/97 and OAL Docket No. EDUO 3170-97, as well as any litigation that could have been brought. The parties express their intent to enter into this Agreement to amicably resolve all disputes between them and to avoid the cost and time of continued litigation on the matters between them.

2. The Board agrees to place six (6) sick days in the sick bank of Eileen Rucki upon the approval of this Agreement by the Commissioner of Education. The Board agrees to settle this matter in the best interests of the district. Such settlement avoids an expensive hearing at the Office of Administrative Law and prevents the disruption of the education process by allowing potential witnesses to remain in their education functions.

3. Neither party makes any admissions in the settlement of this case.

4. Rucki acknowledges that this Agreement is in settlement of disputed issues of fact and law, that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully

understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. In consideration of this Agreement, Rucki irrevocably and unconditionally releases the Board and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Rucki, her heirs, executors, administrators, successor and assigns ever had, now have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under this Agreement and any past Agreement entered into between Rucki and the Board. This Agreement does not impact a presently pending workers' compensation act between the parties.

6. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education

MURRAY, MURRAY & CORRIGAN

Mary E. Hennessy

Mary E. Hennessy, Esquire
Dated: August 10, 2000

For Eileen Rucki

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Dated: Aug. 4, 2000

Eileen Rucki

Eileen Rucki
Dated: Aug. 4, 2000

OAL DKT. NO. EDU 3170-97
AGENCY DKT. NO. 25-1/97

EILEEN RUCKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 02 2000

330-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MANUEL SANTIAGO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

SYNOPSIS

Respondent, a tenured custodian, was arrested for possession of marijuana, cocaine and drug paraphernalia. After his arrest, respondent completed a PTI program, and the criminal charges against him were dismissed. The petitioning Board certified tenure charges of unbecoming conduct against respondent based on the arrest.

At the OAL hearing, respondent argued that the illegal drugs in his possession belonged to his son, and that he accepted responsibility for them to protect his son. As such, respondent contended that the tenure charges should be dismissed, or, at a minimum, the penalty of dismissal should be reduced. Petitioner argued that respondent's arrest was not an isolated incident, since he and his family had been the subjects of a police investigation for distributing narcotics as indicated in the testimony of petitioner's witnesses. Petitioner asserted that, even though respondent completed a PTI program, his conduct warranted his dismissal. The ALJ agreed with petitioner, and concluded that respondent's possession of cocaine, marijuana and drug paraphernalia, as well as the testimony regarding respondent's involvement in distribution of controlled dangerous substances, constituted unbecoming conduct warranting dismissal of respondent from his tenured position.

The Commissioner affirmed the decision of the ALJ for the reasons stated therein. The Commissioner agreed that, although custodians are not held to the same standard as tenured teaching staff members, respondent's possession of controlled dangerous substances and drug paraphernalia warranted his dismissal.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO: EDU 7135 98

AGENCY DKT. NO: 131-5/99

MANUEL SANTIAGO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

Valerie J. Dion, Esq., represented, petitioner
(Murray, Murray & Corrigan, attorneys)

Gregory T. Syrek, Esq., represented respondent
(Bucceri & Pincus, attorneys)

Record Closed: June 30, 2000 Decided: August 16, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

FACTS & PROCEDURAL HISTORY

On May 16, 1997, Manuel Santiago, was arrested for possession of marijuana and cocaine. Petitioner, the Board of Education of the City of Elizabeth (hereinafter Board), brought charges of conduct unbecoming a public school employee pursuant to *N.J.S.A.* 18A:6-11 against Santiago, respondent, a tenured custodian. Respondent has been employed by the City of Elizabeth since September 1, 1980, initially as a custodian than as a head custodian. He had a flawless disciplinary record until the unbecoming conduct charges.

On May 16, 1997, Santiago was at Freitas Bar in Elizabeth, New Jersey. While he was inside the bar, his son, James Santiago, who has a history of drug abuse, was allegedly across the

street using drugs. James Santiago allegedly saw someone put a small package in a crack in a window and he took the package and discovered that it contained marijuana and cocaine. When James saw a police van park behind his father's jeep outside Freitas Bar, he ran into the bar. He entered the bar and walked over to his father and asked him to hold the package he had just found. James then ran to the back of the bar and hid in a closet.

A few minutes later, Police Detectives, Kevin McDonough and John Maloney, who allegedly received information that respondent was distributing narcotics at Freitas, entered the bar after seeing respondent's jeep parked outside. The detectives asked respondent to step outside. Once they were outside, respondent consented to being searched. The police found two clear, knotted plastic bags containing cocaine in respondent's right front pants pocket. Four zip-loc bags containing marijuana were recovered from the top left pocket of respondent's jacket. The police also found $933.00 in cash and a cocktail napkin that contained writing of apparent drug sales in respondent's left front pants pocket. During the search respondent stated "what I have on me is for personal use." After searching respondent, the police requested and received consent to search his home. They found a bag of marijuana seeds in respondent's bedroom, ammunition in another bedroom, and $1000 hidden in a stereo speaker. Respondent was charged with *N.J.A.C.* 2C:35-10A(4) (possession of cocaine), 2C:35-B5 (possession of cocaine with the intent to distribute) and 2C:35-7 (possession of cocaine within 100 feet of a school).

Respondent entered a Pre-Trial Intervention Program (hereinafter "PTI"). He completed the program and on October 28, 1998 the criminal charges were dismissed. Based upon Santiago's arrest, the Board instituted charges on February 5, 1998, for conduct unbecoming a public school employee. On September 30, 1999, respondent filed a post hearing brief in support of his position that the Board failed to prove the tenure charges or in the alternative, if it is determined that the respondent engaged in unbecoming conduct, the penalty of removal is inappropriate.

The respondent contends that the drugs found on him were not his and he was only holding the unidentified package until his son returned. Respondent also argues that he accepted responsibility for the drugs that were found on his person in an effort to protect his son. Additionally, respondent asserts that the money and ammunition found in his home belonged to

his stepson. Finally, the $933.00 in cash found on respondent was contended to be from two paychecks he had just cashed. Respondent maintains that his flawless employment history in the district must be balanced with the facts presented.

On October 1, 1999, the Board filed a post hearing brief in support of the tenure charges instituted against respondent. The Board submits that the incident was not isolated and, according to Detective Kevin McDonough of the Elizabeth Police Department, Narcotics Unit, respondent and several of his family members had been the subject of a narcotics investigation. It is alleged that an undercover informant would be sent to respondent's house with cash to purchase drugs, and the informant had purchased drugs from respondent.

When respondent was searched, the cocaine and marijuana were found in two separate pockets. Thus, even if respondent was holding one package for his son, the other package containing narcotics is quite incriminating. Although respondent has an unblemished disciplinary record, this incident of drug possession is serious enough to warrant dismissal. The Board maintains that despite respondent's successful completion of the PTI program, his involvement with drugs is sufficiently flagrant to warrant dismissal from his position as head custodian. A custodian's conduct of knowingly possessing drugs, within 1000 feet of a school, and the fact that he is the subject of a drug trafficking investigation demonstrates that he is unfit to hold his position as a custodian.

DISCUSSION

Tenure Charges

New Jersey's Supreme Court illustrated the importance of the tenure statutes stating, "tenure is an item that intimately and directly affects the work and welfare of public employees." *Wright v. Bd. of Educ. of the City of East Orange*, 99 *N.J.* 112, 118 (1985). "In the context of the public school teacher tenure statute, tenure 'prevents school boards from abusing their superior bargaining power . . . in contract negotiations.' It protects employees from dismissal for unfounded, flimsy or political reasons." *Wright, supra*, 99 *N.J.* at 118 (citing *Spiewack v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982)). The Court further acknowledged: "once the status of tenure is earned, it provides a measure of job security to those who continue to perform their jobs properly." *Wright, supra*, 99 *N.J.* at 118.

N.J.S.A. 18A:17-3 is part of a statutory scheme providing tenure to certain enumerated employees of local boards of education. A public school custodian holds his employment under tenure during good behavior and efficiency and "shall not be dismissed, suspended or reduced in compensation, except for neglect, misbehavior or other offense." *N.J.S.A.* 18A:17-3. In order to impose a dismissal, suspension or reduction in compensation, the school district must proceed in the manner described in *N.J.S.A.* 18A:6-9, -29. The burden is on the board that certified the charges to prove them by a preponderance of the credible evidence. *In Re Polk License Revocation*, 90 *N.J.* 550, 560 (1982).

Unbecoming conduct

Although unbecoming conduct is not specifically defined in the statute or regulations, in *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), it was established that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of one's office or position. See also, *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 28-29 (App. Div. 1974), *certif. denied*, 65 *N.J.* 292 (1974). Beyond the field of education, conduct unbecoming a public employee has been defined as an "elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the bureau ... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960). When such conduct creates a hostile and potentially dangerous environment, it also constitutes just cause for major discipline under the civil service laws. *Perry v. Mercer County Department of Public Safety*, 96 *N.J.A.R.*2d (CSV) 834, 837. A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based primarily on a violation of an implicit standard of good behavior. *Emmons*, *supra*, 63 *N.J. Super.* at 140; *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967). Conduct unbecoming is a type of disciplinary charge that is determined on a case-by-case basis and can embrace a wide range of conduct.

In the case of charges of unbecoming conduct against tenured teachers a court must consider "the gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuating, or aggravation," and "any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the

school system." *In re Fulcomer*, 93 *N.J. Super.* 404, 422 (App.Div.1967). It is however, important to recognize that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *Id.* at 421 (citations omitted). Although, the specific tenure statute governing the circumstances in *Fulcomer, supra*, does not regulate tenured custodians, the tenure statutes all basically function analogously. The noteworthy distinction amongst the tenure statutes is that they apply to different types of employees. Thus, cases discussing conduct unbecoming a tenured teacher may provide valuable insight into a similar type of tenure charge instituted against a school custodian.

It is important to recognize that this is not a forfeiture case because there was no conviction.[i[1]] The PTI program is designed to divert certain individuals from the ordinary course of prosecution into programs that provide rehabilitative services and supervisory treatment. *Lindes v. Sutter*, 621 *F.Supp.* 1197, 1201 (D.C. N.J. 1985); *N.J.S.A.* 2C:43-12(a)(1)-(5). In *Thomas v. N.J. Institute of Technology*, 178 *N.J.Super.* 60 (Law Div. 1981), the Superior Court held that "acceptance in PTI, even where the program is successfully completed, cannot be regarded as the equivalent of a judgment of acquittal or an otherwise favorable termination of the criminal proceeding." *Id.* at 62. Thus, though respondent's completion of the PTI program prevents a forfeiture analysis, his acceptance into the PTI program does not bar his dismissal based upon conduct unbecoming a public school janitor pursuant to *N.J.S.A.* 18A:17-3. *See, Bd. of Educ. of the Borough of National Park, Gloucester County v. Wolfe*, 1980 *S.L.D.* 721, *aff'd*, St. Bd. of Ed., 1980 *S.L.D.* 728, *aff'd,* App. Div. 1981 *S.L.D.* 1537 (upholding dismissal despite completion of PTI program). The fact that respondent entered into the PTI program will have no bearing on the tenure charges or the imposition of an appropriate penalty.

In *Morton v. Board of Education of the City of Camden, Camden County*, EDU 253-97 and EDU 956-97 (consolidated), Initial Decision, (June 11, 1999), *adopted* Commissioner, (July

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i[1] Pursuant to *N.J.S.A.* 2C:51-2, a person forfeits his public position if:

(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
(2) He is convicted of an offense involving or touching such office, position or employment; or
(3) The Constitution or a statute other than the code so provides. [*N.J.S.A.* 2C:51-2.]

The protections contained in the tenure laws are not applicable where a school employee has forfeited his position by virtue of *N.J.S.A.* 2C:51-2. *Arocha and Gonzalez v. Bd. of Educ. of the Hudson County Area Vocational Technical Schools District*, 1985 *S.L.D.* 1, 7-8 (citations omitted). Thus, if respondent was convicted of possession, or entered a guilty plea, he may have forfeited

30, 1999) <http://lawlibrary.rutgers.edu/oal/>, the ALJ determined that possession of a controlled dangerous substance and possession of drug paraphernalia constituted conduct unbecoming a teaching staff member. "That the possession of the controlled dangerous substance or paraphernalia occurred off school premises has no bearing on the determination that the possession, in and of itself, constitutes unbecoming conduct." *Ibid.* Similarly, the ALJ indicated "[n]or does the fact that Mr. Morton received a conditional discharge and eventual dismissal of the ... drug possession charge preclude a finding of unbecoming conduct as to that incident." *Ibid.* (citing *Willingboro Board of Education v. Lott,* 93 *N.J.A.R.* 2d (EDU) 516, *aff'd* State Board of Education, 94 *N.J.A.R.* 2d (EDU); *In the Matter of the Tenure Hearing of McIntyre,* 96 *N.J.A.R.* 2d (EDU) 718, *aff'd*, App. Div. No. A-5942-94 (July 10, 1996); *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph,* 1980 *S.L.D.* 721, *aff'd* App. Div. 1981 *S.L.D.* 1537. 1539).

In *Edison Twp. Bd. of Educ. v. Passero*, 1983 *S.L.D.* 1, the Commissioner adopted the ALJ's determination that the dismissal of a school janitor based on his arrest for two counts of possession of controlled dangerous substances was too harsh. In that case, the janitor was arrested for possession of hashish and methamphetamines while performing his duties as a janitor at the Edison High School. *Id.* at 5. Although the janitor was charged with possession of controlled dangerous substances he was not convicted because he entered a conditional discharge program, which is essentially the equivalent of the PTI program in this case. *Id.* at 6. The ALJ held that regardless of the result in criminal court, it was clear that such conduct rises to the level of conduct unbecoming a public school janitor. *Id.* at 7-8. However, the ALJ concluded that that suspension was the appropriate penalty because the janitor contributed to the support of his ill mother, he had not been involved in any prior drug related incidents, and he was not charged with the more serious offense of intent to distribute. *Edison, supra*, 1983 *S.L.D.* at 8. The ALJ also took into consideration the fact that the janitor worked on the night shift where he had little or no contact with the school children. *Ibid.* In the instant case, it is clear that the criminal charges resulting from the May 16, 1997 incident constitute unbecoming conduct, but it is necessary to evaluate the nature of the penalty to be imposed.

---

his public employment under *N.J.S.A.* 2C:51-2. However, his criminal charges were diverted by his entry into the PTI program, which obviates a finding of either guilt or innocence for purposes of the forfeiture statute.

Edison, supra, was the only case discussing the penalty for a custodian charged with unbecoming conduct based on an arrest for possession of controlled dangerous substances. However, there is case law that discusses the appropriate penalty in similar circumstances concerning tenured teachers. Although, custodians are not held to the same standards as teachers, those cases can provide guidelines to the appropriate penalty. A review of the case law indicates that the issue of what is the appropriate discipline is somewhat fact specific. Ultimately, a determination of fitness for a particular position in the school system requires a balancing of interests. *In re Tenure Hearing of McIntyre,* 96 *N.J.A.R.*2d. 718, 725, *aff'd*, App. Div. No. A-5942-94 (July 10, 1996). "Where unfitness for a position in a school system is evidenced by a single incident of misconduct ... that instance must be 'sufficiently flagrant'." *Ibid.* In *Willingboro Bd. of Educ. v. Lott*, 93 *N.J.A.R.*2d (EDU) 516, the tenured teacher was dismissed based on unbecoming conduct stemming from an arrest for growing 68 marijuana plants in her backyard. Although the ALJ recognized that "the drug involved is not one of the so-called 'hard' drugs and that the respondent had an exemplary record" he found that termination was the appropriate penalty. The ALJ distinguished that case from *Valenti v. Sch. Dist. of the Twp. of Monroe*, OAL DKT. EDU 4926-89, *adopted* Commissioner of Ed. (March 6, 1990), where the penalty was 180-day forfeiture and no increment. In *Monroe, supra*, the teacher was arrested for one hand-rolled joint of marijuana and an additional 2.5 grams of marijuana. The ALJ in *Willingboro, supra*, focused on the significant difference in the amount of marijuana in the teacher's possession.

In *In re Tenure Hearing of McIntyre,* 96 *N.J.A.R.*2d. 718, *aff'd,* App. Div. No. A-5942-94 (July 10, 1996), the ALJ determined that the appropriate penalty for the tenured teacher, who was arrested for possession of marijuana and operating a motor vehicle while in the possession of marijuana, was a 120-day suspension. It was the ALJ's opinion that the one act of unbecoming conduct did not compel termination based upon the teacher's contributions to the school and favorable evaluations. *Id.* at 722. However, the Commissioner modified the penalty to include termination. *Id.* at 726. The Commissioner determined that "possession of a controlled dangerous substance by an educator, absent mitigating circumstances, . . . is sufficiently flagrant conduct to warrant dismissal," even if it reflects only one instance of misconduct. *Id.* at 726. Teachers serve as role models, "'a heavy duty [which] requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.'" *McIntyre, supra,* 96

*N.J.A.R.*2d at 726 (quoting *In the Matter of the Tenure Hearing of Jacques L. Sammons, School District of Black Horse Pike Regional, Camden County,* 1972 *S.L.D.* 302, 321).

With respect to the role custodians play in the school system, the ALJ in *Sch. Dist. of Garfield v. Olek*, 92 *N.J.A.R.*2d (EDU) 319, stated:

> Although other school employees are not necessarily required to meet the same standard of conduct as teachers, we find that all employees in the public school system who are charged with the care of students or have significant contact with students serve as adult role models and contribute to the student's education through what students see, hear, experience and learn about them. We conclude that, given this state's commitment to solving the widespread drug problems in the schools, each employee who is charged with the care of students or has significant student contact is under a duty to conduct himself in a manner that in no way condones or encourages the use of drugs. [*Id.* at 321 (citing *Arocha and Gonzalez v. Bd. of Educ. of the Hudson County Area Vocational Technical Schools District, Hudson County*, 1985 *S.L.D.* 1, 8.]

Similarly, the ALJ in *Sch. Dist. of the City of Bridgeton v. McMahan*, 84 *S.L.D.* 1, stated:

> The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He must come into regular contact with members of the school staff, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence. [*Id.* at 14 (citations omitted).]

Although custodians may not be held to as high a standard as teachers, they still work within the confines of the school community and thus they must be held to a standard that reflects such.

Santiago's testimony was not convincing. His contention that the drugs found on his person were his son's is unbelievable. The quantity, though not sufficient to establish distribution, is much more than the single bag supposedly picked up at a window slot. Just as disturbing is the allegation that Santiago was involved in distribution. Though this allegation is made by an unidentified informer, it is in fact corroborated as to reliability by Detective McDonough. These factors, plus the unquestionable conduct of Santiago that amounted to unbecoming conduct, leads me to conclude that the imposed penalty of termination is appropriate.

ORDERED

It is **ORDERED** that Daniel Santiago is hereby terminated from his position of custodian in the Elizabeth School system.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/16/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

8-18-00
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 21 2000
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

IN THE MATTER OF THE TENURE HEARING OF MANUEL SANTIAGO, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and Initial Decision[1] issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4. To the extent that these submissions merely reiterate those arguments advanced before and considered by the Administrative Law Judge (ALJ), they are only briefly summarized herein.

Initially, respondent's exceptions maintain that the Initial Decision improperly relied on a hearsay claim that he was involved in the distribution of drugs, averring that the ALJ places great weight on this speculative assertion which has no legitimate evidence in support thereof. He urges, *inter alia*, that the Board presented, and the Initial Decision accepts as true, unsworn statements of an unidentified, paid informant who has a criminal record and who was not presented as a witness. Respondent further avers that the testimony of Detective McDonough, a witness presented by the Board, should never have played a role in the decision making in this matter. Of this, respondent states:

> The Board's police witness was clear that he did not observe any of the activities he was discussing. The witness actually presented had no knowledge of who was present or what actually occurred. The testimony was pure, unadulterated hearsay and should never have played a role in the decision-making in this case. The mere

[1] It is noted for the record that the Initial Decision has both an inaccurate caption and Agency Docket Number which have been corrected herein.

> fact that the phantom informant may have been reliable in unrelated matters simply does not justify reliance on such allegations in the present matter. (Respondent's Exceptions at 2)

Respondent further avers that the Initial Decision improperly determined that the tenure charges were proven and offers in support of this exception the legal arguments set forth in his post-hearing brief. Lastly, respondent maintains that the Initial Decision improperly recommended the sanction of dismissal, in part because it was based upon the hearsay testimony referenced above, and because it is an unduly harsh sanction in light of the circumstances in this matter. In support of his position, respondent sets forth a series of school law decisions in which the Commissioner or State Board examined the totality of the circumstances and determined that termination was not the appropriate sanction, but instead, levied various forms of financial penalties, which he argues should occur in the instant matter. With respect to this, respondent argues, *inter alia*, that:

> The initial decision does not contain any analysis regarding the possibility of imposing another sanction. Instead it relies on a series of illusory, conclusory factors. (Initial Decision at page 8.) There is no explanation for the determination that the "quantity" of drugs "is much more than the single bag supposedly picked up at a window slot." The evidence made reference to a package given to Santiago by his son. (Initial Decision, page 2.) Thus, the conclusion regarding a "single bag" is plainly wrong. Similarly, there is nothing to support the references to the quantity of drugs. The allegation regarding distribution is equally inappropriate for use as a factor towards termination. In short the factors presented are unsupportable and without proper explanation. (*Id.* at 8)

The Board's reply exceptions aver that the ALJ properly examined all the evidence at the hearing, including respondent's admissions, the testimony of McDonough and the direct evidence found on Santiago's person. The Board points to the fact that the ALJ specifically found that respondent's testimony was unbelievable and that McDonough's was reliable. Moreover, the Board avers that the recommended decision does not rely solely on hearsay testimony or upon the statements of an unidentified informer, maintaining that all these factors, when weighed together, support the charge of unbecoming conduct.

Additionally, the Board argues that, even assuming *arguendo* the Initial Decision did rely upon some hearsay evidence, hearsay testimony is admissible in an administrative hearing and "'shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence the circumstances of its creation and production, and, generally, its reliability.' *N.J.A.C.* 1:1-15.5(a)." (Board's Reply Exceptions at 3) However, as recognized by the Board, such hearsay testimony may not serve as the sole basis for the ultimate finding of fact pursuant to *N.J.A.C.* 1:1-15.5(b), the residuum rule, which requires that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." As to this, the Board avers that, in the instant matter, the introduction of hearsay evidence was proper, and any reliance upon it was appropriate, as there were other credible facts upon which the ALJ could base his determination.

Moreover, the Board argues, protection of the identity of a confidential informant has been upheld in New Jersey both in the criminal context and the administrative setting, citing in support thereof *State v. Oliver*, 50 *N.J.* 39 (1967); *State v. Williams*, 239 *N.J. Super.* 620 (App. Div. 1990); and *Jersey City Police Department v. Harrison*, 95 *N.J.A.R.*2d (CSV) 269 (1995). With respect to this, the Board avers that:

> The instant case is almost identical to *Harrison*. Santiago admittedly had drugs on his possession, had unexplained money on his possession, had a cocktail napkin in his pocket with evidence of drug sales and was where the informant said he would be. Thus, the introduction of the hearsay evidence was proper. (Board's Reply Exceptions at 5)

Consequently, the Board argues, the hearsay evidence merely supported the other direct evidence of drug possession. Furthermore, it is the Board's position that:

> Contrary to the position asserted by Respondent, the initial decision did not rely on any hearsay evidence. A review of the decision clearly illustrates that the initial decision determined that the possession of drug paraphernalia alone was what led to the determination that there was unbecoming conduct. The decision

> clearly references the fact that Santiago had on his person drugs, and that at the very least, either the drugs in his front pants pocket or that found in his jacket pocket were his. *See* p. 3 of initial decision. Thus, any argument that the judge improperly relied upon the hearsay evidence that Santiago was selling drugs is incorrect.
>
> Thus, the decision by the ALJ was entirely proper, as it was within his discretion to allow [that] hearsay evidence be admitted. Although there was no reliance on this evidence, even had there been some, the residuum rule makes the reliance proper. (*Id.* at 6)

The Board next argues that the Initial Decision properly determined that respondent's behavior was sufficient to prove the tenure charges, averring, *inter alia*, that his knowing possession of drugs constitutes a single act sufficient to warrant discharge, independent of respondent's participation in PTI and in light of the standard to which public school employees are held. In support thereof, the Board cites, among other cases, *Wolfe, supra; Olek, supra;* and *In the Matter of the Tenure Hearing of Theresa Luccarelli, Board of Education of the Borough of Brielle*, 97 *N.J.A.R.*2d (EDU) 537 (1997).

Upon careful and independent review of the record of this matter,[2] the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ for the reasons stated in the Initial Decision, both as to the sufficiency of the charges against respondent and the appropriateness of the recommended penalty of termination. Initially, the Commissioner concludes that the ALJ gave appropriate weight to the testimony and proper consideration of the residuum rule and hearsay testimony in this matter. Further, the Commissioner fully concurs with the ALJ's conclusion at page 8 of the Initial Decision that, although custodians may not be held to the same high standards as teachers, they still work within the confines of the school community and must be held to a standard that reflects the same, particularly in light of the State's commitment to combating the widespread drug problems in the schools. In so determining, the Commissioner finds that the State Board of Education's holding in

[2] The Commissioner notes that transcripts of the hearing are not included as part of the record in this matter.

Alfredo Arocha and Lazaro Gonzalez v. Bd. of Education of the Hudson County Area Vocational Technical Schools Board, (April 3, 1985), a case involving two custodians convicted of drug-related offenses, bears repeating herein. It reads:

> Although other school employees are not necessarily required to meet the same standard of conduct as teachers, we find that all employees in the public school system who are charged with care of students or have significant contact with students serve as adult role models and contribute to the student[s'] education through what students see, hear, experience and learn about them. We conclude that, given this state's commitment to solving the widespread drug problem in the schools, each employee who is charged with the care of students or has significant student contact is under a duty to conduct himself in a manner that in no way encourages or condones the use of drugs. *** (Slip Op. at 6-7)

As to penalty, the Commissioner agrees with Board that this single incident of drug possession, under the factual circumstances presented herein, and in light of the ALJ's credibility determinations, is sufficient to warrant respondent's removal as a janitor with the City of Elizabeth Board of Education.

Accordingly, the Initial Decision is adopted as the final decision of this matter. Respondent is hereby dismissed, as of the date of this decision, from his tenured custodian position in the employ of the City of Elizabeth Board of Education.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 02 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

330-00

EDU #7135-98
C # 330-00
SB # 64-00

IN THE MATTER OF THE TENURE	:	
HEARING OF MANUEL SANTIAGO,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	

Decided by the Commissioner of Education, October 2, 2000

For the Respondent-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Petitioner-Respondent, Murray, Murray & Corrigan (David F. Corrigan, Esq., of Counsel)

The decision of the Commissioner of Education to dismiss the respondent from his tenured custodial position for unbecoming conduct is affirmed for the reasons expressed therein. Given the gravity of the charges against the respondent–possession of marijuana and cocaine with intent to distribute within 1,000 feet of a school–we agree with the Commissioner that dismissal is the appropriate penalty. We reiterate, in addition, that although the position of school custodian does not carry with it responsibility for the care, supervision or instruction of students, such position does provide an individual with significant access to children.

Dr. Orlando Edreira abstained.

March 7, 2001

Date of mailing MAR 09 2001

3/7/01

331-00

C.H., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 2, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISIONS SETTLEMENT

OAL DKT. No. EDU 1117-00

AGENCY DKT. NO. 13-1/00

C.H. ON BEHALF OF MINOR CHILD, R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MT. OLIVE,

Respondent.

Matthew A. Schiappa, Esq., for petitioner (Clemente, Mueller & Tobia, attorneys

Nathanya G. Simon, Esq., for respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: August 3, 2000 Decided: August 10, 2000

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in January 2000 as the result of a request by petitioner, C.H., on behalf of her son, R.M., for emergent relief respecting a challenge to the Board's decision in October 1999 to expel her son based upon a Zero Tolerance hearing. The emergent hearing scheduled before Administrative Law Judge Margaret M. Hayden was adjourned and the file then was filed transferred to the undersigned who rescheduled the matter for June 15, 2000. That date, too, had to be adjourned and it was agreed that the Board would conduct a hearing on June 26, 2000 in order to determine whether the matter could be resolved in an amicable fashion.

Thereafter, a Stipulation of Settlement and Dismissal was prepared and submitted to the undersigned. That document makes reference to the fact that the Board had readmitted R.M. into the Mount Olive School District and had approved his attendance at a private school, effective in September 2000 subject to conditions agreeable to petitioner. Thus, the parties agreed to waive and release any and all claims against each other and to dismiss the instant matter.

I have reviewed the Stipulation of Settlement and Dismissal which is attached hereto and FIND as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures contained thereon.

2. The settlement fully disposes of all issues in controversy between the parties and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 2000
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8-16-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 17 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

AUG 3 10 55 AM '00

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, NJ 07932
(973) 301-0001
Attorneys for Respondent

C.H. on behalf of R.M., Petitioner, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF MT. OLIVE, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION : OFFICE OF ADMINISTRATIVE LAW : OAL DKT. NO. EDU-1117-00 AGENCY REF. NO. 13-1/00 : : **STIPULATION OF SETTLEMENT AND DISMISSAL**

The parties hereto enter into this Stipulation of Settlement and Dismissal in order to reach a mutually agreeable resolution to disputed claims. This Agreement is not a finding on the merits and is not an admission by either party of a violation of any statute or regulation.

On June 26, 2000, Respondent permitted Petitioner with representation, to appear before the Board of Education in order to seek readmission into the Mount Olive Township School District.

Subsequent to the presentation by counsel and Petitioner, the Respondent approved a Resolution readmitting R.M. into the Mount Olive School District and approving his

attendance at Morris Academy School effective September, 2000, subject to some conditions. These conditions were agreeable to Petitioner.

In consideration of all of the above, Petitioner and Respondent expressly waive and release any and all claims against each other with reference to the issues presented to the Office of Administrative Law/Commissioner of Education in the Petition of Appeal and Answer to Petition of Appeal with Affirmative Defenses filed by the parties in this matter. Each party agrees to a dismissal with prejudice of the claims raised in the aforesaid documents. Each party acknowledges familiarity with the facts and circumstances of this Stipulation of Settlement Agreement and Dismissal, and intends to be bound by its terms, have been represented by competent counsel, and enters into same voluntarily without duress.

All of the terms of this Stipulation are deemed material. This document constitutes the entire understanding of the parties and incorporates and settles with finality all claims and disputes which exist or may exist between the parties to date.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date noted.

C.H. on behalf of R.M.

Dated: 7-7-00

Matthew A. Schiappa, Esq.

Dated: 7/7/2000

BOARD OF EDUCATION OF THE
TOWNSHIP OF MT. OLIVE

BY: Donald Rutledge
Donald Rutledge,
Board President

Dated: 7-27-00

WITNESS:

Lynn Jones
Lynn Jones, Board Secretary

Dated: 7-27-00

Nathanya G. Simon, Esq.

Dated: 7/31/00

STATE OF NEW JERSEY)
) SS
COUNTY OF Morris)

On July 7, 2000, before me personally came C.H. on behalf of R.M. known to me to be the individual described in and who executed the foregoing Stipulation of Settlement and Dismissal, and that she duly acknowledged to me that she voluntarily and knowingly executed said Stipulation of Settlement and Dismissal after having read and understood said document.

Barbara M Colie
Notary Public

BARBARA M. COLIE
Notary Public of New Jersey
My Commission Expires Mar. 17, 2005

OAL DKT. NO. EDU 1117-00
AGENCY DKT. NO. 13-1/00

C.H., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Dismissal, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 03 2000

332-00

LINDA J. AVELLINO,	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, who sought certification through the Alternate Route Program, challenged the determination of the New Jersey State Board of Examiners denying her application for a standard instructional certificate with teacher of elementary school and teacher of psychology endorsements, and the denial of her application for an educational services certificate with student personnel services and substance awareness endorsements. Petitioner appealed to the State Board of Education, which remanded the case to the Commissioner to decide in the first instance.

The Commissioner transmitted the case to the OAL for hearing, where petitioner withdrew her challenge to the denial of an endorsement to the educational services certificate as a substance awareness coordinator. The ALJ concluded that petitioner's participation in an after-school program in the Spotswood School District did not satisfy the intensive teacher training experience required by Department of Education regulations for certification through the Alternate Route Program. The ALJ determined, *inter alia*, that the after-school program did not require that she be responsible for provision of instruction in a board-approved curriculum, did not require that her ability to instruct students be assessed, was not a full-time position, included no intensive supervision of petitioner, and that there was no "team" in place to mentor, instruct and evaluate petitioner. As such, the ALJ concluded that petitioner failed to sustain her burden of proof that she was entitled to the certificates/endorsements which she sought and the State Board of Examiners' determination must be upheld.

The Commissioner affirmed the decision of the ALJ for the reasons stated therein. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4974-99

AGENCY DKT. NO. 106-5/99

LINDA J. AVELLINO,

Petitioner,

v.

NEW JERSEY STATE

BOARD OF EXAMINERS,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzalli, Fagella & Nowak, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: June 26, 2000 Decided: August 17, 2000

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter involves the appeal of Linda J. Avellino (hereinafter petitioner) from the November 5, 1998 determination of the New Jersey State Board of Examiners (hereinafter respondent) denying her request for issuance of a standard Instructional Certificate with endorsements of Teacher of Elementary School and Teacher of Psychology and a standard Educational Services Certificate with endorsements of Substance Awareness Coordinator and Student Personnel Services. The November 30, 1998 written decision advising appellant of the determination provided as follows:

> At its meeting of November 5, 1998, the State Board of Examiners unanimously voted to deny Linda Avellino's request for issuance of standard Teacher of Elementary School, Teacher of Psychology, Student Personnel Services and Substance Awareness Coordinator certification.
>
> In the matter of standard Teacher of Elementary School certification, the Board found that the professional education component of the Provisional Teacher Program/Alternate Route was incomplete because Ms. Avellino did not complete the educational component of the program in an appropriate educational setting. Pursuant to *N.J.A.C.* 6:11-5.3, provisional teachers must complete a State-approved district training program which includes the eventual assumption of full responsibility for a classroom under the supervision of a state-approved support team. Ms. Avellino was employed in an after-school-child-care program as a supervisor and not as a teacher. Thus, the professional education component is also incomplete for a standard Teacher of Psychology certificate.
>
> In the matter of standard Student Personnel Services certification, the Board found that Ms. Avellino lacked eligibility for a standard New Jersey teaching certificate, a requirement for the Student Personnel Services certificate, and also did not meet the requirement for successful completion of one (1) year of full-time teaching experience.
>
> In the matter of standard Substance Awareness Coordinator certification, the Board found that Ms. Avellino lacked the required areas of study as outlined in *N.J.A.C.* 6:11-11.5.2 and the six (6) month state-approved Substance Awareness Coordinator residency under provisional certification.
>
> Appeal of this decision may be made to the State Board of Education pursuant to the provisions of *N.J.S.A.* 18A:6-28.

The appeal was initially processed by the State Board of Education, as the written determination from the Board of Examiners indicated would be appropriate. The parties filed legal memoranda for consideration by the State Board Legal Committee. On May 5, 1999, the State Board of Education issued a decision, indicating that jurisdiction to review the determination of the State Board of Examiners in the first instance lies with the Commissioner of Education rather than with the State Board and transferring the appeal to the Commissioner for a determination in

conformity with the standards established in *In re Masiello*, 25 *N.J.* 590 (1958). The State Board decision further provided:

> In doing so, we note that one of the pivotal issues involved in the underlying appeal is whether the district training program in which Ms. Avellino was employed by the Spotswood School District during the 1995-96 school year was in conformity with the requirements of the regulations governing provisional teachers. We stress that this question relates to the factual basis of the Board of Examiners' determination and that, although a full evidentiary hearing may not be required; Ms. Avellino must be afforded an adequate opportunity to present evidence material to resolving the issue. *See Griskey, supra.*
>
> Finally, we direct the State Board of Examiners to revise its decision letters to insure that individuals who are denied the issuance of certification are properly notified that such decisions may be appealed to the Commissioner of Education. *Cf. J.A. v. Board of Education for the District of South Orange and Maplewood*, Docket #A-1615-97T2 (App. Div. 1999) (approved for publication), slip op. at 15-16.

On June 15, 1999, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was conducted on October 29, 1999, at which time the following were identified as issues for determination at hearing:

1. Is petitioner eligible for a standard instructional certificate with either or both of the following endorsements: Elementary Education, Psychology?

2. Is petitioner eligible for a standard educational services certificate with either or both of the following endorsements: Substance Awareness Coordinator, Student Personnel Services?

At the hearing in the within matter petitioner withdrew her appeal with respect to the endorsement Substance Awareness Coordinator.

The hearing commenced as scheduled on February 29, 2000 and concluded on May 5, 2000. Following the close of the hearing, the record remained open for the receipt of post-hearing written submissions. A letter brief on behalf of respondent was filed on May 26, 2000. Petitioner's post-hearing brief was received on May 30, 2000. Replies on behalf of both parties were filed on June 26, 2000, whereupon the record closed.

FINDINGS OF FACT

In addition to the foregoing some of the relevant facts in this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Prior to the commencement of testimony the parties entered into the following stipulations:

1. Petitioner Linda J. Avellino holds a B.A. degree issued by the College of Staten Island in June of 1992 and a Master of Science in Education degree issued by St. John's University in January of 1994. A copy of her college transcript, dated 5/6/93, from the College of Staten Island is attached as Exhibit J-1 and a copy of her college transcript, dated 6/4/93, issued by St. John's University is attached as Exhibit J-2.

2. On or about May 20, 1993, petitioner applied to the New Jersey Department of Education for Alternate Route certification through the Provisional Teacher Program. A copy of her application, covering letter and NTE test scores are attached as Exhibit J-3.

3. In June of 1993 the New Jersey State Board of Examiners issued petitioner certificates of eligibility for provisional certification as an elementary school teacher and teacher of psychology. A copy of those certificates and covering correspondence from the Office of Teacher Certification is attached as Exhibit J-4.

4. Petitioner thereafter obtained a substitute teacher's certificate in January 1994, which permitted her to serve as a substitute teacher in Middlesex County until July 1, 1997. A copy of that certificate is attached as Exhibit J-5.

5. By correspondence dated May 25, 1994 from the Office of Licensing and Academic Credentials, petitioner was advised of the requirements for her to obtain a standard student personnel services endorsement. A copy of that correspondence is attached as Exhibit J-6.

6. By correspondence dated August 18, 1994, the Office of Licensing and Academic Credentials updated its evaluation dated May 25, 1994, which had been sent to petitioner. A copy of that correspondence is attached as Exhibit J-7.

7. In August 1994 the New Jersey State Board of Examiners issued petitioner a certificate of eligibility for provisional certification as a substance awareness coordinator. A copy of that certificate and covering correspondence from the Office of Teacher Certification, along with a re-evaluation dated November 23, 1994, is attached as Exhibit J-8.

8. In September 1994 petitioner was issued a provisional certificate by the New York State Department of Education to serve as a school counselor. She received her permanent New York certification as a counselor in February 1998. A copy of those certifications is attached as Exhibit J-9.

9. By correspondence dated October 10, 1995 from the Office of Teacher Certification, petitioner was sent an information statement and various documentation required for the issuance of a provisional certificate in connection with the State's Provisional Teacher Program. A copy of that correspondence is attached as Exhibit J-10.

10. A Statement of Assurance to Teach, dated January 23, 1996, was submitted to the State Board of Examiners on petitioner's behalf by Dr. Ronald Chiste, Superintendent of Schools for the Spotswood School District, which indicated that petitioner had been hired for an elementary teaching position under the Provisional Teacher Program beginning September 1, 1995. A copy of that document is attached as Exhibit J-11.

11. A Training Support and Evaluation Contract was also submitted which identified Dr. Chiste as the support teacher and William Skowronski, school principal, and Dr. Chiste as the support team. A copy of that document is attached as Exhibit J-12.

12. Dr. Chiste conducted evaluations on 1/96, 4/1/96 and 4/30/96. Copies are attached hereto as Exhibits J-13, J-14 and J-15.

13. Petitioner completed all the necessary coursework for her permanent certification through the Regional Training Center in East Brunswick, NJ. A copy of the Regional Training Center Reports for Phases I, II, and III, a letter from Tony Evangelisto, Ed. D. and a Certificate of Completion are attached as Exhibit J-16.

14. In or about April 1996, petitioner submitted a written application for certification, requesting permanent certificates in the following 4 areas: elementary teacher, teacher of psychology, student personnel services and substance awareness coordinator. A copy of that application is attached as Exhibit J-17.

15. By correspondence dated May 8, 1997 from the Office of Licensing and Academic Credentials, petitioner was advised of the requirements for her to obtain a standard student personnel services endorsement, and was also issued an emergency student personnel services certificate with an expiration date of 7/97. A copy of that correspondence and the emergency certificate are attached as Exhibit J-18.

16. By correspondence dated June 19, 1997, the Office of Licensing and Academic Credentials, revised its correspondence to petitioner dated May 8, 1997, and also issued her another emergency student personnel services certificate with an expiration date of 7/98. A copy of that correspondence and emergency certificate are attached as Exhibit J-19.

In addition to the foregoing, some of the facts relevant to a determination in this matter are not in dispute and accordingly, I **FIND** the following as uncontested facts.

In March or April 1995, when petitioner was registering her child as a kindergarten student in the Spotswood public school system, she had a conversation with Ronald L. Chiste, Ed. D., Superintendent of Schools, wherein she inquired about the existence of an after school program. After being informed that there was no such program in the Spotswood district, petitioner volunteered to look into the possibility of creating such a program. She presented her

proposed program to the Board of Education who approved it prior to the commencement of the 1995-96 school year. The program, entitled "CARES" (Children's After-School Recreation Enrichment Services) was conducted in two school buildings, Shoenly, for children in kindergarten and first grade, and Applebee, for children in grades two through six. The program at Shoenly was available for students commencing at 2:30 p.m. when they were released from school until approximately 6 p.m. and at Applebee from 2:15 p.m. until 6 p.m., although most students were picked up by their parents between 4:45 and 5:30 p.m. Enrollment in the program started with 21 children and increased to 87 by December 1995. Students were not screened for placement in the CARES Program and there was no Board-approved curriculum for the program. Petitioner was not required to prepare lesson plans. She was not formally observed as part of the district's teacher evaluation program. There was no required assessment of the student's performance or progress in the program. The students did not receive grades or report cards related to the CARES Program. Petitioner entered into a contract with the District to serve as the Director of the program; she was paid for 19.75 hours per week. She hired the staff for the program, some of whom were required by respondent to be certified teachers. Petitioner functioned as Director of the program from September 5, 1995 through June 1, 1996, when her employment with the District terminated as the result of some dispute concerning administration of the program.

On or about September 18, 1995, a member of the staff at the Provisional Teacher Program in the Office of Licensing and Academic Credentials at the State Department of Education completed a form indicating that a telephone call had been received from Joan Polon at the Spotswood Board of Education indicating that petitioner, a holder of a certificate of eligibility for elementary education, had commenced employment with the District on September 1, 1995. The nature of the employment was described on the form with a checkmark on the line indicating "Full-time." On or about January 23, 1996, Dr. Chiste signed a Statement of Assurance of Position to Teach, indicating that petitioner had been assured of a position to teach that required an elementary endorsement and that the position was effective under the Provisional Teacher Program on September 1, 1995. That form bears the following paragraph:

> This signed statement should be sent to the Office of Personnel Preparation and Recruitment, CN 500, Trenton, NJ 08625 by the

> chief school administrator when the candidate has been offered an appointment to teach and participate in the Provisional Teacher Program. No provisional certificate may be issued until this form and the Training and Supervision Contract have been received. A contract between a teacher unlicensed in New Jersey and a board of education is invalid. Only an original, signed statement of assurance will be accepted indicating the teaching field required for the teaching assignment (*e.g.*, English, Mathematics, Biological Science, Elementary).

Dr. Chiste also completed and forwarded the required "Training Support and Evaluation Contract for Holders of Certificates of Eligibility" wherein he agreed on behalf of the school district to provide petitioner with support during her first 20 days of employment and to form a support team composed of school principal William Skowronski and listing himself, Ronald L. Chiste, Ed. D., as the experienced teacher. Concerning this contract, on May 21, 1996 the Director of the Office of Professional Development at the Department of Education wrote to Dr. Chiste, as follows:

> It was brought to my attention that a Training Support and Evaluation Contract for Linda Avellino, an alternate route provisional teacher in your district, was submitted by your office. The document indicated that you were the designated mentor for both the first 20 days of Ms. Avellino's employment as well as for the remaining 30 weeks of her participation in the Provisional Teacher Program.
>
> The use of a superintendent of schools as the "experienced" teacher serving as the mentor raises several concerns. According to *N.J.A.C.* 6:11-5.4(d), a mentor teacher does not participate in any way in decisions which might bear on employment or certification of the first year provisional teacher. Moreover, the relationship between the new teacher and mentor is "formative in nature and considered a matter of professional privilege." While it would certainly appear that you are making a good faith attempt to assure that new employees receive necessary coaching and guidance by personally providing such input, the regulations and spirit of this program clearly separates the requirement of peer mentoring from that of evaluation and supervision.
>
> I am returning the contract and ask that it be revised to satisfy the requirement, which mandates the separation of supervisor and mentor responsibilities. I appreciate your support for the program and new teachers. Should you have any questions or concerns, do

not hesitate to contact me or Judy Cifone, coordinator of the Provisional Teacher Program.

Thank you for your cooperation in this matter.

The contract was not revised thereafter, however, and Dr. Chiste's name remained as petitioner's mentor.

On or about February 2, 1996, Dr. Chiste completed the evaluation form, which is required for the Provisional Teacher Program at the conclusion of the first ten-week period (following the initial 20 days of employment). He evaluated petitioner as satisfactory or outstanding in all areas specified for evaluation (curriculum, instruction and assessment; student learning and development; and classroom and school). On or about April 8, 1996, he completed the required 20-week evaluation where he likewise rated petitioner outstanding or satisfactory. In the commendation section he wrote, "This has been a most successful experience for Lynn and one that was equally rewarding for the students she helped." In the final summative evaluation, which the form indicates is "required after 30 weeks of full-time teaching," Dr. Chiste recommended that petitioner be approved for a standard instructional certificate. This form he completed on or about April 30, 1996. In or about April 1996 petitioner completed the 200 hours of classroom instruction, which is required for alternate route candidates. These classes were conducted at the Regional Training Center in East Brunswick during evening hours and at Trenton State College on Saturdays. On April 9, 1996, petitioner forwarded to the Provisional Teacher Program her certified check in the amount of $900 to cover the costs of the Alternate Route Instruction and also forwarded at that time her completed application for certification. In that application she described the following work experience: 9/5/95 to present, Spotswood Public Schools, "Elementary Basic Skills, K-6"; substitute teacher from 9/94 to 6/95, Woodbridge Township/East Brunswick Township/Spotswood; Director of Guidance Services/Psychology teacher, 1/1/94 to 6/30/94, Academy of the Sacred Heart. Also in April 1996, petitioner successfully completed the required physiology and hygiene examination and, but for the issues which gave rise to the within matter, upon successful completion of that examination on April 26, 1996, and upon payment of a required $20 fee, she would have been eligible for issuance of a provisional certificate.

Thereafter petitioner was hired by the Bound Brook school district as a high school guidance counselor commencing in September 1996. Bound Brook applied on petitioner's behalf for an Emergency Student Personnel Services Endorsement for the 1996-97 school year. The emergency certificate was issued; the evaluation of petitioner's credentials by the Office of Licensing and Academic Credentials at that time indicated that in order to obtain standard certification for Student Personnel Services, petitioner needed, *inter alia*, a standard New Jersey teacher's certificate, proof of one year of successful teaching experience to be submitted in the form of an original letter from the superintendent or principal of the school specifying whether the employment was full-time or part-time. Perhaps it was in relation to this last requirement that Dr. Chiste wrote to Ann Rossi, in the New Jersey Department of Education, Middlesex County office on September 16, 1996, as follows:

> This is to inform you that Ms. Lin Avellino was employed by the Spotswood Public School System in our after-school child-care program (Children's Academic Recreation Enrichment Services) through the Alternate Route Program from September 5, 1995, through June 1, 1996.

Emergency certification was again requested and granted for the 1997-98 school year by the Bound Brook Board of Education. No emergency certificate was requested or granted for the 1998-99 school year, and effective September 26, 1998, the Bound Brook board removed petitioner from her position as high school guidance counselor. She continued in that position, however, on a per diem basis, until November 11, 1998. Petitioner has filed a separate appeal with the Commissioner of Education concerning the actions of the Bound Brook Board of Education, and that matter is currently scheduled for a hearing in September 2000.

Petitioner testified on her own behalf and indicated that Dr. Chiste had suggested to her the possibility of utilizing her work in the CARES Program to obtain standard certification pursuant to the Alternate Route Provisional Teacher Program. She testified that she had never made any attempt to obtain assurance from the Office of Licensing and Academic Credentials that this after-school program would qualify as a full-time teaching position. "I relied on Dr.

Chiste providing me with this opportunity as someone who had alternative route teachers who knew what would be acceptable to the State and what would not be," she testified. She had reviewed the requirements for Alternative Route certification in a pamphlet or brochure which she had obtained from the State and felt that what she was doing met the requirement of contractual teaching. She acknowledged that she was aware that her prior teaching experience could not be utilized to fulfill the provisional teaching program requirements and that her teaching experience was required to be a full-time contractual experience. Concerning her typical day between the hours of 2 and 6, petitioner testified:

> I would arrive at one or the other school, sometimes at the behest of one of the teachers to start the program day with her or sometimes because we had something scheduled with kids at one particular building or another. So my day was flexible in terms of where I started depending on what we had scheduled for that day in what building.
>
> And the kids would come in from their classroom, and we would take attendance and make sure all were accounted for. Kids would sit down and have a snack; there would be a brief time where they could sort of socialize with each other; and then they were broken up into groups, whatever groups were the groups of that day. It may have been that we started rotation of part of the kids as a homework group and part of the kids in the computer club and part of the kids – there were a variety of things that they could have been rotated through.
>
> Every kid was part of every group every day. Depending on when they arrived and when they left. That's where we would begin their rotations. So they could be part of anything that we were doing through the course of the time that they were there. The kids who stayed the longest, and sometimes it was 6:15 or 6:30 before parents came to collect kids, those kids did some of the activities and rotation twice.
>
> . . .
>
> We had all kinds of stuff; Legos and a lot of arts and crafts stuff. We did a lot of art projects, projects for the school. We did bulletin boards for the school and things like that. So there were heavy-duty art projects. Some of them were more involved than others. Most of it was themed around whatever instruction – for instance, in February, celebrating Mardi Gras, understanding the history of that. The kids made Mardi Gras masks, and that was part of what we did, you know, as a themed instruction for that time.

> Things that we did related to that. So if we were reading stories, we were reading *Tom Sawyer* and *Huck Finn* and things about the Mississippi and the Delta, and it allowed us to bring in a lot of other things into the instruction. We had a lot of freedom to choose where we wanted to take the kids and what we wanted to expose them to, but it gave us enough latitude that we could do themed instruction and talk about music and art and history and poetry and the natural world and all kinds of things.
>
> . . .
>
> There were two teachers with these – with the younger elementary school kids, and they had an aide, who was a student from the high school who was employed in the program. At Applebee, it was one teacher and me, an adult aide, and two high school students who served as aides, as well as volunteers from the high school who came down to do music and band programs and chorus programs with the kids. So there were – the kids were put into groups, you know, and rotated through them for a variety – you know, lots of activities.

Concerning her responsibilities as Director of the program outside the hours the children were present she testified:

> My day started with sending my own children off to school at eight o'clock. And whatever business needed to be done – because I was using my own telephone, my own fax machine, and my computer at home to generate whatever reports, documents, or whatever was necessary. Certainly, I couldn't do the banking at any other time other than in the morning because at noon, I had to be in the buildings preparing materials for whatever lessons or plans we had with the children, and I was allowed to use the Board photocopy machine to do that.
>
> So my prep time really was between 12 and before I got to the program at two. Any other administrative functions were performed before noon or after six. That included, you know, snack stuff and ordering materials or purchasing materials for the use of the children in the program. I couldn't do that while I was in the program. It had to be done outside those hours.

Petitioner testified that she could not remember exactly what time she was required to arrive at the Regional Training Center in East Brunswick on the evenings she was required to attend classes. She said that the instructor was flexible and would allow participants who arrived late to make up time. She acknowledged that sometimes she might have left the CARES program a few minutes early to get to class.

Dr. Chiste testified on behalf of respondent. It was his testimony that petitioner had approached him about the possibility of utilizing her experience in the CARES Program to obtain certification through the Alternate Route. He testified that she had called him in that regard around the end of July 1995 and had asked if she were to function as one of the instructors in the after-school program they had been discussing, whether she could use the experience to satisfy the requirements of the Provisional Teacher Program. According to Dr. Chiste, he response was, "If the State is willing to go along with that, yeah, I could support that." He indicated that he assumed petitioner had gotten the State's approval and it was his recollection that petitioner had initiated and had provided all of the paperwork to enroll in the program, although he acknowledged his signature on the documents previously discussed. He had listed himself as petitioner's mentor because petitioner was not working in the daytime part of the school program and his own schedule was the only one which would match with petitioner's hours. This was not a conventional program, he testified; there was no correlation between regular elementary school teachers on staff and the CARES program. He indicated that when he completed the evaluation forms, which were marked into evidence, he evaluated petitioner as the Director of the program and as a teacher in combination. The experience he had described as being very successful was the program, he said, which had turned out to be better than the district had anticipated. The evaluation forms had been completed by him as cumulative evaluations based upon between 10 and 20 walk-through visits to the program; he did not go to the program and stay for any length of time for the purpose of evaluating petitioner's performance. He also testified that he had provided petitioner with no instructional assistance; on a couple of occasions he had provided constructive criticism concerning administrative aspects of the program. William Skowronski, the principal at Applebee, was present in the building everyday until at least 4 p.m. and would have had ample opportunity to observe the program as well, he testified. When he was asked whether petitioner was engaged in a full-time teaching assignment, he responded that the Board

was very specific that it be less than half. He noted that although the Board had required those who were employed in the program as teachers to be certified, that requirement had not been imposed for the Director of the program. On several occasions during his testimony he repeated that if the State saw this as a viable way of earning standard certification, he was willing to comply with petitioner's request. When asked by the undersigned to compare what petitioner did with the responsibilities of an elementary teacher in a basic skills class, he responded that there was no correlation. He indicated that CARES was a day-care child-care program established primarily for the convenience of parents. A basic skills program has a formally established curriculum, he indicated, and enrollment is based upon evaluating each child's degree of deficiency.

Elizabeth Haywood, who is employed by the State Department, Office of Licensing and Academic Credentials, testified that her office had sent out a package of information to the school district concerning petitioner after receiving a telephone call in September 1995. She indicated that it took an unusually long time for the district to return the contract (J-12 in evidence). It arrived in her office in March 1, 1996, she testified. After reviewing the contract, they had advised Dr. Chiste both by telephone and in writing that the administrative code did not allow him as an evaluator to be petitioner's mentor. Nevertheless in April 1996, they had received the contract back, unaltered, together with the two completed formative evaluation forms, she testified. When her office reviewed Dr. Chiste's September 1996 letter, indicating the petitioner had been employed in an after-school program, Margaret Smith, in the licensing arm of the office, called the district to inquire further. Handwritten notes made by Ms. Smith in petitioner's file indicate that on October 25, 1996, June or Joan Polen, contact person in Spotswood, indicated that petitioner was no longer employed by the district and that she had been a supervisor in an after-school program, not a full-time teacher. Ms. Haywood noted that in reviewing petitioner's file in preparation for testifying at the hearing, she had noted that petitioner had obtained emergency certificates on a number of occasions to function as a guidance counselor. She volunteered that if what petitioner really wanted to do was be a guidance counselor and not a classroom teacher, that it was still necessary for petitioner to complete a full year of full-time classroom teaching, but that if her district were willing, she could work half-time as a guidance counselor under the Emergency Certificate and half-time as a classroom teacher under the Provisional Program for a period of two years to satisfy the one-year

of full-time teaching requirement. She noted that petitioner holds a standard Student Personnel Services Certificate in the State of New York, but the State of New York does not have as a requirement a year of full-time teaching, she said.

Judith Cifone, the employee in the State Department of Education who oversees the training portion of the Provisional Teacher Program, testified that Alternative Route candidates must complete 34 weeks of teaching with support, supervision and evaluation and 200 hours of formal instruction completed in the evenings and on Saturdays. Traditional Route teachers, who have experienced student teaching as part of their training, are required to complete 30 weeks of teaching with support supervision and evaluation. Concerning the 200 hours of formal instruction for the Alternative Route, Ms. Cifone testified that classes at Regional Training Centers are four hours in the evenings, commencing at 4 or 4:30 or 5 p.m. and concluding around 8:30 or 9 p.m. Saturday sessions are also conducted in addition to the evening programs. She testified that the reason for the inception of the Alternative Route Program was not to address necessarily teacher shortages, but was to increase the quality of the pool of candidates so that districts could chose from alternate or traditional route teachers. The 34 weeks of full-time teaching can be accomplished on a part-time basis; for instance, if a teacher were contracted for half-time teaching, it would take 68 weeks to complete the program, she testified. The program's contract is with the school district who employs the teacher rather than with the teacher directly, she indicated, and implementing the program is basically the responsibility of the school district. In general, the State Department does not go out to evaluate programs in individual districts, but rather relies upon paperwork to assure that districts are following the requirements of the regulations. Although the teaching experience to satisfy the Provisional Teacher Program does not need to be in a regular classroom, it does have to be a tenure-eligible position, which requires certification and a specific endorsement, she testified. The program does not necessarily require the teacher to be employed in a self-contained class, with a specific number of students; a basic skills program could indeed fulfill the requirements, she testified. Teachers in the Provisional Program may not satisfy the program requirements by volunteering their time; there must be a contract of employment between the teacher and the board, she said. The number of hours required to constitute a full-time position is left up to the district; however, in general a full-time load is somewhere between 35 and 40 hours per week. Under the program a principal or other evaluator can never serve the functions of mentor. The mentor's function is to provide a

confidential relationship with instructional support, she testified. Sometimes there is more than one mentor teacher and sometimes the district hires retired teachers to perform the function, particularly within the first 20 days when constant presence and support is required. She did note that if an alternate route candidate has some prior teaching experience, for instance in a private school, that the mentor's constant presence during the first 20 days might not be required.

Both Ms. Cifone and Ms. Haywood were candid, sincere and credible witnesses. Furthermore, the substance of their testimony is not really disputed. Accordingly, I **FIND** the facts in their testimony described above as additional relevant facts in this matter. The major areas of dispute between the testimony of petitioner and Dr. Chiste relate to who initiated the suggestion that petitioner's CARES experience might be used to obtain standard certification. In this regard I find Dr. Chiste's testimony more credible than petitioner's. Testimony to be believable must not only come from the mouth of a credible witness but must be such that the common experience of mankind can approve as probable under the circumstances. *Spagnuolo v. Bonnett*, 16 *N.J.* 546, 554-555 (1954). The documentary evidence reveals that petitioner was aware of the Alternate Route certification program as early as May of 1993 when she wrote to the Office of Teacher Certification and Academic Credentials (J-3 in evidence). She needed no additional inducement to set up and run the after-school program; by her own testimony, it had been her idea and she had volunteered immediately when Dr. Chiste had advised her that the district did not have one. It is more reasonable to conclude that petitioner had initiated the conversations about using her experience in the CARES program to satisfy the provisional teacher program requirements, and Dr. Chiste's testimony concerning his response, "If the State is willing to go along with that, yeah, I could support that," has the ring of truth. His testimony that petitioner provided him with the paperwork is also supported by exhibit J-10, a form letter written to petitioner on October 10, 1995 by the Provisional Teacher Program indicating the enclosure of the Statement of Assurance to Teach and the Training and Supervision Contract to be completed and submitted by the school district and noting that "materials requested are due within 60 days." Concerning the facts in dispute I **FIND** the facts set forth in Dr. Chiste's testimony described above as additional facts in this matter. Concerning petitioner's activities both during program hours and before I **FIND** as additional facts the description in petitioner's testimony as set forth above.

APPLICABLE LAW AND DISCUSSION

The requirements for State-approved District Training Programs for Alternative Route Certification candidates are set forth at *N.J.A.C.* 6:11-5.2(f) as follows:

> (f) Each State-approved district training program shall provide essential knowledge and skills to provisional teachers through the following phases of training:
>
> 1. A full-time seminar/practicum of no less than 20 days duration which takes place prior to the time at which the provisional teacher takes full responsibility for a classroom. This seminar/practicum shall provide formal instruction in the essential areas for professional study listed in (g) below. It should introduce basic teaching skills through supervised teaching experiences with students. The seminar and practicum components of the experience shall be integrated and shall include an orientation to the policies, organization and curriculum of the employing district. This requirement shall not apply to provisional teachers who are holders of Certificates of Eligibility with Advanced Standing pursuant to *N.J.A.C.* 6:11-5.1(c).
>
> 2. A period of intensive on-the-job supervision beginning the first day on which the provisional teacher assumes full responsibility for a classroom and continuing for a period of at least 10 weeks. During this time, the provisional teacher shall be visited and critiqued no less than one time every two weeks by members of a Professional Support Team (see (i) below) and shall be observed and formally evaluated at the end of 10 weeks by the appropriately certified members of the team. At the end of the 10-week period, the provisional teacher shall receive a formal written progress report from the chairperson of the Support Team.
>
> 3. An additional period of continued supervision and evaluation of no less than 20 weeks duration. During this period, the provisional teacher shall be visited and critiqued at least four times and shall be observed formally and evaluated at least twice. No more than two months shall pass without a formal observation. Opportunities shall be provided for the provisional teacher to observe the teaching of experienced colleagues.

Subsection (i) of the same regulation requires that training and supervision of provisional teachers in State-approved Alternative Programs be provided by a Professional Support Team comprised of the school principal, an experienced mentor teacher, a college faculty member and a curriculum supervisor. The principal is to serve as chairperson of the team. Under *N.J.A.C.* 6:11-5.4, evaluation of provisional teachers is required to be shared by at least two but no more than three members of the support team and with respect to mentor teachers, that regulation provides at subsection (d):

> (d) Mentor teachers shall not participate in any way in decisions which might have a bearing on the employment or certification of provisional teachers. They shall not assess or evaluate the performance of provisional teachers unless they are appropriately certified administrators. Interactions between provisional teachers and experienced mentor teachers are formative in nature and considered a matter of professional privilege. Mentor teachers shall not be compelled to offer testimony on the performance of provisional teachers.

The burden of establishing that she is entitled to issuance of the certifications/endorsements which she seeks is upon petitioner by a preponderance of the competent and credible evidence. *In re Masiello*, 25 *N.J.* 590 (1958). Although the State Board of Examiners is the body statutorily empowered to issue appropriate certificates (*N.J.S.A.* 18A:6-38), the Commissioner's function on review is to make an independent determination concerning whether petitioner has met her burden under the rules and whether certification is proper. *Id.* at 605-607.

Applying the foregoing regulations to the undisputed facts and those I have found to be the facts in the within matter, I **CONCLUDE** that petitioner's experience in the CARES Program did not provide her with the intensive teacher training program contemplated by the regulations. Petitioner was not responsible for providing instruction in any board-approved curriculum, nor was she responsible for any assessment of the success of her instruction. There was no 20-day period of intense supervision with formal instruction at the commencement of the

program. It further appears that there was no "team;" no evidence was offered concerning what Mr. Skowronski did, if anything, and he certainly did not function as chairperson or formal evaluator as required. Dr. Chiste who was not even eligible to fulfill the role of mentor under the rules testified that he provided no instructional supervision to petitioner, and he did not perform any formal evaluation as required by the regulations. He testified that he completed the evaluation forms based upon his cumulative assessment from brief visits just walking through the program for a few minutes each time on somewhere between 10 and 20 occasions. The constructive criticism he did provide to petitioner related to her administrative duties, he testified. Petitioner's brief notes that *N.J.A.C.* 6:3-3.1 states "the period of time in each day required for a full-time employment shall be the number of hours prescribed by the district board of education, but shall not be less than four clock hours" and she argues substantial compliance with the "full-time" teaching requirement. Her contract with the board, however, provided for 19.75 hours per week, which is not quite four hours per day, and there was no testimony or evidence concerning the number of hours prescribed by the district board of education as constituting "full-time employment." Undoubtedly petitioner devoted far more than 19.75 hours per week to her duties, but the State requirement is for full-time contractual employment and "full-time" must be defined by the contract. Furthermore, it appears from the evidence that petitioner may not even have been physically present for the entire program on days when she was required to attend classes in East Brunswick. Exhibit C-1 in evidence indicates that there were 27 days between September 9, 1995 and April 27, 1996 when she was supposed to report to the Regional Training Center at 5 p.m.

There is further evidence in the record that petitioner and the district both knew that the after-school program was not the type of position the Board of Examiners would approve for satisfying the Provisional Teacher requirements in the Alternate Route Program. When petitioner completed her application for certification in April 1996, she described her experience with the Spotswood Board of Education commencing in September 1995, as a "Elementary basic skills" teacher. She also used this description during her testimony; however, Dr. Chiste's testimony in this regard, that petitioner's duties were in no way comparable to the duties of a basic skills teacher, was most persuasive. Although he acknowledged signing the Assurance of Position to Teach indicating that petitioner had been hired for a position requiring an elementary education endorsement, the undisputed facts reveal that in fact no certificate was required for

petitioner's position as the Director of the program. Clearly petitioner did do some teaching in the general sense of the word while she was running the after-school program. That experience, however, did not make her a teaching staff member anymore than the instructional assistance provided by a teacher's aide makes him or her a teaching staff member. The petitioner in the within matter did have other teaching experience in a private school, the Academy of the Sacred Heart, and substitute teaching experience, and at the hearing in the within matter she appeared to be intelligent, articulate and knowledgeable; in all likelihood, she is a very good teacher. That, however, is not the focus of the provisional teacher regulations. All new teachers, not just Alternative Route teachers, must comply with the supervised teacher in training program described by the regulations. To permit individuals on an *ad hoc* basis to substitute different kinds of teaching experiences from those described in the regulations would create an enormous burden for the State Board of Examiners by requiring individual assessments of sufficient training. The kind of exercise undertaken at the hearing in the within matter to describe a particular program/experience is simply not a reasonable alternative to requiring that all individual experiences and all local board programs comply with the rules.

Petitioner is presumed to know the law and is charged with knowledge of the provisions of the regulations whether she had any such actual knowledge or not. *Matter of Kovalsky*, 195 *N.J. Super.* 91, 98 (App. Div. 1984). She initiated her participation in the program and ultimately it was her responsibility to ensure that her experience, which was obviously and unarguably unconventional, would satisfy the regulatory requirements. The After-School Enrichment Program created and run by petitioner, to all appearances and assessments a wonderful program, did not constitute substantial compliance with the intensive teacher training program contemplated by the regulations, and accordingly, I **CONCLUDE** that petitioner has failed to sustain her burden of proof by a preponderance of the competent and credible evidence that she is entitled to the certificates/endorsements which see seeks. As noted by Ms. Haywood during her testimony, petitioner may still complete an approved provisional teacher program; she may wish to explore Ms. Haywood's suggestion for achieving the required one-year of teaching experience with her current employer.

For all of the foregoing reasons the determination of the State Board of Examiners denying petitioner's applications for certification is hereby **AFFIRMED** and the within matter is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 17, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8-17-00
DATE

Deborah M. Cancelliere /CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

J1 – J19	Described in the Stipulation of Facts set forth hereinabove
J-20	Stipulation of Facts

For Petitioner:

P-1	Letter from Assistant Principal, Academy of the Sacred Heart, to Middlesex County Superintendent of Schools, dated April 26, 1994

For respondent:

R-1	Letter from Ronald Chiste, Ed. D., Superintendent of Spotswood Public Schools to Middlesex County Superintendent's office, dated September 16, 1996
R-2	Internal intake document, Provisional Teacher Program, Office of Licensing and Academic Credentials
R-3	Letter from Office of Professional Development, State Department of Education, to Ronald L. Chiste, Superintendent of Schools, dated May 21, 1996 (2 pages)
R-4	Final notice concerning provisional teaching certificate (12 pages)
R-5	Handwritten notes, dated 10/25/96
R-6	Handwritten notes, Office of Licensing and Academic Credentials, dated 10/25/96 (2 pages)
R-7	November 30, 1998 determination of State Board of Examiners (2 pages)

For the Court:

C-1	Packet of documents sent to school districts enrolling candidates for provisional teacher program and letter sent to applicants
C-2	Current packet of documents sent to applicants

EXHIBITS FOR IDENTIFICATION ONLY

P-2 Application for review of individual case emergency certification (Springfield Board of Education)

WITNESSES

For appellant:

Linda J. Avellino

For respondent:

Judith Cifone, J.D.
Ronald J. Chiste, Ed. D.
Elizabeth Haywood

OAL DKT. NO. EDU 4974-99
AGENCY DKT. NO. 106-5/99

LINDA J. AVELLINO,	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the State Board of Examiners' reply thereto were timely filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and considered by the Commissioner in reaching his determination herein.[1]

Upon a thorough and independent review of the record in this matter,[2] the Commissioner concurs with, and adopts as his own, the findings and conclusions of the Administrative Law Judge for the reasons well-stated in her Initial Decision.

[1] Petitioner's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge below. As it is determined that the Initial Decision fully addressed all of the relevant proffered arguments, further explication herein is unnecessary.

[2] It is noted that the record includes a transcript of only one of the hearing days, February 29, 2000.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 03 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

332-00

EDU #4974-99
C # 332-00
SB # 65-00

IN THE MATTER OF THE ISSUANCE :

OF A TEACHING CERTIFICATE TO : STATE BOARD OF EDUCATION

LINDA J. AVELLINO. : DECISION

Decided by the Commissioner of Education, October 2, 2000

For the Petitioner-Appellant, Zazzali, Fagella & Nowak
(Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Thomas Russo, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

The decision of the Commissioner of Education sustaining the determination by the State Board of Examiners to deny the issuance of a standard certificate to the petitioner is affirmed for the reasons expressed therein. In so doing, we stress that the alternate route program was intended to be "stringent." In the Matter of the Final Grant of a Charter for the Englewood on the Palisades Charter School, decided by the State Board of Education, December 1, 1999, slip op. at 7, appeal pending (App. Div.) Like the Commissioner, we agree with the Administrative Law Judge that the after-school enrichment program run by the petitioner did not constitute substantial compliance with the intensive provisional teacher training program contemplated by the regulations for alternative route candidates.

March 7, 2001

Date of mailing MAR 09 2001

333-00

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA WOOLARD,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

October 2, 2000

OAL DKT. NO. EDU 9520-98
AGENCY DKT. NO. 583-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA WOOLARD,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

For Petitioner, Philip Stern, Esq., of Counsel (Sills, Cummis, Radin, Tischman, Epstein & Gross)

For Respondent, Hardge Davis, Jr., Esq.

BACKGROUND

The record of this matter, advisement of respondent's failure to appear at hearing on August 1, 2000 and a copy of notification sent to respondent by the Office of Administrative Law (OAL) providing her ten days to submit an explanation for such nonappearance, which were transmitted to the Commissioner by the OAL pursuant to *N.J.A.C.* 1:1-14.4, were received by the Commissioner on August 17, 2000.

This matter was opened on December 11, 1996 through petitioner State-operated District's (SOD) filing of tenure charges with the Commissioner against respondent, pursuant to *N.J.S.A.* 18A:6-9 *et seq.* Respondent was charged with unbecoming conduct due to her participation in a fraudulent health insurance scheme by submitting false claims for psychological services. On February 4, 1997, prior to the submission of an Answer to the tenure charges, respondent's attorney, who at that time was Eugene Liss, Esq., notified the Commissioner that respondent was requesting that the matter be held in abeyance until disposition of the criminal charges against her. The request was granted on February 6, 1997. On August 28, 1998, respondent requested that the matter move forward; whereupon, she was

directed to file an Answer to the charges. An Answer was filed on September 28, 1998; whereupon, the matter was transmitted to the OAL.

On February 23, 1999, a substitution of attorney form was submitted to the OAL entering Hardge Davis, Esq., as respondent's attorney. The hearing dates were set for January 6 and 7, 2000; however, respondent requested an adjournment because her criminal matter was to go forward the next month. On January 5, 2000, the Administrative Law Judge (ALJ) granted the request based on two factors – respondent's attorney had been suspended from practice until February 2000 and respondent's trial was set for February 24, 2000. Further, the ALJ set March 20, 2000 for hearing of the tenure charges.

By letter on March 16, 2000, counsel for the SOD requested that the matter not go forward on March 20, 2000 because respondent had pled guilty at trial and, as part of the plea agreement, she had forfeited her position in the District. Sentencing was scheduled for April 7, 2000. The ALJ denied the request and, on March 17, 2000, respondent was notified by the ALJ's secretary that the hearing would be held as scheduled. Respondent was also contacted by counsel for the SOD on the Friday evening prior to the hearing and was told by respondent that she would be out of town. (See ALJ's letter to respondent dated March 20, 2000.)

On March 20, 2000, respondent failed to appear at the hearing. As a result, the ALJ sent Ms. Woolard and the SOD's counsel on that same day a letter which reads in pertinent part:

> Under the circumstances, I do not feel comfortable entering a default judgment against Ms. Woolard. Consequently, I have carried the tenure hearing to August 1, 2000. It is mandatory that Ms. Woolard be present on that date. If Ms. Woolard wishes to be represented by counsel and Mr. Davis will still be suspended, she must make immediate arrangements for another attorney to represent her. Otherwise, she must represent herself. (ALJ's March 20, 2000 Letter at 2)

Upon receipt of the ALJ's notice of return of the matter to the Commissioner for failure to appear at the August 1, 2000 hearing, respondent's counsel sent to the OAL and the Commissioner, a letter informing them that he did not receive notice of the August 1, 2000 hearing date and that the last time he had contact with respondent was when she was putting the matter in abeyance and had not heard from her since then. On August 17, 2000, respondent wrote to her attorney indicating to him, *inter alia*, that she had been unable to reach him and that she thought that the tenure matter had been resolved since she took a plea in criminal court in

April, rather than risk going to trial. She also states that she would like the tenure matter disposed of as soon as possible.

COMMISSIONER'S DECISION

Given respondent's failure to appear at the hearing scheduled on August 1, 2000, notwithstanding the ALJ's directive to her on March 20, 2000 that it was mandatory for her to be at the hearing, with or without counsel, and given that it is uncontested that respondent's plea in the criminal matter against her includes forfeiture of her position as teacher in the Newark School District, the Commissioner determines that respondent's actions in this matter shall be deemed tantamount to admission of the charges against her. Upon review of the severity of the charges, respondent's guilty plea in criminal court, and the absence of a claim by respondent that the matter was wrongfully returned to the Commissioner by the OAL, the Commissioner finds and determines that respondent is guilty of unbecoming conduct as charged by the SOD and she, shall, therefore, be dismissed from her teaching position in the District.

Accordingly, this matter shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: OCT 02 2000

Date of Mailing: OCT 03 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

338-00

#338-00

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	
DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, BRIAN W. CLYMER, NEW JERSEY STATE TREASURER, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

The Bayonne Board of Education challenged the method of State Aid distribution for the 1993-94 through 1995-1996 school years. During those years, the Legislature, with some small adjustments, froze State Aid at the amount distributed for the 1992-1993 school year. Petitioner challenged the state's determination to distribute State Aid to districts in the amount they had received in the 1992-1993 school year, rather than adjusting the amount each district would receive based on enrollment changes that had occurred in the districts. The same amount of State school aid, with adjustments as specified by the Legislature, was received by every school district regardless of enrollment changes since 1991. Petitioner argued that districts such as it, which experienced increases in enrollment, were improperly denied State Aid, while districts with declining enrollment received a windfall at the expense of districts such as Bayonne. As such, petitioner argued that the State's method for distributing State Aid was arbitrary, capricious and unreasonable.

In light of the testimony of witnesses, the ALJ found that the Department legitimately felt it had no discretion as to the manner in which the funds were to be distributed. The amount of State Aid was plainly established by the Legislature. The ALJ determined that the Board failed to show that respondent's interpretation of the laws was arbitrary, capricious, unreasonable or otherwise so improper as to warrant setting aside its determination. Petition was dismissed.

The Commissioner adopted findings and determination in Initial Decision as his own.

October 11, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 3764-98
(OAL DKT. NOS. EDU 5721-94,
EDU 6021-94 AND EDU 1431-97
ON REMAND)
AGENCY DKT. NOS.
5721-94, 6021-94 AND 1431-97

BOARD OF EDUCATION OF THE CITY OF BAYONNE,
HUDSON COUNTY,

Petitioner,

v.

DR. LEO KLAGHOLTZ, COMMISSIONER OF EDUCATION,
AND NEW JERSEY STATE BOARD OF EDUCATION,

Respondent

AND

BOARD OF EDUCATION OF THE CITY OF HACKENSACK,
BERGEN COUNTY,

Petitioner,

v.

DR. LEO KLAGHOLTZ, COMMISSIONER OF EDUCATION,
BRIAN W. CLYMER, NEW JERSEY STATE TREASURER, AND
NEW JERSEY STATE BOARD OF EDUCATION,

Respondent.

James L. Plosia, Esq., for petitioners (Apruzzese, McDermott, Mastro & Murphy, attorneys)

John K. Worthington, Deputy Attorney General, for respondents
(John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: August 11, 2000 Decided: August 11, 2000

BEFORE **STEPHEN G. WEISS**, ALJ:

It is my intention this date (August 11, 2000) to deliver an oral decision in order to comply with the requirements of the last Order of Extension, dated June 26, 2000, which extended the time for the issuance of the initial decision. Several previous extensions had been granted in connection with this matter as a result of a family medical situation. The rules pertaining to the delivery of oral determinations may be found in *N.J.A.C.* 1:1-18.2. As a result of an amendment, no longer is it required that the decision be rendered in the presence of the parties. The earlier version of the rule did have that requirement. In that respect see Comment, LeFelt, 37 *New Jersey Practice*, Section 258. The attorneys who had appeared in this matter were, on behalf of the Bayonne Board of Education, James L. Plosia, Jr., Esq. of Apruzzese, McDermott, Mastro & Murphy, Liberty Corner, New Jersey, and for the State, John K. Worthington, Deputy Attorney General.

This case is on remand following the March 4, 1998 decision of the State Board of Education which directed that a plenary hearing be conducted in order to provide an opportunity for the parties to establish a factual record to assist in a determination of whether the petitioner, Board of Education of Bayonne, (hereinafter referred to as "Bayonne": (a) had the requisite standing to pose a State equal protection challenge to the method of distribution of both foundation and categorical aid under the Quality Education Act (QEA) of 1990, as amended; and, (b) If Bayonne has such standing, either on its own or on behalf of its students, or both; whether it has demonstrated that

a State equal protection violation has occurred in connection with distribution of that aid.. The essential argument made by Bayonne with regard to that second issue is that the method of distribution chosen by respondents is based upon outdated, not current enrollment data, thereby depriving Bayonne of additional aid due to the fact that over a period of years its enrollment in the school district increased while its State aid did not. The remand from the State Board of Education also made reference to the fact that the parties may be raising not only State but Federal constitutional claims as well. However, the parties agree, as do I, that there are no Federal constitutional issues involved.

I first will make some historical findings of fact, essentially in the nature of a relation of the procedural history of the case. In its post-hearing brief the State set forth proposed findings which summarized this history. I will now read them, with certain modifications that I have made, as follows.

1. On May 1, 1994, the Bayonne Board of Education filed a petition of appeal against the respondents including the Commissioner of Education and the State Board of Education, alleging that the QEA of 1990, *N.J.S.A.* 18A:7D-1 *et seq.* was unconstitutional as applied to Bayonne because it did not adequately increase foundation aid and aid for categorical programs commensurate with Bayonne's increased pupil population.

2. The petition alleged violations of both the "thorough and efficient" and "equal protection" provisions of the New Jersey Constitution, as well as arbitrary and capricious actions by the Commissioner. By way of relief, Bayonne asked that the QEA be declared unconstitutional and that the district be reimbursed for aid for 1992-93 and 1993-94 based on actual enrollments from the previous October. Bayonne also asked that all future aid be distributed based upon more current enrollment figures.

3. The funding mechanisms put in issue by Bayonne annually were amended as follows. For 1993-94, the Public School Reform Act of 1992, *L.* 1993, *c.* 7, amended

the manner in which State aid was to be distributed pursuant to the QEA. In 1994-95, *L.* 1994, *c.* 67 amended the distribution method. In 1995-96, *L.* 1995, *c.* 164, implemented an amendment with respect to distribution and it is those statutes which also are at issue in this case.

4. The petition filed by Bayonne originally challenged the distribution of State Aid pursuant to the QEA and other applicable funding formulas for the 1992-93, 1993-1994 and 1994-95 school years. However, in petitioner's opening argument counsel stated that aid distribution for 1992-93 was no longer in issue and its challenge to that school year was withdrawn. The 1993-94 and 1994-95 school years remained in issue and counsel also asserted that 1995-96 was subject to challenge as well. Parenthetically, that is a subject which I will discuss further in this decision. Also at this point I would note that when I first took over the case from Judge Springer, sometime during 1997, in addition to Bayonne, the Board of Education of Hackensack was a petitioner as well. Not long thereafter an amicable resolution was reached with Hackensack and that school district no longer is a party to these proceedings.

5. Although petitioner never sought formally to amend its petition after it was filed, and I never granted a motion to amend or signed any order to that effect, relief for the 1995-96 school year also is sought by Bayonne. I determined despite the State's objection to consider Bayonne's claim with respect to that school year.

6. On November 30, 1994, respondents moved to dismiss based upon the doctrines of justiciability and the alleged failure by Bayonne to state a claim upon which relief could be granted.

7. Previously, on May 28, 1996, Administrative Law Judge Ken Springer had issued a decision which found the matters were not moot since petitioner was not challenging the QEA, as such, but actually was challenging the Public School Reform Act of 1993, which had provided a one year statutory formula establishing aid distribution for 1993-94, and the Appropriations Act language under which aid was distributed for 1994-95.

8. In his initial decision Judge Springer dismissed Count 1 of the petition because it failed to state a claim under the "thorough and efficient" clause, particularly in light of the fact that Bayonne took the position that its students were receiving an excellent education. He also dismissed Count 3, a claim of arbitrary action, since it was covered by Count 2.

9. Judge Springer did not dismiss Count 2, the state equal protection claim concluding that a factual record ought to be developed in order to determine if the State's decision not to provide increases in foundation aid based on increased student population or to increase categoricall aid was irrational. On appeal from Judge Springer's determination the Commissioner upheld the dismissals of Counts 1 and 3, but reversed Judge Springer's determination and dismissed Count 2 as well. On appeal to the State Board of Education, the Commissioner's decision was reversed as to the dismissal of Count 2 and the case was retransmitted to the Office of Administrative Law for the purpose of a hearing regarding the equal protection claim reinstated by the State Board.

10. The State thereafter again moved for summary decision arguing that the matter now was moot as a result of the passage of the Comprehensive Educational Financing Act, *L.* 1996, *c.* 138, which hereinafter I will refer to as the "CEIFA." The State also moved for summary decision based upon a contention that Bayonne, *per se*, lacked the capacity to raise equal protection claims. By that time I had been assigned to the case (following Judge Springer's recusal on his own motion) and I denied the State's motion.

11. Respondent then filed an interlocutory appeal to the Commissioner who, in a decision dated September 2, 1997, reversed my initial determination and again dismissed the entire petition, finding that Bayonne lacked standing to assert the equal protection claim pursued in Count 2 of the petition. However, on March 4, 1998, the State Board of Education again reversed the Commissioner and, as I have noted, remanded the matter to the Office of Administrative Law for a hearing to determine the efficacy of Bayonne's equal protection claim. The State Board also indicated that the

issue of standing should be addressed. Accordingly, plenary hearings were held before me on June 3 and June 4, 1999.

12. In both 1991-92 and 1992-93, state aid for school districts was distributed pursuant to the QEA. From that time until the passage of CEIFA in 1996, school aid was not distributed pursuant to any permanent statutory scheme. Rather, it was distributed through annual funding legislative provisions. In 1993-94, funding was distributed pursuant to the Public School Reform Act of 1993. (Ex. R-1.)

13. The Public School Reform Act provided that each school district would be entitled to at- risk, special education, bilingual, transition and county vocational aid in the same amount the district had received for the 1992-93 school year. (Ex. R-1.) With respect to transportation aid, each district was entitled to the same amount it had received in 1992-93, as well as its proportionate share of a $4 million statewide increase in that category.

14. Foundation aid also was to be based on a multiple of the 1992-93 entitlement. Every non-special needs district was entitle to receive 1.04% of their 1992-93 entitlement and special needs districts were entitled to their 1992-93 entitlement, plus a proportionate share of a $115 million increase. (Ex. R-1.)

15. After 1993-94, school funding was distributed pursuant to annual Appropriations Acts. See, *L.* 1994, *c.* 67; and *L.* 1995, *c.* 164.

16. For 1994-95, districts were entitled to receive the same amount of foundation aid and categorical aid that it received the previous school year. Additional foundation aid was distributed, as noted, with regard to special needs districts on a proportionate basis. Districts that received transition aid in 1993-94 were entitled to two-thirds of that amount in 1994-95. (Ex. R-6.)

17. For 1995-96, districts were entitled to the same amount of at-risk, bilingual and county vocational aid received in 1994-95. Foundation aid entitlements also were to be the same as the previous school year, except that districts with increased enrollment shared $47 million in proportion to their enrollment increases, to a maximum of 7.5%. Special needs districts received additional foundation aid distributed, in part, on a proportional basis and, in part, targeted to the lowest special needs district. Special education aid was increased by $19 million and distributed pursuant to enrollment increases. Transition aid was reduced by one-third over the district's transition aid entitlement for the 1994-95 school year. (Ex. R-9.)

18. For 1993-94, Bayonne was awarded approximately $9.5 million in foundation aid and a total of approximately $15.8 million in State Aid pursuant to the applicable legislation. (Exh. R-4.) After deductions to the amount awarded, Bayonne ultimately received $14.8 million in State Aid payments in 1993-94. (Ex. R-5.)

19. For 1994-95, Bayonne was awarded $8.12 million in foundation aid after adjustments and offsets. (Ex. R-7.) Bayonne also was awarded $15.148 million, approximately, in State Aid. After deductions to the amount awarded, Bayonne received State Aid payments in 1994-95 of approximately $14.11 million. (Ex. R-8.)

20. For 1995-96, Bayonne was awarded $9.626 million in foundation aid, and a total of $16.334 million in State Aid. (Exh. R-10.) Again, after deductions to the amount awarded, Bayonne ultimately received $15.554 million in State Aid in 1995-96. (Ex. R-11.)

21. With respect to student enrollment, Bayonne reported that for 1992-93 it had 7,012.5 students. For 1993-94, it reported enrollment of 7,033 students. For 1994-95, it reported enrollment of 7,661.5 students. (Exs. R-12,R-13 and R-14.)

22. For the 1993-94 school year, State-wide student enrollment was 1,161,260.5 students. For 1994-95, State-wide student enrollment was 1,181,406 students. For the

1995-96 school year, the State-wide student enrollment increased to 1,202,527 students. (Exs. R-15, R-16 and R-17.)

That completes my historical findings of fact, together with a review of the essentially stipulated statistical data offered at the hearing through the respondent's exhibits. I will now discuss the two issues in the case.

The first issue is whether Bayonne has demonstrated it has the requisite standing even to pursue this action which has now been reduced to Count 2 of its petition. The respondent maintains Bayonne does not have such standing since a school district is a State instrumentality, a "creature of the State", and therefore not a "person" able to mount a challenge on constitutional grounds to a State statute. Although no cases involving boards of education were cited by the respondents for this proposition many, many cases involving municipalities were cited in the post-hearing brief. By analogy, school districts and municipalities, according to the State, are to be treated the same. *See, e.g.*, *Borough of Glassboro v. Byrne*, 141 *N.J. Super* 19 (App. Div. 1976), *Certif. den.*, 71 *N.J.* 518 (1976).

In my view, further extended discussion of the standing issue simply is not needed. First, as Bayonne aptly observes, the State Equal Protection argument essentially is that the flaw it challenges is not in the in the legislation *per se*, but in the administrative agency's interpretation of it and the decision by the Department, which Bayonne claims was discretionary, to use outdated rather than current enrollment data.

I agree with Bayonne with respect to this first point regarding the standing issue. Second, I also agree with Bayonne that the petition, on its face, can be read to pursue claims on behalf of its students in that the crux of the complaint is that the reduction in State Aid funding impacted, obviously, on the offerings that can be made to students. Bayonne, I believe, easily could have added individual students as named petitioners to overcome the technical standing argument, and as I have indicated in the past, its decision not to do so is not fatal given the particular context of this case. Third, the

State offered nothing new with respect to this issue in its post-hearing brief sufficient for me to reject my own letter decision of August 5, 1997 wherein I upheld Bayonne's standing to bring the action. Although the State Board remand mentioned the standing issue, it did not reverse my determination. Fourth, even if a school district's standing independently to mount a State Constitutional challenge of the sort involved in this case is questionable, there are exceptions as cited by the State itself. *See, City of New York v. State of New York*, 86 *N.Y.S.* 2d 553,556 (1995). At page 556 of that decision certain exceptions to the rejection of standing of a creature of the legislature, such as a municipality or school district, were addressed. One is where the legislature, or an administrative agency's interpretation of legislation, adversely affects the instrumentality's proprietary interest in a specific fund. Bayonne points out that this is precisely what the instant case involves; namely, the amount of State Aid and foundation and categorical aid it will receive from a finite pot of money. I agree.

Accordingly, for these reasons I am determining that Bayonne has standing. I should also observe that the argument offered by Bayonne that the State should be equitably estopped from pursuing the standing issue is rejected. The right of the State to pursue the issue, even though I am rejecting it, was preserved, I believe, by the March 1998 decision of the State Board of Education. The State's argument in its brief that the passage of the CEIFA mooted Bayonne's decision is also rejected.

I turn now to the major issue in the case which, of course, is the question of whether, as Bayonne claims, the State, through the Department of Education, deprived it of equal protection by basing foundation and categorical aid for the school years 1993-94 through 1995-96 upon other than readily available more current enrollment figures and by using instead, what Bayonne describes as outdated or "old" enrollment data which failed to take into account, in Bayonne's case, enrollment increases during the particular school years in question. In other words, by freezing foundation and categorical aid to 1991-92, and not using updated enrollment figures for the October of the previous school year, Bayonne had the same amount of money but more students to educate, whereas districts which "lost" enrollment also had the same amount of

money but now had less students to educate. For example, Bayonne as of October 1992 had 328 more "net" students than a year earlier. Thus, it claims it should have received additional foundation aid of $1,178 per additional student, or a total of more than $386,000. Worse, says Bayonne, over the full three years involved here, the failure to update enrollment figures, which easily could have been achieved, ended up costing Bayonne over $2 million. Then, to compound this error, by not using the more current and available enrollment data, those districts which lost students from school year to school year, but received aid based upon the older data, actually were benefiting at the expense of districts like Bayonne. Testimony pertinent to this issue was offered by the petitioner and by the State at the hearing. The testimony offered by Bayonne came from Clifford Doll, Bayonne's School Business Administrator for over nineteen years. His testimony actually was fairly synopsized by petitioner in the post-hearing brief and I will relate it here with modifications.

Doll testified that prior to 1993-94, the methodology by which the Department of Education distributed State school aid was based upon enrollment figures from the previous October. For example, school aid for 1992-93 was based upon October 1991 enrollment figures. However, according to Doll, the methodology changed for 1993-94, 1994-95 and 1995-96. During those three school years no recognition of enrollment changes from October 1991 was implemented and under the State's method of interpreting the school aid appropriation legislation, the same amount of State school aid, with whatever adjustments were provided by the legislature was received by every school district regardless of actual enrollment changes since 1991.

Doll testified that with respect to the 328 net additional students enrolled in October 1992 over October 1991, most were transfer students from other school districts, be they public or from New Jersey private schools. Although he did not have a precise breakdown he estimated that at least 95% came from within New Jersey and many of those from public schools in Jersey City. In October 1993, Bayonne calculated it now had 650 more net students since 1991 and if more current enrollment figures had been used to calculate State school aid, as Bayonne insists it should have, it would

have received approximately $765,000 more in foundation aid for that school year. Then, in October 1994, according to Doll, Bayonne had 829 net more students than 1991 and by multiplying that number by $1178, the amount of aid Bayonne should have received was an additional $976,562. Thus, by adding the figures together, it was estimated by Doll that about $2.128,640 had been "lost".

Doll went on to note that this total did not include any calculation of increased entitlement to categorical aid for these so-called "new" students. Categorical aid relates to special education, at-risk and bilingual students. At least some of these, according to Doll, would have qualified for one or more types of categorical aid, which again Bayonne did not receive in the full amount due to the State's method of distribution. Doll felt that the State could have held each district "harmless" and still equitably considered enrollment changes simply by continuing to use a one year "lag" as it had done in the past. As he put it, "the money would have followed the students." Insofar as there were increases in newly enrolled students and the State was being told to hold at a steady level, he suggested the State could have factored out these new enrollees while still recognizing enrollment increases based upon interdistrict transfers. Alternatively, he opined, the State could have included newly enrolled students and reduced each district's aid proportionately based upon the availability of funds which he claimed is precisely what is done with "debt service" aid. As it was, however, districts from which students transferred (Jersey City, for example), continued to receive state school aid calculated on 1991 enrollment even though many had left the district. Districts like Bayonne, which were educating more students each year, were not receiving additional aid for them.

Doll also opined on whether respondent's recognition of interdistrict transfers in its state school aid distribution for the years in question would have resulted in more or less school aid being distributed. He observed that dependent upon whether the students transferring were, as an aggregate, going from districts receiving more state aid per pupil to those receiving less aid, or vice versa, the amount of state aid per pupil "gained" or "lost" would also have been relevant. Insofar as Bayonne was concerned,

given the influx of students from its neighbor, Jersey City, the result, he said, would have been a savings to the state because per pupil foundation aid provided to Bayonne is actually thousands of dollars less than that provided by Jersey City. He also pointed out that if respondents had required it, Bayonne and all other school districts could have provided enrollment information reflecting from where interdistrict transfer students came, so that distinctions between students from out-of-state, from private schools within the state and from other New Jersey public schools could have been made. Indeed, given the transfer trend from urban to suburban, respondents may have been distributing much too much money in state school aid for the years in question because the state continued to provide per pupil foundation aid to places like Jersey City. Had "the money follow the student" concept been followed, since the "moving" students disproportionately transferred to districts which received less per pupil foundation aid , the savings to the Department could, he claimed, have been in the millions of dollars.

Thus, in Bayonne alone, if 600 children, net, came to that school district by October 1994, from Jersey City, assuming per pupil foundation aid received by Jersey City in 1991 was $5000, the per student aid difference with respect to what Bayonne's per pupil foundation aid was would have saved over $2 million. Thus, he speculated that respondent's attempt to comply with the "hold harmless" provisions of the law actually may have cost the state millions of dollars in state school aid.

One witness testified for the State – Melvin Wyns, Director of the Office of School Finance in the Department of Education. His role with respect to the subject of state school aid was to apply the school aid formula and convey the information about state school aid to each individual school district.

In defense of the state's method of distribution of school aid for the three school years in question, he pointed to the specific language of the legislative enactments to demonstrate that the Department "had no choice" but to distribute state school aid exactly as it did. For example, the "Public School Reform Act of 1992" which set forth school aid amounts for 1993-94, provided that districts were to receive foundation aid

"in an amount equal to the product of the foundation aid which the district received in the 1992-93 school year multiplied by 1.04". (Ex. R-1.) He interpreted that language to mean that each district's foundation aid amount for 1992-93 was to be increased by 4%, regardless of any changes in actual enrollment due to transfers. Thus, Bayonne, as with all other school districts, received precisely the amount of foundation aid plus 4% as it had received during the prior school year. That was legislatively mandated and left no discretion in Wyns' opinion.

Exhibit R-6 sets forth legislative language which governed the state's calculation of state school aid for 1994-95. On page "D-6" the language concerning foundation aid provided that " . . . the foundation aid entitlement for each school district shall be the same as the entitlement amount for the district in 1993-94. Similar provisions for transition, special education, at-risk and bilingual aid are set forth in the same document as is transportation aid. Wyns testified that respondents logically interpreted this provision in accordance with its language. In other words, keep aid the same as that received the prior year. The legislative language for 1995-96 was the same as the prior year and respondents interpreted it in the same fashion. (Ex. R-9.) Therefore, according to Wyns, the Department really had no discretion in the method of state school aid distribution for the school years in questions. He did acknowledge that in the process of legislative development from Governor's budget message to legislative enactment – the Department played an important role in aiding the Governor and her staff in developing state school aid recommendations, and he agreed that the Governor's recommendations for foundation aid were not altered in any of the three years in question by the legislature. Further efforts to inquire into the policy decision-making in that respect was objected to, and I sustained many of the objections based upon the speculative nature of the cross-examination with respect to what "may have" or "should have" happened had the Department done or not done certain things in the budget development process.

Wyns insisted that the Department distributed foundation and categorical aid in the only possible way it could because the statutory language was clear. Also, when

discussing debt service, he conceded that the Department based its aid distribution on current debt owed rather than on debt owed the prior year. However, he pointed out that this, too, specifically was required by the statutory language.

Finally, Wyns conceded that insofar as property values remained relatively stable in the early and mid-1990's, it is unlikely that had the state used current enrollment figures and recalculated foundation aid entitlement using those figures, Bayonne would have received less aid that it did actually receive. He also conceded that if the Department had been "directed" to do so, it could have distributed foundation aid for the three year period at issue according to more current enrollment figures. However, he again pointed that no direction to do so was given either legislatively or by the executive branch.

Having reviewed the testimony of Doll and Wyns, and having considered the documentary evidence offered in the case, despite the sympathetic nature of Bayonne's argument in regard to the state school aid issue, I have concluded that it has failed to offer sufficient proof to establish: (1) that the challenged funding formulas created any improper classifications among school districts; (2) or that the legislature had any improper purpose in adopting the legislation; or (3) that the formulas had a disparate impact on Bayonne. In short, I do not find that Bayonne was "harmed" legally in any way by the statutes or by the administration of the formulas by the Department. Thus, having heard the evidence, I conclude that Bayonne's petition must be rejected. Indeed, it is clear to me that while the formulas may not have been perfect, and certainly could have been improved upon with respect to further benefiting a district like Bayonne the statutory scheme and its implementation represent a rational method of advancing a legitimate governmental purpose and is not marked by arbitrary, unreasonable or capricious action.

My own review of the formulas reveal they are facially neutral and result in no meaningful differential treatment among the State's "non-Abbott" school districts. The statutes refer consistently to "each school district" and do not qualify or classify them at

all. In short, all of the non-Abbott districts like Bayonne are treated exactly the same. It is well established that, "even if a statute has a disparate impact on a class of individuals, an equal protection challenge based upon the New Jersey Constitution will succeed only where the legislature intended to discriminate unlawfully against the class." *See, Rutgers Council of AAUP v. Rutgers*, 298 *N.J. Super.* 442, 452 (App. Div. 1997), *Certif. den.*, 153 *N.J.* 48 (1998); *see, also, Greenberg v. Kimmelman*, 99 *N.J.* 552 (1985). In this case, Bayonne simply did not prove the existence of any invidious purpose on the part of the legislature in enacting the funding formulas at issue, nor is any such purpose evident from the language of the statutes, or from the legislative history of the statute. The funding formulas, as I have indicated, do not violate any equal protection provisions of the New Jersey Constitution. I should note here as well that although Bayonne, both in its brief and elsewhere, points out it is not challenging any statutory provisions, only the agency's implementation of the law, I believe its petition did raise a challenge to the statute and, in any event, in order to complete the record I believe it is appropriate for me to deal with the facial constitutional challenge given the language of the State Board remand decision.

Nor in my judgment did Bayonne establish that its students were treated any differently under the funding formulas from other similarly situated districts or students in those districts. Although Doll testified that enrollment increased during the years in question, while state funding remained relatively constant, there was no hard evidence to show that any district was unfairly advantaged under the funding formulas. Wyns, on the other hand, presented evidence which demonstrated that public school enrollment actually increased state-wide during the school year in questions and, most importantly, all districts were treated equally under the distribution scheme. Certainly, then, Bayonne was not harmed in terms of State Constitution equal protection analysis.

Moreover, no testimony or evidence was presented to demonstrate that any student in Bayonne was treated differently than a student in any other district. The argument was simply one of hypothesis – less money and more students equals disparate treatment. Bayonne failed to prove either that the funding formulas

established classes among the non-added districts or their students, or that the funding formulas had a disparate impact on different types of school districts or students and/or that the legislature had enacted them with an invidious purpose. In this state, an equal protection claim brought under the New Jersey Constitution is judged by a balancing test. In other words, whether there is an appropriate governmental interest suitably furthered by the differing treatment. In this respect I refer to the decision In the Matter of the Grant of the Charter School Application of Englewood, 320 N.J. Super. 174, 237 (App. Div. 1999). In that case, at page 237, the Appellate Division noted that the three pertinent factors in striking the balance are: (a) the nature of the affected right; (b) the extent to which the government restriction intrudes upon it; and (c) the public need for the restriction. New Jersey courts examine statutes closely to determine whether there is any suspect classification involved; that is, a class which is "saddled with such disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See, Barone v. Department of Human Services*, 107 *N.J.* 355,365 (1987). Given those standards and definition, a school district like Bayonne which simply experiences an increase in student enrollment does not fall within a "suspect" class. Nor are students in the district a "suspect class". Indeed, even assuming the formulas create classifications for school districts based upon changing enrollments, in other words, a "difference", those are not a classification which merits any heightened attention from the courts.

Furthermore, although New Jersey long has adhered to the maxim that the more personal the right the greater the public need must be to justify governmental interference with the exercise of that right, *See, George Harms Construction Co., Inc. v. N.J. Turnpike Authority*, 137 *N.J.* 8,29 (1994), the mere right to receive public funds has never been considered personal in nature. Thus, in the *Barone* case, *supra*, the New Jersey Supreme Court upheld a statute that created classifications in the distribution of public assistance, noting as follows:

> It is the Legislature that has the duty to allocate the resources of the State. As long as the classification chosen by the Legislature rationally advances a legitimate governmental objective, it need not be the wisest, the fairest, or the one we would chose, it is not for the courts to determine if there is a better way to allocate resources. . . .
> *Barone v. Department of Human Services*, *supra*, 107 *N.J.* at 370.

Here it is clear that Bayonne's understandable interest in obtaining more aid from the state does not rise to the level of a "fundamental right." As long as the formulas rationally advance a legitimate governmental objective which I found that they do, there is no violation of state equal protection. Rather, the formulas advance the state's objective in maintaining an amount of state aid fairly to provide districts with an opportunity to offer a thorough and efficient education to their students, especially in light of the fact that the challenged formulas were adopted during what may be called a transition to new permanent funding formulas.

Nor, in my judgment, did Bayonne offer evidence concerning the second prong of the equal protection balancing test. That is, the extent to which the governmental restriction may intrude upon the affected right. Although Doll testified the school district received essentially the same amount of state funding each year, even though its enrollment increased, he did not testify nor did anyone else testify as to how, specifically, that situation impacted the district or its students adversely. He did not describe, for example, any particular harm to any student or students, or upon faculty or administration as a result of the funding formulas. Nor did Doll testify concerning the total school budget for the years in question and whether or not its revenue needs otherwise were satisfied by increases either in federal funding or in local tax levies. Bayonne does not dispute that during the school years in question it continued to provide its students with a thorough and efficient education. Thus, it is clear that neither the school district, nor its students, nor its faculty, nor its administration, nor any other party in interest, suffered any cognizable injury as a result of the distribution schemes. Rather, the funding formulas rationally advanced a legitimate governmental purpose by providing for distribution of school aid during a dynamic period of budgetary constraints and statutory changes. Also, it was a period during which court monitoring

of state efforts in this regard was particularly heightened. For a variety of reasons, the legislature determined for the 1993-94, 1994-95 and 1995-96 school years that it was necessary to freeze, essentially, the amount of aid distributed to certain public school districts that were described as non-Abbott districts. Since school enrollment increased state-wide, during the same period, the legislature could not very well tie state funding directly to state student enrollment without experiencing a substantial like increase in funding. The solution to this dilemma was to implement interim funding formulas which, while advancing the purpose of providing adequate funds to the public schools (perhaps not as much as they wanted); nevertheless, at the same time responsibly managed available resources. As the court noted in *Barone,* the legislature may allocate resources as it sees fit and so long as that reasonably advances, as here, a legitimate governmental objective, it passes constitutional muster, whether or not it is the "wisest", "fairest" or "best" plan possible.

I also **FIND** contrary to Bayonne's arguments, that the Department legitimately felt it had no discretion as to the manner in which the funds were to be distributed. Wyn's description of what the statute requires was clear in that regard. The mandatory nature of the funding distribution formulas may be found, for example, in Section 2 of the PSRA. The amount was plainly established by the legislature, no more and no less. Bayonne's attempt to accord great weight to the phrase "as defined" in the QEA is unavailing. That provision, as noted by the state respondents, refers only to the definition of foundation aid and not to the determination or calculation of that aid. In other words, reference is made to the QEA to explain what sort of funds fall under the term "foundation aid", but does not supply any different formula for calculating the amount of that aid.

Wyns, of course, testified at some length concerning his and the Department's interpretation of the interim funding formulas. He has over thirty years' experience in state school finance and personally was responsible for administering the funding statutes during the years in question. Based upon his experience, which I find to be substantial, he credibly testified that the Department felt it had no discretion in the

awarding of aid during the school years in question but was required to distribute it according to the explicit formulas as read by the Department. It is well settled that substantial deference should be given to the interpretation an agency gives to a statute that it is charged with implementing. In light of Wyn's many years experience in the area of school finance, his and the Department's interpretation of the provisions of the interim funding formulas are to be accorded such deference. In short, Bayonne simply has failed to show that respondent's interpretation of the laws was arbitrary, capricious, unreasonable or otherwise so improper as to warrant my setting aside those determinations and embarking upon the question of remedy. There is no liability, and therefore no reason to proceed any further.

Accordingly, for the reason set forth above, I **CONCLUDE** as follows:

1. Bayonne has the requisite standing to pursue its claims in this case and has done so on its own behalf and on behalf of its students.

2. Neither the statutes under which Bayonne received state school aid during 1993-94 through 1995-96, nor the method implemented by the Department of Education to distribute the same, violated any equal protection provision of the New Jersey Constitution.

3. There are no federal constitutional issues of concern with regard to this case.

4. Bayonne failed to demonstrate that the aforesaid state school aid distribution was the product of any invidious motive on the part of the legislature or the Department, or that any legally cognizable harm was suffered by Bayonne or its students by virtue of any action, or inaction, by the respondents.

Therefore, I hereby **ORDER** that the petition be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date upon which the transcript of this recommendation is mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

This now concludes the rendering of my oral initial decision in this case pursuant to *N.J.A.C.* 1:1-18.2. In accordance with the oral decision regulations, a transcript will be issued and filed with the agency head and mailed to the parties within fifteen working days of today's date and shall be mailed to the parties within that same period

I will not attach any separate witness list or appendix since I have made reference to the witnesses and to the pertinent exhibits during the course of this oral decision which I herewith conclude.

END OF TRANSCRIPT

OAL DKT. NO. EDU 3764-98

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on August 11, 2000.

August 23, 2000
DATE

Marie V. Hackett
MARIE V. HACKETT

August 23, 2000
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8-25-00
DATE

Debbie Antanitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 28 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/mvh

OAL DKT. NOS. EDU 3764-98 AND EDU 5721-94, 6021-94 AND 1431-97 (ON REMAND)
AGENCY DKT. NOS. 70-4/94 AND 150-5/94

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, PETITIONER, V. DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION, RESPONDENTS.	:	COMMISSIONER OF EDUCATION
AND	:	
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, PETITIONER, V. DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, BRIAN W. CLYMER, NEW JERSEY STATE TREASURER, AND NEW JERSEY STATE BOARD OF EDUCATION, RESPONDENTS.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.[1]

[1] As noted by the Administrative Law Judge in his decision (see Initial Decision at 4, 4.), Hackensack is no longer a party to this matter. Because of its extensive history, the matter's original caption was retained by the Commissioner for purposes of consistency and clarity.

Upon his independent and careful review of the record, which included transcripts of the hearing conducted at the OAL on June 3 and 4, 1999, the Commissioner determines to affirm the recommended decision of the OAL for the reasons well-expressed therein.

Accordingly, the decision of the OAL is adopted as the final determination in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 10 2000

Date of Mailing: OCT 11 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

339-00

VERA JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the District's decision to withhold her increment for the 1998-99 school year was arbitrary, capricious and unreasonable.

In light of the testimony and evidence presented, the ALJ concluded that the Board's discretionary exercise of its statutory authority to withhold petitioner's increment should not be overturned. The ALJ determined that petitioner failed to prove that it was unreasonable for the administrators who observed and evaluated her teaching performance during the 1997-98 school year to conclude that her performance was less than satisfactory. Thus, the ALJ concluded that petitioner did not sustain her burden of establishing that the Board's decision to withhold her increment was arbitrary, capricious and unreasonable. Petition was dismissed.

The Commissioner adopted findings and determination in Initial Decision as his own.

October 13,2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3804-99
AGENCY DKT. NO. 399-9/98

VERA JACKSON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: July 18, 2000 Decided: August 24, 2000

BEFORE **ELINOR R. REINER**, ALJ:

STATEMENT OF THE CASE

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City (District) to withhold her salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

Initially this matter was one of thirty-one consolidated cases filed with the Commissioner of Education on August 31, 1998. Count 25 of the multi-count petition alleged the wrongful withholding of the increment of petitioner, Vera Jackson. On September 21, 1998, the District filed its answer. On October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Jackson case, designated EDU 3804-99, on December 9, 1999, and February 8, 2000. Witnesses and exhibits are listed in the attached appendix.

FINDINGS OF FACT

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the District submitted a detailed review of the testimony and proposed findings of fact, which I largely have adopted herein.

1. Petitioner, Vera Jackson, was a first-grade teacher at Public School No. 15 during the 1997-98 school year.

2. Petitioner has been employed more than twenty-five years with the District. She has a master's degree in urban education and has earned more than thirty-two credits beyond the master's in general education courses. She taught basic skills for fifteen years in a small setting with only a few students.

3. Petitioner's teaching performance was formally evaluated on two separate occasions by two different administrators during the first half of the 1997-98 year. Petitioner was absent from work from January 1998 through the remainder of the school year on medical leave.

4. Annie Graham, then principal of P.S. No. 15, formally observed and evaluated petitioner on September 29, 1997, from 1:10 p.m. until 2:00 p.m. Petitioner was scheduled to teach a math lesson on counting with pennies.

5. Graham had been employed by the District for twenty-one years and is presently principal of P.S. 12. She previously served as an elementary school teacher, a basic skills teacher and an assistant principal. As principal of the school, her duties entailed observing and evaluating teaching staff members. At the beginning of the school year, Graham informed all teachers at the school that they would be monitored; she reviewed the matters that the evaluators would be looking for.

6. Petitioner's performance was evaluated in relation to five performance factors which are listed on the observation report (R-1). The factors are: (1) demonstrates proficiency in subject matter; (2) assesses needs and evaluates progress of pupils; (3) employs effective organization and planning; (4) utilizes effective instructional techniques; and (5) addresses affective domain.

7. Graham rated the teaching performance of petitioner, on September 29, 1997, as less than satisfactory on all five factors.

8. Graham rated petitioner as needing improvement in demonstrating proficiency in subject matter. She was not proficient or organized. She did not have the materials ready for the lesson and wasted valuable instructional time while she gathered materials and distributed them to the

students. Petitioner had the students sit in their seats while she went to her purse to gather pennies. Petitioner then asked a student to count the pennies. Nothing more was done with the pennies for the remainder of the lesson and there was no purpose for this activity.

9. Petitioner received a "needs improvement" rating in assesses needs and evaluates progress of the pupils because petitioner showed no indication of having assessed the needs and progress of students before or during the lesson observed by Ms. Graham on September 29, 1997. Petitioner gave all of the students the same activity for counting pennies. Although some of the students finished the activity quickly, no other activity was assigned to them by petitioner. Petitioner did not have folders available for the students, advising Ms. Graham that the folders were at home. Petitioner also had not updated her roll book.

10. Petitioner received an "unsatisfactory" rating for organization and planning. Petitioner had not planned to have the chips (manipulatives) ready. The materials were not prepared and at least twenty minutes were wasted when petitioner took the time to walk around to each student and hand out chips.

11. Petitioner received an "unsatisfactory" rating in instructional techniques. Petitioner did not introduce or model the lesson to get the students involved, but left them sitting at their seats waiting for direction while she went to her purse to get coins. Petitioner did not tell the students what the objective was. Some of the students did not understand what they were supposed to do with the chips and began playing with them.

12. Petitioner received an "unsatisfactory" rating in affective domain. Petitioner had trouble handling and relating to the students. Although rules were posted in petitioner's classroom, petitioner did not implement them in terms of consequences or incentives or to get the students to be

quiet. Petitioner did not show respect for the students; petitioner spoke to the students in a demeaning and negative fashion, making comments such as "you're giving me a headache."

13. Graham held a post-observation conference with petitioner on October 6, 1997, during which Graham gave petitioner a copy of the observation report (R-1) and reviewed each phase of the evaluation. Petitioner refused to read the evaluation, so Ms. Graham went over it in detail. Petitioner asked no questions during the conference.

14. Petitioner had taught sixth grade during the 1996-97 school year. Petitioner came to Ms. Graham and asked to teach the first grade, indicating that her forte and expertise were in the primary grades. Graham was able to meet petitioner's request and assigned her to the first grade in September for the 1997-98 school year.

15. Assistance had been offered to petitioner to help her with her performance, including the assignment of supervisory staff to help her. In addition, there was a staff development workshop held at the beginning of September, where portfolios, cooperative learning and other instructional strategies and the evaluation process were discussed. Petitioner's attendance during that school year hindered any assistance she could receive.

16. After the formal observation of September 29, 1997, Graham conducted informal observations of petitioner's class and continued to find petitioner having difficulties with the way she spoke to students and addressed discipline concerns.

17. Petitioner's class was observed on November 6, 1997, by Dawn Reynolds, assistant principal of P.S. 15 since 1993. Reynolds has served approximately twenty-three years with the District, as an elementary

school teacher, a Title I teacher of basic skills, head teacher with the adult learning center and assistant principal.

18. Reynolds arrived at petitioner's classroom at 11:45 a.m. for a scheduled language arts lesson, but no one was there. Reynolds waited at the classroom for approximately ten minutes until she heard voices, went around the corner and found petitioner speaking to a colleague. Thereafter, petitioner brought her students to the classroom, allowed the students to sharpen their pencils and go to the restroom before she began the lesson at 12:20 p.m., approximately thirty-five minutes later than scheduled. Reynolds remained in petitioner's class until 12:45 p.m.

19. On her formal observation report, Reynolds rated petitioner as in need of improvement in demonstrating proficiency in subject matter. The activities were not presented in a manner that the students could understand, and the lesson kept changing from one activity to another, in no sequential manner and with no continuity in the instruction. Petitioner did not give a clear introduction and did not take any steps to find out what skills the students already had. Also, petitioner did not teach basic skills enrichment as had been noted in her plan book. Petitioner did not give any student individual attention.

20. Reynolds rated petitioner as needing improvement in the area of assessing student needs and evaluating their progress. Petitioner could not assess whether the students were learning because many of the students were disengaged and not participating in the lesson. Also, petitioner jumped from one activity to the other. No objectives were written on the board to prepare the students and to focus their attention on what they were going to learn. Petitioner gave no individual assistance to any student. Further, petitioner's grading system was not consistent. Petitioner's roll book showed more grades in one subject than in another. There was no assessment instrument in place.

21. Petitioner received an "unsatisfactory" rating in employs effective organization and planning. Petitioner's lesson did not begin on time, had no beginning, no middle, no end. There was so much switching back and forth from one activity to the next that the students became disengaged. Petitioner did not call on any students to see if they understood the lesson. Petitioner continually reprimanded the students to get them back to the lesson, but to no avail. Petitioner wasted time in the distribution of materials and did not teach basic skills enrichment, which was on her schedule.

22. Petitioner received an "unsatisfactory" rating in instructional techniques. Petitioner started two activities and did not complete either one. She did not address the individual needs of the students; she gave no individual assistance nor did she group the students according to their levels. The students had difficulty understanding what they were supposed to do with the "bug wheel," and petitioner failed to motivate the students to keep them on task.

23. Petitioner received an "unsatisfactory" rating in the area of affective domain because of the negative fashion in which she addressed the students. Petitioner's only discipline plan for enforcing the class rules was negative; she kept reprimanding the students, making statements such as, "you won't see the outside until June."

24. Due to petitioner's less than satisfactory performance rating during the 1997-98 school year, Annie Graham recommend that petitioner's salary increment be withheld.

25. Based upon Graham's recommendation, the District withheld petitioner's salary increment for the 1998-99 school year.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Jackson's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Petitioner asserts that her increment denial was arbitrary, unreasonable and motivated by improper motives. Petitioner asserts that there was a serious question as

to the motives and credibility of her evaluators, Ms. Graham and Ms. Reynolds, who had a personal predilection against her. Petitioner contends that she taught her class in a sufficient manner considering that she learned of her new assignment only a few days before the first evaluation and received no specific training or guidance in her new assignment. According to petitioner, the District "simply threw her into the class and hoped for the best" and has "penalized her for its unreasonable staffing demand." Petitioner further argues that the criteria requirements were not clear to the evaluators and were not made clear to her. Further, petitioner contends that she was critiqued not based on objective District-wide criteria, but by the evaluators' own personal views of what a teacher should do. Petitioner further asserts that the District failed to set forth the guidelines the District uses to grant or deny increments.

I have considered petitioner's arguments and conclude that the evidence simply does not substantiate her contentions. Specifically, she failed to present any evidence to support her claim that the motives and credibility of the evaluators were insincere or that one or both of the evaluators had a personal predilection against her. Moreover, although petitioner now objects to the fact that she was assigned to teach the first grade at the beginning of the school year, it is clear that Ms. Graham was attempting to accommodate Ms. Jackson's request to teach the first grade rather than the sixth grade, which she taught the previous year. The District did not throw her into a new class and hope for the best, but actually accommodated her own request. Moreover, petitioner did not ask for specific training or guidance relative to her new assignment, and in fact refused to read the evaluation that Ms. Graham went over with her anyway. Further, assistance had been offered to petitioner to help her with her performance, including the assignment of supervisory staff, as well as a staff development workshop held in the beginning of September. Apparently, petitioner did not seek to correct her deficient performance. Moreover, it is obvious that petitioner's twenty-five years with the District, along with a master's degree in urban education and thirty-two credits beyond the master's in general education courses, should have prepared her to teach the first grade. Clearly, she should have possessed the requisite expertise to rectify the situation.

Further, petitioner's contention that she was not critiqued based upon objective District-wide criteria, but based on the evaluators' own personal views of what a teacher should do, is simply not borne out by the evidence. There are District-wide requirements which were understood and utilized by the evaluators, who sought to make them clear to Jackson.

In sum, petitioner's arguments amounted to excuses, which were unsupported by any independent evidence and were not reasonable or credible. Petitioner's effort to blame her poor teaching performance either on those who conducted the evaluations or other factors was unsuccessful. Petitioner failed to prove that it was unreasonable for the administrators who observed and evaluated her teaching performance during the 1997-98 school year to conclude that her performance was less than satisfactory.

Of import, petitioner's assertions were contrary to the testimony and evidence adduced by respondent's witnesses. Petitioner was evaluated by two independent and experienced evaluators who observed and evaluated petitioner's teaching performance on at least one occasion each. Their testimony, as substantiated by their reports, was clear, specific, credible and worthy of belief. It demonstrated that petitioner properly received unsatisfactory ratings and needed improvement in demonstrating proficiency in subject matter, assessing needs and evaluating the progress of the pupils, employing effective organization and planning, utilizing effective instructional techniques and addressing affective domain. Clearly, the evidence demonstrated that petitioner's teaching performance on the occasions on which she was observed was actually less than satisfactory in each performance category set forth in the evaluation form. Although one of the evaluations occurred at the end of September, the other evaluation occurred on November 6, 1997. Neither evaluation occurred on the first or second day of school. Moreover, Ms. Graham attempted to advise petitioner of what was expected of her and make suggestions for her improvement. In sum, petitioner was advised as to what was expected of her and was properly evaluated. Under the circumstances, I **CONCLUDE** that petitioner has not proven that the Board's decision to withhold her salary increment was arbitrary, capricious or unreasonable.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner is **DENIED** and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 24, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8/29/00
DATE

Debbie Anderson /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Vera Jackson

For Respondent:

Dawn Victoria Reynolds

Annie Graham

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Instructional Staff Observation Report for Vera Jackson, dated September 29, 1997 (3 pp)

R-2 Memo to Annie Graham from Vera Jackson, dated October 17, 1997 (2 pp)

R-3 Memo to Vera Jackson from A. Graham, dated October 21, 1997

R-4 Memo to A. Graham from Vera Jackson, undated

R-5 Instructional Staff Observation Report for Vera Jackson , dated November 6, 1997

R-6 Memorandum to D. Reynolds from V. Jackson, dated December 1, 1997

R-7 Memo to Vera Jackson from A. Graham, dated March 6, 1998

R-8 Instructional Annual Written Performance Report for Vera Jackson, dated May 14, 1998

R-9 Letter to Vera Jackson from Judi Granick, dated June 1, 1998

OAL DKT. NO. EDU 3804-99
AGENCY DKT. NO. 399-9/98

VERA JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of the record, which included transcripts of the hearing conducted at the OAL[1], the Commissioner determines to affirm the Administrative Law Judge's (ALJ) recommended decision as he concurs with the ALJ that the District's action of withholding petitioner's 1998-99 increment was a valid exercise of that body's discretionary authority. In this regard, it must be reemphasized that the decision of the District is entitled to a presumption of correctness and will not be overturned unless petitioner makes an affirmative showing, by a preponderance of the credible evidence, that such action was arbitrary, capricious or unreasonable. Here, the Commissioner concludes that the record amply establishes that the District's action in withholding petitioner's increment was based on validly perceived deficiencies in her performance during the 1997-98 school year and, as such, petitioner has failed to sustain her burden.

[1] Hearing dates were December 9, 1999 and February 3, 2000.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons well-stated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 13 2000

Date of Mailing: OCT 13 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

340-00

S.W., on behalf of minor child, K.E.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

October 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6382-00

AGENCY DKT. NO. 276-8/00

S.W. o/b/o K.E.,

Petitioner,

v.

BOARD OF EDUCATION OF ASBURY PARK AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents.

S.W. o/b/o K.E., petitioner, *pro se*

Kathleen Smallwood-Johnson, Esq., for the respondent, Board of Education of Asbury Park

James P. Granello, Esq., for the respondent, Board of Education of Red Bank Regional High School District

Record Closed: August 29, 2000 Decided: August 31, 2000

BEFOR **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the request of the petitioner, S.W., that her daughter, K.E., be placed in the performing arts program at Red Bank Regional High School. Petitioner alleges that her daughter has the legal right to attend that program, and asked that the Asbury Park School District pay the tuition for her daughter's attendance at the performing art program for the 1999-2000 and 2000-01 school years, and that the Red Bank Regional School District accept her daughter in the program for the 2000-01 school year. The petitioner requested a hearing and asked for emergent relief as to the placement for the 2000-01 school year. The matter was transmitted to the Office of Administrative Law (OAL) on August 17, 2000, for a hearing pursuant to *N.J.S.A.* 52:4B-1 to –15 and *N.J.S.A.*52:14F-to –13.

The matter was scheduled for argument as to the emergent relief request on August 29, 2000. On that date, the parties conferred and agreed to a settlement of the entire matter. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 31, 2000
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

9-1-00
DATE

Deborah A. Gilmartin
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 5 - 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

Agency Ref No. 276-8/00
OAL Dkt No EDU05
6382-00S

S.W. on behalf of K.E.
Petitioner

V.

BOE of Asbury Park Board of Education
and Red Bank Regional H.S. District

Settlement

1. Respondent A.P.B.O.E. will agree to pay one-half (1/2) tuition for K.E. for the 1999 - 2000 year ~~for~~ to Red Bank Regional.

2. Respondent A.P.B.O.E. will agree to pay one-half (1/2) tuition for K.E. for the 2000 - 2001 year ~~for~~ to Red Bank Regional and transportation.

3. The parents of S.W. agree to register K.E. as a student in the Asbury Park School District.

4. The tuition due and owing from the 1999-2000 for Red Bank Regional will be frozen pending the case before Judge Duncan. ~~$4200.00~~

5. The Parents of K.E. agree to pay the tuition if the decision from Judge Duncan ~~regarding~~ does not mandate the ~~tuition payment~~ Asbury Park School District

to pay the tuition.

6. Red Bank Regional agrees to work with Asbury Park to arrange an appropriate program/schedule for KE.

7. Asbury Park BOE agree to pay a lump sum. pursue

Susan & Richard Witkes
Parents of KE

Asbury Park BOE Atty

William J. Shannon
Patti Shannon
Asbury Park BOE

the Red Bank Regional HS Bd of Education

August 29, 2000

OAL DKT. NO. 6382-00
AGENCY DKT. NO. 276-8/00

S.W., on behalf of minor child, K.E.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

The record, Settlement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] The matter [2]is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 16 2000

Date of Mailing: OCT 16 2000

[1] The Commissioner clarifies that although paragraph five provides for a payment contingent upon a particular outcome in a case pending before ALJ Duncan, the Administrative Law Judge's decision therein does not become final until the agency head determines to adopt, reject or modify that decision. *N.J.A.C.* 1:1-18.6.

[2] Although transmitted on application for emergent relief, as the Initial Decision indicates, the parties agreed to settle the entire matter.

341-00

BEATRICE THOMAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

October 16, 2000

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 10742-97

AGENCY DKT. NO: 418-10/97

BEATRICE THOMAS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Robert T. Pickett, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: July 28, 2000 Decided: August 24, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 15, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/24/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

9-1-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 5 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/g

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COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 10742-97N
Agency Ref. No.418-10/97

Beatrice Thomas,

Petitioner,

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

—vs-

State-Operated School District for the City of Newark,

Respondent.

The State-Operated School District of the City of Newark ("Newark" or "District") and Beatrice Thomas ("Petitioner" or "Thomas") agree to the following terms in full resolution of this matter:

WHEREAS, Thomas disputes the basis for the increment withholding for the 1997-1998 school year, and

WHEREAS, Thomas retired as of June 30, 1998, and

WHEREAS, the parties further agree that it is in the public interest to enter into this

agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation,

NOW, THEREFORE, the parties agree as follows:

1. The District agrees to remove from Ms. Thomas' employment record documentation referencing the withholding of her increment and to reflect Ms. Thomas as having retired in good standing effective as of June 30, 1998.

2. Upon approval of this Agreement, Thomas will withdraw her appeal of the 1997-1998 increment withholding, with prejudice.

3. This agreement is subject to the approval of the State District Superintendent.

4. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Robert T. Pickett, Esq., Attorney
For Petitioner BEATRICE THOMAS
Dated:

State-Operated School District
of the City of Newark
By:
Dated:

JUL 20 2 28 PM '00

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++ADMITTED IN NY & GA ONLY

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BRETT M. POPOLOW
JASON L. JURKEVICH
ELNARDO J. WEBSTER II
MARGUERITA B. DOLATLY
JAMES E. JASAITIS
JOSEPH A. BECHT
ROBERT J. FARKAS
RICHARD T. CADIGAN
KATHLEEN CROCCO
KENNETH HAYES
DEBRA M. LIGHTNER
N. ALEXIS THOMAS□
VINCENT R. LODATO
STEVEN MAGER
BRIGETTE N. SHRANK
WILLIAM LOUIS HURLOCK
ANNE BUCKLEY
MATTHEW J. HENDERSON□
DEANE E. CHONKO
STEVEN FLEISCHER
JONATHAN S. JEMISON
ROBERT PAUL MEIER
JONATHAN SIEGEL

PLEASE REPLY TO NEWARK

July 18, 2000

Honorable Jeffrey Gerson, ALJ
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

JUL 20 2000

Re: Lillian Brown v. NPS; Manibhai Patel v. NPS; Beatrice Thomas v. NPS

Dear Judge Gerson:

Enclosed please find fully-executed Stipulations of Settlement, Waiver and Release in connection with the above matters.

Thank you for your assistance.

Very truly yours,

Cherie L. Maxwell

CHERIE L. MAXWELL

CLM/mw
Enclosures

2C

OAL DKT. NO. EDU 10742-97
AGENCY DKT. NO. 418-10/97

BEATRICE THOMAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 16 2000

Date of Mailing: OCT 16 2000

342-00

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, (Supplemental Funding),	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

October 16, 2000

OAL DKT. NO. EDU 9617-99
AGENCY DKT. NO. 213-8/99

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, (Supplemental Funding),	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present matter, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter and the case is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 16 2000

Date of Mailing: OCT 18 2000

343-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ZENA MITCHELL,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

October 16, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3765-98
AGENCY DKT. NO. 64-3/98

IN THE MATTER OF THE TENURE HEARING OF ZENA MITCHELL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Cherie L. Maxwell, Esq., for the State-Operated School of the City of Newark
(Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Claudine M. Liss, Esq., for Zena Mitchell

Record Closed: July 18, 2000 Decided: August 29, 2000

BEFORE **RICHARD McGILL,** ALJ

The State-Operated School District of the City of Newark (School District) filed charges with the Commissioner of Education against Zena Mitchell (respondent),whom it employees as a tenured teacher. The matter was transmitted to the Office of Administrative Law on April 28, 1998, for determination as a contested case.

This matter was consolidated with Zena Mitchell v. State-Operated School District of the City of Newark, OAL Dkt. No. EDU 10967-97, Agency Dkt. No. 424-10/97, which involved a withholding of respondent's increment for the 1997-98 school year based upon the same

concerns as the tenure charges. After the School District restored the increment, respondent withdrew her petition.

Prior to hearing, the parties submitted a Settlement Agreement which resolves the dispute with respect to the tenure charges and also a civil action commenced by respondent in the Superior Court of New Jersey, Law Division, Essex County. The Settlement Agreement provides for the withdrawal of the tenure charges in this matter. The parties also submitted a Stipulation, which sets forth the reasons for the withdrawal of the tenure charges. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 29, 2000
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

9-1-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 5 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") dated this 9th day of June, 2000, is by and between Zena Mitchell ("Mitchell") and the State-Operated School District of Newark ("School District").

WHEREAS, Mitchell commenced a civil action against the School District and Kathryn Gadson (collectively "Defendants") in the Superior Court of New Jersey, Law Division, Essex County, entitled Zena Mitchell v. State-Operated School District of Newark, et al., Docket No. ESX-L-4596-98 ("Civil Action"), asserting certain claims arising out of Mitchell's employment relationship with Defendants; and

WHEREAS, Defendants disputed the claims asserted by Mitchell and denied that they engaged in any wrongful conduct toward Mitchell and denied that Mitchell was entitled to any relief against them; and

WHEREAS, the School District certified tenure charges against Mitchell with the Commissioner of Education of New Jersey ("Commissioner") and upon certification of such charges Mitchell was suspended without pay for 120 days and thereafter has been suspended with pay; and

WHEREAS, Mitchell filed a petition with the Commissioner challenging the School District's action to withhold her salary increment for the 1997-1998 school year;

WHEREAS, Mitchell filed an answer denying the tenure charges certified by the School District and the charges were transmitted to the Office of Administrative Law and assigned OAL Docket No. EDU 3765-98 ("Tenure Charges"); and

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WHEREAS, the School District filed an answer denying the allegations in the petition, and this action was transmitted to the Office of Administrative Law and assigned OAL Docket No. EDU 10967-97, Agency Ref. No. 424-10/97 ("Increment Withholding Action"); and the Tenure Charges and the Increment Withholding Action have been consolidated by the Office of Administrative Law;

WHEREAS, in June of 2000 the School District voluntarily restored Mitchell's 1997-1998 salary increment and Mitchell voluntarily withdrew her appeal; and

WHEREAS, Mitchell and the School District desire to reach an amicable settlement of the Civil Action, the Tenure Charges and the Increment Withholding Action;

NOW, THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

1. Withdrawal of Tenure Charges and Dismissal of Increment Withholding Action. The School District agrees to withdraw the Tenure Charges, subject to approval of this settlement by the Commissioner. Both parties agree to take any and all steps necessary to obtain such approval, including, but not limited to submitting to the Commissioner a joint request for approval and the Stipulation attached hereto as Exhibit "A" in support of such request.

2. Dismissal of Civil Action. Promptly upon receipt of the Commissioner's decision approving this settlement, Mitchell shall take any and all steps necessary for the Civil Action to be dismissed with prejudice.

3. Resignation and General Release.

A. Mitchell shall submit a letter of resignation/retirement voluntarily terminating her employment with the District, effective on the date Mitchell receives approval and confirmation from the Division of Pensions and Benefits that her service credits have been purchased. This letter shall be held in escrow by Cherie L. Maxwell, counsel for the District and shall be provided to Ms. Maxwell upon her receipt of the Commissioner's decision approving this settlement. Once Ms. Maxwell receives written confirmation from Mitchell's attorney, Claudine M. Liss, Esq., that the service credits have been purchased and approved. The letter may be released to the District effective that date.

B. Mitchell shall execute and deliver to the School District a General Release in the form attached hereto as Exhibit "B" (General Release). This General Release shall be held in escrow by Cherie L. Maxwell, counsel for the District and shall be provided to Ms. Maxwell upon receipt of the Commissioner's decision approving the settlement. Once Ms. Maxwell receives written confirmation from Mitchell's attorney, Claudine M. Liss, Esq., that the service credits have been purchased and approved, the General Release may be provided to the District.

4. Settlement Payments. Upon receipt of Mitchell's resignation/retirement letter and the General Release, both of which shall be held in escrow by Cherie L. Maxwell, counsel for the District, until Mitchell and her counsel receive conformation that the pension service credits have been paid to and confirmed by the Division of Pension and Benefits, the retirement shall become effective at that time, the School District shall provide Ms. Mitchell with the following settlement payments:

A. It shall pay Mitchell One Hundred Thousand ($100,000.00) Dollars in a lump sum and shall report such payment to the Internal Revenue Service ("IRS") as "other income" and not as "wages"; and Mitchell agrees to indemnify and hold the School District harmless against any and all liability which may arise out of its failure to withhold taxes or meet any employer obligation relating to the payment of wages, including but not limited to any liability for interest or penalties imposed by the IRS or any other authority.

B. It shall continue to pay Mitchell's salary and make all applicable pension contributions on her behalf until Mitchell has purchased her pension service credits and received confirmation from the Division of Pension and Benefits.

C. It shall pay Mitchell an amount equivalent to all salary which was not paid to her during the period of her suspension without pay (March 15 to September 15, 1998) minus all applicable withholdings and deductions; and it shall make pension contributions on her behalf to the Teachers Pension Annuity Fund equivalent to the contributions which would have been made during said period but for the suspension without pay; and

D. Upon election by Mitchell to continue health insurance coverage after retirement/resignation, pursuant to the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), the School District shall pay all applicable premiums on Mitchell's behalf for continuation coverage under the School District's group health insurance plan, at the level of coverage in effect the date of retirement/resignation and in accordance with the same terms which would apply if Mitchell were a current employee of the School District for 18

months after the effective date of her resignation (the "COBRA Period") provided, however, that all benefits shall cease on any date earlier than that set forth herein on which Mitchell becomes covered under another group health insurance plan that does not contain an exclusion for pre-existing conditions. Mitchell agrees to notify the School District of the date on which such other coverage will be in the event that such date is during the COBRA period.

5. Expungement of Record. Upon receipt of Mitchell's letter of resignation, the School District shall remove any reference to the 1997-1998 increment withholding or the Tenure Charges from Mitchell's personnel file.

6. Reference. The School District's response to any request for a reference with respect to Mitchell shall be limited to the dates of her employment and her salary upon termination.

7. Compromise. The parties agree and acknowledge that this Agreement is the result of a compromise and is not to be construed as an admission of liability, wrongdoing or responsibility on the part of the School District or its predecessor, any successors, assigns, agents, officers, employees, agents or contractors. The School District expressly denies any such liability, wrongdoing or responsibility and intends by this Agreement merely to avoid further litigation.

8. Binding Effect. The parties agree to be bound by this Agreement without limitation, restriction or reservation. Anyone who succeeds to the rights and responsibilities of the parties, such as heirs, assigns, transferees, successors, the executor of Mitchell's estate or any other party who succeeds to the interests of either party is also bound.

9. Confidentiality of Agreement. Except as provided herein, the terms of this Agreement shall remain confidential and shall not be directly or indirectly disseminated in any manner whatsoever to any person or entity not a party to this Agreement, except: i) as mutually agreed upon in writing by the parties to this Agreement; ii) pursuant to a valid order of a court or a lawfully issued and enforceable subpoena; or iii) as required by law or regulation. Mitchell may disclose the terms of this Agreement to her attorneys, accountants and/or financial advisors, and the School District may disclose the terms of this Agreement to its attorneys and auditors and any officer or employee of the School District or the New Jersey Department of Education with a legitimate need for such information, provided that prior to any such disclosure, the individual receiving the information shall be advised that the information must be treated confidentially. If either party receives a request or subpoena seeking production or disclosure of the terms of this Agreement, she or it shall give prompt written notice to the other party of the request or subpoena in order to allow the other party an opportunity to resist the request or subpoena.

10. Breach. In the event that either party breaches any of its or her duties or promises under this Agreement or the General Release, the aggrieved party shall have the right to all remedies permissible under law, including, but not limited, damages, legal and equitable relief and any other relief which a court may order.

11. Enforceability. If a court of competent jurisdiction decides that any provision of this Agreement is not enforceable in the manner set forth in this Agreement, the parties agree that it is their intention that such provision should be enforceable to the maximum extent possible under applicable law and that such provision shall be

reformed to make it enforceable in accordance with the intent of the parties. If any provision of this Agreement is held to be invalid or unenforceable, such invalidation or uneforceability shall not affect the validity or enforceablity of any other provision of this Agreement.

12. No Assignment. Neither this Agreement nor any rights hereunder may be assigned by Mitchell, except by will or by operation of the laws of intestate succession.

13. Entire Agreement. This Agreement and the General Release are the entire agreement between Mitchell and the School District and supersedes any existing oral or written agreements with respect to Mitchell's employment with the School District; except for the collective bargaining agreement between the Newark Public Schools and the Newark Teacher's Union, Local 481 AFL-CIO ("Collective Bargaining Agreement"). No representations regarding the School District's relationship with Mitchell or any obligations to Mitchell have been made or survive except as set forth herein or in the Collective Bargaining Agreement.

14. Amendment. This Agreement cannot be amended, supplemented or modified and no provision may be waived, except by a written instrument executed by the party against whom enforcement of any such amendment, supplement, modification or waiver is sought.

15. New Jersey Law. This Agreement and the General Release shall be interpreted in accordance with the laws of the State of New Jersey without regard to its conflicts of laws principles.

16. Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, each of which so executed and delivered shall be an original.

IN WITNESS WHEREOF, the School District, by its duly authorized representative, and Zena Mitchell have executed this Agreement as of the dates below.

Dated: 6/9/00

ZENA MITCHELL

STATE-OPERATED SCHOOL DISTRICT OF NEWARK

Dated:

By: _____
MARION BOLDEN
STATE DISTRICT SUPERINTENDENT

OAL DKT. NO. EDU 3765-98
AGENCY DKT. NO. 64-3/98

IN THE MATTER OF THE TENURE	:	
HEARING OF ZENA MITCHELL,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

The record of this matter, Initial Decision of the Office of Administrative Law (OAL) and the Stipulation[1] and Settlement Agreement have been reviewed. Initially, the Commissioner notes that once tenure charges are certified to him, such charges may be withdrawn or settled only with his approval. Pursuant to *N.J.A.C.* 6A:3-5.6(a), any proposed withdrawal or settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled, *In re Cardonick*, 1990 *S.L.D.* 842, 846. Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters.

Here, respondent, a tenured teacher, is charged with unbecoming conduct by virtue of her alleged engagement in repeated, inappropriate and unjustified physical contact with students under her care; her failure to attend required training relating to effective student

[1] The Stipulation, although not appended to the Initial Decision, was referenced therein. It is made a part of the Commissioner's decision.

techniques or crisis intervention; and her failure to properly supervise her students. (Stipulation at 1) The District now affirms that:

> [it] does not believe that it can sustain its burden of proof in this tenure proceeding. The settlement of this matter under the proposed terms could save the District and the public substantial legal fees which would be necessary to proceed with this matter and would protect the District from the possibility of a substantial jury verdict, including punitive damage. (Stipulation at 6)

Thus, the Agreement provides, in part, that respondent shall dismiss her civil claim against the District and submit a letter of resignation on the date she receives "approval and confirmation from the Division of Pension and Benefits that her service credits have been purchased." (*Id.* at 5) The District has agreed, *inter alia*, to withdraw its charges against respondent; reimburse her for salary and pension contributions lost while she was suspended without pay from March 15, 1998 until September 15, 1998; continue to pay her salary and make applicable salary contributions on her behalf until she receives approval and confirmation from the Division of Pension and Benefits that her service credits have been purchased; pay respondent a lump sum of $100,000 to be applied to the purchase of such service credits; pay applicable health insurance premiums, if respondent so elects, for 18 months after the effective date of her resignation and retirement; remove any reference to her 1997-98 increment withholding or tenure charges from her file; and respond to any request for a reference for respondent by providing only the dates of her employment and her salary upon termination of employment. (*Id.* at 5, 6)

It is clear that where charges are made against any tenured employee of a district, the Commissioner anticipates that the charges are fully investigated and evaluated, vis-a-vis the evidence thereto, prior to the district bringing the weight of the legal process down on the teaching staff member:

> Certification of tenure charges by a [district] is predicated on the [district's] belief that the charges *** and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. *N.J.S.A.* 18A:6-11.
>
> On the basis that the [district] believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide [District] personnel, and hire legal counsel to obtain relief; *i.e.*, dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. *Where it is in the public interest to fully determine the issues, a plenary hearing is required.* (emphasis added) (*Cardonick* at 850)

Notwithstanding the parties' bare assertion that this settlement protects the public's interest, the Commissioner disagrees. In tenure matters such as this, where a teaching staff member loses tenure and/or is dismissed for inefficiency, incapacity, conduct unbecoming or other just cause, the case is forwarded to the State Board of Examiners for a determination as to possible revocation or suspension of the teaching staff member's certificate.[2] Upon such referral, the State Board of Examiners "shall determine by public vote whether or not the offense *[as] proven* is of such a nature as to warrant revocation or suspension consideration, or dismissal of the case." (emphasis added) (*N.J.A.C.* 6:11-3.6) Therefore, even if the agreement had properly acknowledged respondent's awareness of the Commissioner's duty to refer this matter to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6, absent any factual findings on the record with respect to the specific allegations, and noting that respondent continues to dispute the most serious allegations, the Commissioner cannot find that the public good shall be served. The Commissioner underscores that:

[2] The Commissioner notes that there is no indication in the proposed agreement that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations for possible revocation of certificate.

> the mere fact that one of the terms of a proposed settlement *** calls for the teaching staff member's resignation does not in and of itself assure [the Commissioner] that the *Cardonick* standards have been met because concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.*** (*In Re Robert Barnes Driscoll, Board of Education of Cape May County Vocational-Technical School District, Cape May County*, November 10, 1999, Slip Opinion at 5)

Furthermore, the Commissioner observes that respondent's resignation from the District is essentially contingent upon action to be taken by the Department of Treasury, Division of Pensions and Benefits. (Settlement Agreement at 3) Recognizing that any settlement agreement effectuated by parties to a dispute must be fully dispositive of all issues in controversy so that the agreement may, upon the Commissioner's approval, be deemed a final decision, *N.J.A.C.* 1:1-19.1, the Commissioner cannot approve a settlement where a material term, such as respondent's resignation, is dependent upon the satisfaction of conditions *by another agency*, and where the parties make no provision for that condition's nonoccurrence. In this connection, the Commissioner further notes that the proposed agreement provides no explanation of how the $100,000 lump sum payment to respondent for the purchase of her service credits is consonant with the public's interest, or more specifically, how this particular sum was calculated.

Next, with respect to the term wherein the District agrees to respond to any request for a reference for respondent with only the dates of her employment and her salary upon termination of employment (Settlement Agreement at 5), the Commissioner cautions that although the District is not specifically required to state publicly the reasons for separation, it must make such information available upon request, pursuant to Executive Order No. 11 (1974). This Order states, in pertinent part, that the following information be public:

> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service*

and the reason therefor; and the amount and type of pension he is receiving;

b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released. *** (emphasis added)

The Commissioner cannot sanction terms in a settlement that would infringe in any way on the right of the District to be fully forthcoming in responding to any inquiries that might arise concerning respondent's employment with the District. *See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County*, decided by the Commissioner May 11, 1989.

Finally, with respect to the parties' confidentiality clause in term nine of the proposed agreement (Settlement Agreement at 6), the Commissioner stresses that although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or, for that matter, any other individual to such confidentiality provision. The Commissioner's decision in this matter is a public record.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of the settlement documents consistent with this decision, which revisions shall specify that respondent *will not* oppose proceedings before the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6. However, if the parties are unwilling or unable to reach accord on a modified agreement for

submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 16 2000

Date of Mailing: OCT 18 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

343-00

EDU #3765-98
C # 343-00
SB # 66-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ZENA MITCHELL,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

Decided by the Commissioner of Education, October 16, 2000

For the Respondent-Appellant, Claudene M. Liss, Esq.

For the Petitioner-Cross Appellant, Sills, Cummis, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

This matter involves a proposed settlement of both tenure charges that had been certified against Zena Mitchell (hereinafter "respondent") by the State-Operated School District of the City of Newark (hereinafter "District") and a civil action that had been commenced by respondent in Superior Court of New Jersey, Law Division, Essex County. The tenure charges alleged that respondent had engaged in repeated inappropriate and unjustified physical contact with students, that she had failed to attend required training related to effective student techniques or crisis intervention, and that she had failed to properly supervise her students. The civil suit was filed after the Commissioner rendered a decision in another matter arising from the District's action in withholding respondent's increment for 1995-96. In that decision, the Commissioner adopted the findings of the Administrative Law Judge and concluded that the District

3/7/01

had acted in bad faith to withhold respondent's increment for 1995-96 in retaliation for the discrimination claims she had filed against it.[1] Similarly, in her civil action, respondent alleges that the District retaliated against her for a complaint she had filed under the New Jersey Law Against Discrimination. In the civil suit, respondent claims that such retaliation was in violation of the Conscientious Employee Protection Act ("CEPA"), and she is seeking relief, including punitive damages, under that Act.

The settlement was proposed by the parties after the tenure charges against respondent had been transmitted to the Office of Administrative Law ("OAL"). The proposed settlement was reviewed by the ALJ pursuant to N.J.A.C. 1:1-19.1. Finding that the parties had voluntarily agreed to the settlement and that the settlement both disposed of all issues in controversy and was consistent with law, the ALJ concluded that the settlement met the requirements of N.J.A.C. 1:1-19.1 and should be approved.

The Commissioner rejected the ALJ's recommendation, stating that he was compelled to do so because he was not satisfied that the settlement met the standards set forth in In re Cardonick, decided by the Commissioner of Education, April 7, 1982, aff'd by the State Board of Education, April 6,1983. The Commissioner remanded the matter to OAL for revision of the settlement. In doing so, the Commissioner specifically required that the agreement be revised to provide that "respondent will not oppose proceedings before the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6." Commissioner's Decision, slip op. at 8 (emphasis in the original).

[1] See Zena Mitchell v. State-Operated School District of the City of Newark, decided by the Commissioner of Education, June 30, 1997. We note that by interlocutory decision of March 12, 1999 in the tenure matter, the Administrative Law Judge issued an order taking official notice of the Initial Decision in the increment matter and directing that the doctrine of collateral estoppel apply to the factual findings and conclusions set forth in that decision.

The Commissioner also construed the settlement as making respondent's resignation contingent on action by the Department of Treasury, Division of Pensions and Benefits, and rejected the settlement on the grounds that he could not approve a settlement where a material term was dependent on the actions of another agency. He further indicated that the District's agreement to respond to requests for references with only the dates of respondent's employment and her salary might infringe on its obligation to disclose upon request the reason for her separation from employment as required by Executive Order No. 11 (1974). Finally, the Commissioner expressed concern with the parties' confidentiality clause, stressing that they could not bind anyone other than the parties by such provision.

Respondent appealed to the State Board of Education, seeking approval of the proposed settlement. Respondent contends that the Commissioner could not require her to waive her right to oppose proceedings before the Board of Examiners as a condition of settling her tenure matter.

The District cross-appealed, also seeking approval of the settlement. Like respondent, the District argues that the Commissioner could not properly require respondent to agree not to oppose proceedings before the Board of Examiners. In addition, the District contends that the Commissioner misconstrued the settlement and that it does in fact meet the Cardonick standards. In this respect, the District argues that, contrary to the Commissioner's interpretation, the terms of the agreement do not require the Division of Pensions to take any action in order for the agreement between the District and respondent to be effectuated. Rather, the agreement requires that respondent use the lump sum payment of $100,000 from the District to purchase

service credit and to confirm that she has complied with this term by providing the notice of purchase that she will receive from the Division of Pensions. The District also points out that the agreement limits its response to inquiries concerning respondent except as required by law or regulation so that it does permit the District to comply with Executive Order No. 11.

The District further maintains that the proposed settlement is in the public interest. It stresses that the tenure charges would be difficult to prosecute because of the finding made by the ALJ and adopted by the Commissioner in deciding respondent's challenge to the District's action in withholding her increment for 1995-96, i.e., that the District acted in bad faith and in retaliation against respondent for filing discrimination claims. This finding, argues the District, would also affect the District's ability to defend itself in the civil action that respondent initiated under the Conscientious Employee Protection Act. By disposing of both the tenure charges and the civil action and by providing for a lump sum payment of $100,000, the proposed settlement allows the District to avoid the potential costs that would attend litigating these matters, as well as the risk that respondent would be awarded punitive damages in the civil action. This outcome, asserts the District, is in the public good.

We agree with the parties that the proposed agreement meets the standards established in Cardonick, supra. As we stressed in In the Matter of the Tenure Hearing of Lenore M. Allen, decided by the State Board of Education, November 1, 2000, Cardonick requires that a proposed tenure settlement be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent by the district board and teacher to the agreement, and the ALJ's findings that

the agreement is consistent with the public interest and was entered into by the teacher with a full understanding of his or her rights, including the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certification. It does not, however, require that a respondent relinquish the right to defend herself before that board. Moreover, as we indicated in Lenore Allen, principles of due process would not permit either the Commissioner or the State Board to condition approval of a proposed tenure settlement on such an agreement. Lenore Allen, supra, slip op. at 4.

Moreover, as expressed by the State Board of Education:

> ...dismissal from a tenured position and revocation of certification serve different purposes and...the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. E.g., In the Matter of the Revocation of the Teaching Certificates of John Ahern, rev'd and remanded by the State Board of Education, August 5, 1987 (subsequent history omitted).
>
> N.J.S.A. 18A:6-38 confers original jurisdiction on the State Board of Examiners to act under rules prescribed by the State Board of Education to revoke the certificates that it issues. Consequently, it is the determination by the State Board of Examiners that may preclude a teacher who has been dismissed from tenured employment from future employment in any school district in New Jersey. Accordingly, the pertinent regulations set forth procedures under which cases involving offenses of such nature as to warrant suspension or revocation of certification may be decided by the State Board of Examiners following an appropriate hearing. N.J.A.C. 6:11-3.6. Those procedures include transmittal to the Office of Administrative Law, thereby enabling the State Board of Examiners to resolve cases involving disputes as to the material facts. Id. Such disputes may involve, where appropriate, facts relating to the conduct underlying the tenure charges. Id. Given the statutory authority possessed by the State Board of Examiners and the regulations we have adopted to

> implement that authority, we are confident that upon referral of this matter to the State Board of Examiners, that board will insure that the interests of the public are protected.

Lenore Allen, supra, slip op. at 5-6.

Hence, all that was required of the parties in this case with respect to referral to the State Board of Examiners was the inclusion in the proposed settlement of an acknowledgement by respondent that one of the implications of the settlement is referral to the Board of Examiners and that, consequently, there is the potential for that board to initiate proceedings to revoke or suspend her certification. Although not included in the proposed settlement executed by respondent and the State District Superintendent on June 9, 2000, such acknowledgement is set forth in the Stipulation of Agreement executed by the attorneys for the parties on June 26, 2000. In that the final version of the agreement, by which respondent is bound, includes the required acknowledgement, this requirement of Cardonick is satisfied.

Upon review of its terms, we find that the final version of the agreement also conforms to the requirements of Cardonick in all other respects. As more clearly set forth in the Stipulation of Agreement than in the earlier version, the agreement is not dependant on any action by the Division of Pensions. Rather, as the District points out, the notice of purchase that will be generated once respondent purchases her service credit will serve only to evidence that respondent has complied with the agreement by using the $100,000 payment to purchase such credit. Similarly, we find no reason to be concerned about the fact that the agreement requires confidentiality by the parties or would limit the District's response to inquiries about respondent's employment. Again,

as the District argues, the confidentiality agreement binds no one except the parties and the settlement expressly allows the District to comply with Executive Order No. 11.

Finally, we agree with the District that under the circumstances set forth in the Stipulation of Agreement, this settlement is in the public interest. In this respect, we concur that given the finding arrived at in the administrative proceedings related to the withholding of respondent's increment for 1995-96, the District's ability to prosecute the tenure charges would be limited. For the same reason, it would find it difficult to defend itself in the civil action, and we stress that the combined cost of litigating the tenure charges and defending the civil suit would be considerable. The availability of punitive damages in the civil action increases the District's potential liability so that, on balance, agreement to the $100,000 payment is not unreasonable.

Therefore, for the reasons expressed herein, the State Board of Education reverses the Commissioner's decision and approves the settlement proposed by the parties as embodied in the Stipulation executed by the attorneys for the parties in this matter.

March 7, 2001

Date of mailing MAR 09 2001

344-00

LUCY SHERIDAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning school nurse alleged the District wrongfully deducted time from her sick leave bank in violation of *N.J.S.A.* 18A:30-2.1.

The ALJ dismissed the petition on a summary basis, finding that petitioner filed her claim with the Commissioner after her Worker's Compensation claim had already been settled under Section 20.

The Commissioner concurred with the ALJ that the within petition was properly dismissed since petitioner knowingly relinquished any claim that she may have had pursuant to *N.J.S.A.* 18A:30-2.1 when she accepted her Section 20 settlement before the Division of Workers' Compensation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO: EDU 3767-98

AGENCY DKT. NO: 38-2/98

LUCY SHERIDAN,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Howard M. Nirenberg, Esq., for respondent

Record Closed: June 26, 2000 Decided: August 30, 2000

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF FACTS

Lucy Sheridan (petitioner) filed with the Commissioner of Education of the State of New Jersey, a petition pursuant to *N.J.S.A.* 18A:30-2.1 seeking an Order directing the Paterson School District (respondent) to pay the "difference between her full salary which she received pursuant to worker's compensation together with having 55 sick leave days restored to her sick leave bank."

Respondent filed an answer raising the defenses of *estoppel* and *res judicata* as well as the bar of the Worker's Compensation Act. Respondent also contends that when Sheridan

appeared before the Worker's Compensation Court she acknowledged that by accepting the sum of $10,000 that all claims arising out of the incident of January 14, 1991 would be waived.

On January 14, 1991, petitioner, a school nurse, alleged that she was verbally abused by a student. Subsequently, she had a disagreement with the school principal concerning the proposed resolution. The principal telephoned petitioner and allegedly screamed at her "to leave his school." Petitioner thought she would have had his support.

On August 26, 1991, petitioner filed an Employee's Claim Petition with the Division of Worker's Compensation contending that as a result of the above incident, she sustained injury to her nervous system among other complications. On November 22, 1991, respondent filed an answer.

On March 10, March 31, and November 17, 1997, testimony was taken from the petitioner in the Workers' Compensation Court.

Sheridan testified that on January 14, 1991, while employed by the respondent as a nurse at school #4, a student came into her office with a bandage on his arm. She refused to treat the student at this time because she had other children in her office. She told the student to return in two hours. Shortly thereafter, the student returned and told her that the principal said she should "take care of this." Thereafter, Sheridan and the student went to the principal's office. She told the principal that the student was becoming verbally abusive. According to Sheridan, the principal said, "Well if you're not gonna take care of him, send him over to School 28 and let the nurse there take care of him." She refused to send the student over to school #28. Sheridan refused to change the student's dressing after her lunch.

Sheridan also testified that she was upset because the principal did not return the student to class. When she returned to her office, the principal called her and screamed at her to "get out of my school." Petitioner subsequently claims to have experienced chest pain and palpitations. She contacted her supervisor and requested a transfer to another school, which took place the following day. Petitioner did not seek medical treatment during the week following the incident.

After being transferred, petitioner worked for approximately two and a half months. She was out of work from April 1991 to September 3, 1991. In September 1991, she returned to work.

Petitioner alleged that the January 14, 1991 incident[i] with the school principal was so traumatic that she became depressed and could no longer handle her responsibilities as she was previously capable of doing. Sheridan first sought medical treatment on January 21, 1991. The doctor prescribed Xanax. In February of 1991, petitioner saw another doctor. Her medication was changed from Xanax to Ludiomil.

Petitioner claims to have had a second "incident" with a different principal at school #29. She had called a student's doctor to verify medication the student was taking. The student's parent became upset and met with the principal and petitioner. Sheridan claimed the principal let "her [the parent] sit there and abuse me."

Following her transfer to school #29 in September 1991, petitioner had not lost any time from work due to conditions allegedly related to the January 14, 1991 incident. Yet, petitioner saw Dr. Kuvin on four occasions in 1993. Dr. Kuvin prescribed what petitioner remembers as an "anti-depressant", although she states she never took.[ii]

During the workers compensation case, after two days of petitioner's testimony, the parties agreed to a $10,000 settlement pursuant to *N.J.S.A.* 34:15-20.[iii] The settlement was approved by Judge Mohr. When petitioner was asked if she voluntarily entered into the settlement and whether she wished the court to approve, she responded:

---

[i] The entire incident from beginning to end lasted approximately 30 to 35 minutes.

[ii] Petitioner has not taken any medication since July of 1991.

[iii] *N.J.S.A.* 34:15-20 states:

> In case of a dispute over or failure to agree upon a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to the questions of fact, the nature and effect of the injuries, and the amount of compensation thereof....After a petition for compensation or dependency claims has been filed, seeking compensation by reason of accident, injury or occupational disease of any employee, and when the petitioner is represented by an attorney of the State of New Jersey, and when it shall appear that the issue or issues involve the question of jurisdiction, liability, causal relationship or dependency of the petitioner under this chapter, and the petitioner and the respondent are desirous of entering into a lump-sum settlement of the controversy, a judge of compensation may with the consent of the parties, after considering the testimony of the petitioner and other witnesses, together with any stipulation of the parties, and after such judge of compensation has determined that such settlement is fair and just under all the circumstances, enter "an order approving settlement". Such settlement, when so approved, notwithstanding any other provisions of this chapter, shall have the force and effect of a dismissal of the claim petition and shall be final and conclusive upon the employee and the employee's dependents, and shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute...

> I've discussed everything. I'm just, like, a little unhappy at the whole situation, like it was my fault that it went on so long and I went to school a happy camper that day, and my sick days would have been $10,000. I've already paid over $4,000 of my own money. What I'm hoping is by ending this, that I'm gonna start healing and it's gonna be over with. [Emphasis added.]

Sheridan was told by Judge Mohr that in lieu of accepting the settlement she had the right to continue with the hearing. Petitioner responded:

> I did - I was told that, but it sounded very negative. It would have been dismissed and this--and at 63, I've been going on for so long with this I just want it over. [Emphasis added.]

In approving the settlement, the court stated:

> Having heard the trial thus far, I'm satisfied that there are issues as to causal relation which would make this settlement appropriate.
>
> I'm also satisfied having observed and listened to the petitioner and questioned the petitioner myself this morning, that she clearly understands the nature of these proceedings, and that by accepting this settlement, not only is she waiving her right to continue with trial, but also her matter will be dismissed with prejudice. I'm satisfied she entered into this settlement voluntarily.

An Order was entered approving the settlement of $10,000. The Order itself specifically states that it is "pursuant to *N.J.S.A.* 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and the petitioner's dependents and is a complete and absolute surrender of all their rights arising out of this/these claim(s)." Petitioner subsequently filed a petition of appeal with the Commissioner of Education pursuant to *N.J.S.A.* 18A:30-2.1 on February 13, 1998 after her request for payment of salary and sick days lost was denied.

DISCUSSION

New Jersey courts have expressed a strong public policy supporting the enforcement of settlement agreements. *In Dept of Public Advocate v. New Jersey Bd. of Public Utilities*, 206 N.J. Super. 523, 528 (App. Div. 1985), the Appellate Division stated that "courts will strain to give effect to the terms of a settlement wherever possible":

> In our view the beginning point of this analysis is the strong public policy in this state in favor of settlements. *Pascarella v. Bruck*, 190 N.J. Super. 118, 125 (App. Div. 1983), certif. den., 94 N.J. 600 (1983). The point of this policy is not the salutary effect of settlements on our overtaxed judicial and administrative calendars (although this is an undeniable benefit) but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is

> least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced.

Accord, *Jannarone v. W.T. Co.,* 65 N.J.Super. 472, 476 (App.Div.), *certif.den.*, 35 N.J. 61 (1961), following, *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 35 (1957)([t]he settlement of litigation ranks high in our public policy.).

A settlement agreement is enforceable like any other contract in the absence of "fraud or other compelling circumstances." *Pascarella v. Bruck*, 190 N.J.Super. 118, 124-125 (App. Div.1983) certif. den., 94 N.J. 600 (1983)(*citing Honeywell v. Bubb*, 130 N.J.Super. 130, 136 (App.Div. 1974)):

> An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of "fraud or compelling circumstances", should honor and enforce as it does other contracts . . . .

Sheridan filed an Employee's Claim Petition with the Division of Workers' Compensation because of the alleged incident of January 14, 1991. After the $10,000 settlement and pursuant to *N.J.S.A.* 34:15-20 (Section 20), petitioner filed an appeal with the Commissioner of Education seeking reimbursement of 55 sick leave days. This was pursuant to *N.J.S.A.* 18A:30-2.1. However, it is clear from petitioners testimony as previously quoted that the $10,000 settlement figure represented the amount she believed to be the sum total of her sick days used.

Additionally, petitioner's annual salary was $35,000. N.J.S.A. 18A:30-6, which sets forth the method for calculating an employee's per day salary for sick leave under *N.J.S.A.* 18A:30-2.1, states, "a day's salary is defined as 1/200 of the annual salary." Therefore, petitioner's one day salary is $175.00. Since petitioner alleges that she is entitled to 55 sick days, her impression of the value of those sick days would be approximately $10,000 (55 days * $175 = $9,625).

The Order itself states that it is "pursuant to *N.J.S.A.* 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner...and is a complete and absolute surrender of all their rights arising out of this/these claim(s)." It is apparent from petitioner's testimony that the amount of the Section 20 Settlement was considered by her to be compensation for the sick leave days for which she believed she had been

charged. Petitioner can file another petition in a different forum asserting a claim which had previously been settled.

This result is consistent with the holding by the New Jersey Supreme Court in *Coleman v. Fiore Bros. Inc.*, 113 N.J. 594 (1989). In *Coleman*, plaintiffs, represented by the Passaic Legal Aid Society, brought suit against under the Consumer Fraud Act, N.J.S.A. 56:8-1, *et. seq.* The parties reached a settlement, and plaintiffs sought to recover counsel fees. The Court denied plaintiff relief and stated:

> . . . there had been no attempt to expressly reserve the issue: the agreement recited "[A]ll claims for damages – actual, punitive and statutory of the Complaint and Counterclaim are hereby settled. ... In addition, the filed stipulation of dismissal of the case contains no reference to any exclusion of the fees sought in the original complaint. We are satisfied that it would be counter to the fair expectations of counsel in the conduct of this case to have surmised that the public policy of New Jersey forbade such a settlement and dismissal of the action for statutory fees. [*Id.* at 62.]

The conclusion reached in *Coleman* is also consistent with the holding of the State Board of Education in *Marino v. Willingboro Twp. Bd. of Education*, OAL DKT. EDU 8580-98, State Board (March 1, 2000). In *Marino*, petitioner had filed a petition of appeal with the Commissioner of Education seeking sick leave benefits from the respondent under *N.J.S.A.* 18A:30-2.1. Petitioner's appeal was stayed while remedies under the Workers' Compensation Act were pursued. Petitioner's later settled under Section 20. What is significant in *Marino*, is the fact that respondent knew at the time of the Section 20 settlement that petitioner still had pending his appeal under *N.J.S.A.* 18A:30-2.1 before the Commissioner of Education. Petitioner in *Marino* clearly indicated that he was not waiving any entitlement to sick leave benefits he may have under *N.J.S.A.* 18A:30-2.1 by settling his workers' compensation claim. In the case *sub judice*, petitioner filed her claim with the Commissioner of Education after her workers' compensation claim had already been settled, a settlement which was "final as to all rights and benefits of the petitioner and the petitioner's dependents and is a complete and absolute surrender of all their rights arising out of this/these claim(s)."

At no time during the workers' compensation hearing, or at the time of the Section 20 settlement, did petitioner indicate that she was not waiving any entitlement she may have to sick leave benefits under *N.J.S.A.* 18A:30-2.1. In fact, she indicated that the amount of her settlement

was compensation for the sick leave days for which she believed she had been charged[iv]. In *Marino*, the State Board explicitly stated that "the parties to a workers' compensation case are free to agree in settling such a claim that the claimant is thereby waiving his statutory rights to benefits under *N.J.S.A.* 18A:30-2.1." *Marino, supra*, OAL DKT. EDU 8580-98, *State Board* (March 1, 2000) at 6. Clearly, the Section 20 settlement entered into by the parties herein on November 17, 1997 evidenced an unambiguous waiver of any rights petitioner may have had under *N.J.S.A.* 18A:30-2.1. When the court advised petitioner that in lieu of accepting the settlement she had the right to continue with the trial, petitioner, responded:

> I did-I was told that, but it sounded very negative. It would have been dismissed and this--and at 63, I've been going on for so long with this I just want it over. [Emphasis added.]

The court, in approving the settlement, stated:

> Having heard the trial thus far, I'm satisfied that there are issues as to causal relation which would make this settlement appropriate.
>
> I'm also satisfied having observed and listened to the petitioner and questioned the petitioner myself this morning, that she clearly understands the nature of these proceedings, and that by accepting this settlement, not only is she waiving her right to continue with trial, but also her matter will be dismissed with prejudice. I'm satisfied she entered into this settlement voluntarily.

In fact, the terms of the Settlement Order could not be more clear. The Order specifically states:

> ...pursuant to *N.J.S.A.* 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and the petitioner's dependents and is a complete and absolute surrender of all their rights arising out of this/these claim(s)." Emphasis added.]

In the case at hand, petitioner's position is more akin to the defendant in *Coleman*, where the parties made no attempt to expressly reserve the issue, rather than the factual scenario in *Marino* where the parties did expressly reserve the issue. Unlike in *Marino*, where the petitioner stated that he was not waiving any entitlement he might have to sick leave benefits under *N.J.S.A.* 18A:30-2.1, petitioner has made no such reservations expressly agreeing instead, to waive "all their rights arising out of this/these claim(s)" under the Section 20 Settlement. In *Marino* and *Coleman*, the State Board and the court were simply enforcing the terms of the settlement entered into between the parties. Courts are not free to make a better contract for a party than that which he had voluntarily entered into or to alter it for his benefit to the detriment of the other party.

[iv] Petitioner's testimony:

> I've discussed everything. I'm just, like, a little unhappy at the whole situation, like it was my fault that it went on so long and I went to school a happy camper that day, and my sick days would have been $10,000. I've already paid over $4,000 of my own money. What I'm hoping is by ending this, that I'm gonna start healing and it's gonna be over with. [Emphasis added.]

aff'd in part, rev'd in part, *Onderdonk v. Presbyterian Homes of New Jersey, Inc.*, 171 N.J. Super. 529 (App. Div. 1979), 85 N.J. 171 (1981).

CONCLUSION

Petitioner's claim is hereby dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/30/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

9-1-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 5 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 3767-98
AGENCY DKT. NO. 38-2/98

LUCY SHERIDAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the within appeal is properly dismissed on a summary basis, since petitioner knowingly relinquished any claim she may have had pursuant to *N.J.S.A.* 18A:30-2.1 when she accepted her "Section 20" settlement before the Division of Workers' Compensation. As the ALJ noted, "it is clear from petitioner's testimony [before the Division of Workers' Compensation] that the $10,000 settlement figure represented the amount she believed to be the sum total of her sick days used." (Initial Decision at 5)[1]

[1] To the extent this matter might be considered untimely, the Commissioner notes that the District failed to raise this claim, and the parties did not specifically brief this issue. Under the circumstances, the Commissioner reaches the merits of this matter.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: OCT 16 2000

Date of Mailing: OCT 18 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

345-00

IN THE MATTER OF THE TENURE HEARING	:	
OF MICHAEL BERKLEY, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF PEMBERTON,	:	DECISION
BURLINGTON COUNTY.	:	

October 18, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6978-99
AGENCY DKT. NO. 256-8/99

PEMBERTON BOARD OF EDUCATION,
Petitioner,
v.
MICHAEL BERKLEY,
Respondent.

Frederick W. Hardt, Esq., for petitioner

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: September 5, 2000 Decided: September 6, 2000

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 31, 999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an Order indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

9/6/00
DATE

SOLOMON A. METGER, ALJ

Receipt Acknowledged:

9-7-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 8 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

Law Offices of
FREDERICK W. HARDT
Suite 101
300 Chester Avenue
P.O. Box 840
Moorestown, NJ 08057
(856) 234-4141
Attorney for Pemberton Township Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST MICHAEL BERKLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUTH 06978-99S ORDER

THIS MATTER being presented to the Court for trial on May 15th, 2000, and the parties to this matter, the Pemberton Township Board of Education and Michael Berkley, having met both with the Court and individually to review their positions and having reached an Agreement to resolve the matter before the Court and it being determined that it is appropriate to reduce this understanding to writing to avoid confusion during its implementation, and good cause appearing;

NOW THEREFORE IT IS agreed by and between the Parties, subject to the approval of the Commissioner of Education, as follows:

1. Findings. Michael Berkley agrees that if the Court were to find that the facts set forth in support of charges 1 through 7 by the Board of Education of the Township of Pemberton were true they would support the imposition of some form of disciplinary action although he disputes that removal from his employment with the District would be the appropriate sanction.

2. Disciplinary Action to be Taken. The parties agree to imposition of the following disciplinary action for the for the reasons set forth in Paragraph 3 below:

a. Suspension From Work. Michael Berkley is suspended from his employment

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with the District for a total of nine and one-half (9 ½) months. Of this nine and one-half (9 1/2) months suspension, four (4) months have already been served and are credited against the total time of suspension.

b. Loss of Increment. Michael Berkley shall lose his year 2000 increment. Pending good behavior, this increment is subject to restoration at the end of two (2) years in accordance with Board Policy.

c. Loss of Accrued Vacation. No vacation time shall accrue during the time period that Michael Berkley was suspended with or without pay provided that this paragraph shall not effect any other vacation time to which Michael Berkley may be entitled .

d. Termination Provision. The Board warns that in the event that respondent engages in any inappropriate conduct or any attempt to retaliate against any of the individuals providing information on this matter, the Board will seek, under tenure proceedings, removal of the employee from public service. Respondent reserves the right to oppose this action, and assert any defenses which may be applicable.

e. Interpersonal Training. The Board will provide and Michael Berkley must attend and successfully complete a course of training dealing with inter-personal skills and relationships.

f. Transfer. Michael Berkley will be transferred from his current assignment to an assignment specified by the Board.

g. Calculation of Time. For the purpose of calculating any other benefits in the future, the time interval that Michael Berkley was suspended with pay shall be counted, but the time period that he was suspended without pay shall not.

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Moorestown, NJ 08057

3. Rationale for Settlement.

a. Board's Position. Michael Berkley has been an employee of the District since July 1, 1985. As a custodian he holds tenure pursuant to N.J.S.A. 18A:17-3. The District has installed a system of security cameras through out various schools in the District. The security cameras are designed to provide protection to the employees of the District and to prevent theft of public property. Under the rules and regulations covering employee conduct within the District, all security cameras are to be kept operational. In December of 1998, Michael Berkley was employed by the District as a custodian in the Helen Fort Middle School. At approximately 4:30 on December 7, 1998 while allegedly working as a custodian in the school, he entered the green hallway at the school, proceeded to the "team" room, came out of the "team" at 4:31 holding a soda. For a while he watched another employee working at the end of the hallway. At approximately 4:32 he proceeded toward a security camera with a soda bottle and a newspaper in his hand where he stood against a wall or in a corner watching the custodian working in the hallway for about 41/2 minutes until the worker entered a classroom. At 4:36 p.m. he put a newspaper over the camera lens to block all further recording in that area. At approximately 6:02 p.m. the night supervisor discovered that the camera was covered and removed the paper. Michael Berkley, on inquiry, stated that: "while he did cover the camera with a piece of paper while in the green hallway, he did not do any of the other things he was being accused of." The Board further states that on Thursday, June 17, 1999 at approximately 5:00 p.m. Michael Berkley, while on duty as a custodian in the employ of the District at the Helen Fort Middle School, confronted George Rounsaville, another employee of the District, in a threatening and belligerent manner seeking to provoke a fight or other physical altercation by addressing the other

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employee with: "does he want a piece of him?" Upon being asked about the incident by his supervisor, Michael Berkley denied that the incident had occurred. Investigation by his supervisor indicated that he had lied about the altercation. Last, the district argues on June 17th at approximately 3:19 in the afternoon, Michael Berkley entered the faculty room of the Helen Fort Middle School. Upon entry and while no one else present, Michael Berkley proceeded to "trash" the room by throwing a platter of broccoli and bagels all over the floor. His actions were captured on a video tape maintained by the security camera operating in the room.

b. Michael Berkley's Position. Michael Berkley denies that on December 7, 1998 he covered over a security camera with a newspaper. He also denies that he did anything untold while it was covered. He adamantly denies the altercation with George Rounsaville. Any statements back and forth were not confrontational nor abusive. Last, Michael Berkley states that while he dropped a plate of vegetables and bagels on June 17th in the teachers' room, they were not thrown around the room as alleged. He had left the room to get material to clean it up and was confronted with the problem before he had a chance to clean it up.

c. Public Benefit of Settlement. The Board is aware of the public's interest in the proper handling of tenure charges to insure that unqualified persons do not continue to be employed when diligence at this stage might prevent difficulties in the future. However, based on its review of the total circumstances which includes an evaluation of the time and expense in maintaining the tenure charge, the lack of clarity in the tapes, the lack of direct witnesses to events other than to the confrontation, the uncorroborated testimony of the witness to the confrontation, the uncertainty of the ultimate result which might be obtained, and the lack of any allegation that Michael Berkley presents any threat to the children of New Jersey, the parties

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believe that it is in the best interests of the District, Michael Berkley, and the public to resolve this matter by settlement.

d. The parties agree that Michael Berkley shall be offered coverage under COBRA, 29 U.S.C. 1161 et seq. and 42 U.S.C. 300bb-1 et seq, for the period of his suspension without pay.

DATED: 9/5/00

, A. L. J.

Consented to as to form and substance.

FREDERICK W. HARDT, Esq.,
Attorney for BOARD OF EDUCATION
OF PEMBERTON TOWNSHIP

RICHARD A. FRIEDMAN, Esq.,
Attorney for MICHAEL BERKLEY

MICHAEL BERKLEY

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OAL DKT. NO. EDU 6978-99
AGENCY DKT. NO. 256-8/99

IN THE MATTER OF THE TENURE HEARING	:	
OF MICHAEL BERKLEY, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF PEMBERTON,	:	DECISION
BURLINGTON COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms, since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *In re Cardonick,* 1990 *S.L.D.* 842, 846, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983. The matter is hereby dismissed subject to compliance with the terms of the settlement. In effectuating the terms of the settlement with respect to the transfer of respondent, the Board is cautioned to be mindful of the nature of the charges and the Board's responsibility to assure student safety when determining respondent's appropriate reassignment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 18 2000

Date of Mailing: OCT 18 2000

347-00

#347-00

H.A. DeHART AND SON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY AND SHEPPARD BUS SERVICE, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder for a busing contract, claimed it was the lowest bidder and contended the District's awarding of the contract to Wolfington was illegal and in contravention of the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1 to –49.2.

The ALJ found that the District inadvertently may have violated *N.J.S.A.*18A:18A-15(d), which prohibits a district from requiring "brand name" materials, although the statute allows a school district to require "brand name *or equivalent*" materials, or to specify patented or copyrighted materials if there is a special need for those materials. The ALJ determined that the District did not allow for an equivalent to the DT 466 engine in its notice to bidders and its bid summary sheet, and its technical specifications did not refer to the DT 466 engine at all. The ALJ further determined that the District was not unreasonable in preferring the DT 466 engine to the CAT 3126B engine, which petitioner claims is an equivalent engine, because the DT 466 engine has greater utility. The ALJ concluded that the District should reject all of the original bids, correct errors and inconsistencies, clarify its specifications and re-bid the contract.

The Commissioner found that the central issue in the ALJ's determination as to whether the contract should be re-bid was his finding that petitioner's CAT 3126B engine was not equivalent to the DT 466 engine which the District preferred. Finding that the parties did not have the opportunity to brief or introduce technical evidence on the issue of whether the two engines were equivalent, the Commissioner's decision re-affirmed the ALJ's Order restraining the District from taking action to award the Bid for School Buses until a plenary hearing is held to resolve the issues as to the award of the contract and remanded the matter for further proceedings as necessary so that the question of equivalency can be determined based upon a complete record.

October 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

OAL DKT. NO. EDU 4012-00

AGENCY DKT. NO. 156-5/00

H.A. DeHART AND SONS,

Petitioner,

v.

SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY, AND SHEPPARD BUS SERVICE, INC.,

Respondent.

Thomas H. Ward, Esq., for petitioner

John J. Jordan, Esq., for respondent, Salem County Special Services School District

William Wilkins, Esq., for respondent, Wolfington Body Company, (Wilkins & Vallone, attorneys)

Samuel J. Serata, Esq., for respondent, Sheppard Bus Service, Inc.

Record Closed: August 17, 2000 Decided: August 31, 2000

BEFORE **ROBERT S. MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

H.A. DeHart & Sons ("petitioner") began this action by applying to the Commission of Education for emergency relief, viz., to enjoin respondent Salem County Special Services School District ("the District") "from pursuing any further action in awarding or executing a contract for school buses until a resolution can be reached with regard to [a] disputed bid award" of April 26, 2000.

On May 12, 2000 the matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. The hearing was held on May 25, 2000. On May 30 I issued a decision and letter order granting petitioner's application. I followed this with a formal Order dated June 7, 2000 temporarily restraining respondents school district and Wolfington Body Company ("Wolfington") from taking any further action on the award of the school bus contract on April 26, 2000, until after a plenary hearing.

Hearings were scheduled for June and August but they had to be rescheduled because of the unavailability of counsel. By letter dated July 13, 2000, I advised counsel that, because of substantial inconsistency between the "notice of bidders" and the actual specifications, I was inclined to the view that the best and fairest course of action would be to set aside the award of the school bus contract to Wolfington and to order that the contract be rebid. I asked counsel to advise me of their positions by letter memoranda.

The last memorandum was filed on August 17, 2000, on which date the record closed.

The essential facts in this case are relatively simple and undisputed, having been established by certifications of knowledgeable officials and other persons and by the submission of copies of relevant documents. The facts are as follows.

FACTS

In March 2000, the District invited bids for the purchase of seven school buses. According to its notice to bidders, the District wanted buses with "DT 466 Diesel Automatic 190 Horse Power 6 Cylinder" engines. The District expressly reserved the right to reject any or all bids and to accept any bid that was in the best interest of the participating school districts.

According to the District's instructions to bidders, each bidder was required to identify any feature on the buses that did not meet the technical specifications. These required that the engines of the buses had to come equipped with the following features:

> Minimum 190 horsepower diesel with plug - in block heater. Throttle lock with RPM gauge. Engine plug-in shall be mounted right-side, below the mirrors, by the entrance door.

Notably, the specifications did not require a DT 466 engine, although the accompanying bid summary sheet did specify the DT 466 engine.[1] The petitioner, H.A. DeHart & Son, submitted a bid of $349,923 for seven buses with CAT 3126B engines. Apparently, the principal difference between these two types of engines is that a DT 466 contains a "wet sleeve" design feature, whereas the CAT 3126B contains a "parent bore" feature.

Four bidders submitted bids. Petitioner's bid was the lowest. The second-lowest bidder, Wolfington, submitted a bid of $353,582 for seven buses with DT 466 engines. During a meeting on April 26, 2000, the District voted to approve Wolfington's bid. The minutes of the meeting do not indicate why the District voted in favor of the second-lowest bidder. Subsequently, petitioner filed a petition for emergent relief, claiming the District had violated the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1 to -49.2. Specifically, petitioner alleged that it was the lowest responsible bidder and, further, that the specification of a DT 466 engine violated *N.J.S.A.* 18A:18A-15(d), which prohibits the specification of a particular "brand name" without permitting its equivalent.

[1] A six-cylinder engine was also specified in the notice to bidders and bid summary sheet, but not in the technical specifications.

In a letter order dated May 30, 2000, I granted petitioner emergent relief, enjoining the District from executing the contract with Wolfington. I found the issue of whether the "wet sleeve" DT 466 engine was superior to the "parent bore" CAT 3126B engine should be resolved after plenary hearing.

The DT 466 engine is manufactured by Navistar International Transportation Corporation. The CAT 3126B engine is manufactured by the Caterpillar Corporation. The DT 466 engine is equipped with a "wet sleeve" design feature. The CAT 3126B engine is equipped with a "parent bore" design feature. The District has submitted the affidavit of William A. Pushkar, a sales consultant for Freedom International Trucks of NJ, Inc., explaining the wet sleeve design feature in the DT 466 engine:

> This [wet sleeve] design allows coolant to flow around inserts, which are known as "sleeves." The circulating coolant more efficiently cools the cylinders. In addition, the sleeves are designed for easy in-chassis removal and replacement during engine overhaul. This design adds to the life of the engine since it effectively combats heat, the enemy of any mechanical device.

Mr. Pushkar's affidavit also explains the parent bore design feature in the CAT 3126B engine:

> The parent bore engine consists of a cylinder block which has a hole drilled in the parent block to fit a cylinder to a specified tolerance level. This construction is the simplest and least expensive to design and build. It does not, however, offer the same protection as a wet-sleeve engine.

The District has also submitted the affidavit of Todd Boston, a mechanic for the Pittsgrove Township Board of Education, who further describes the differences between the wet sleeve design and parent bore design:

> 4. The CAT 3126B is a parent bore engine. This means that the engine is bored from a solid block. As a consequence, cylinder walls cannot be removed. If the engine "wears out" or needs repair, a parent bore engine must be removed from the chassis. This involves extra work, time and expense.

5. The DT466E is a wet-sleeve engine. As such, the cylinder sleeves are easily removed when repairs are needed or when replacement is required. It is much easier and less costly and time consuming to work on a wet-sleeve engine. Since the sleeves are easily replaced, a wet-sleeve engine is more durable and has a longer useful life for the school district.

6. There are other differences between these two engines. The DT466E is built with six (6) head bolts per cylinder bore, while the CAT 3126B is built with only four (4) head bolts per cylinder bore. The maintenance specifications for the DT 466E require lubrication and changes of oil and filters every 12,000 miles. The specifications for the CAT 3126B require this service every 6,000 miles. The DT 466E engine also is equipped with valve rotators and a thermostatic oil temperature control valve. Neither of these items is included with the CAT 3126B engine.

According to the affidavit of Henry Bermann, business administrator, the District requested DT 466 engines because of its wet sleeve design feature, which he claims makes the engines "easier and less costly to maintain and repair". Mr. Bermann claims that his office recommended against the CAT 3126B engine because of its allegedly inferior parent bore design.[2]

According to petitioner, the CAT 3126 engine is the most widely used bus engine among New Jersey school districts, meeting or exceeding the District's technical specifications, and is the equivalent of (if not superior to) the DT 466 engine. Petitioner has submitted the affidavit of Harry Bartling, an employee of H.A. DeHart & Sons, who states that a CAT 3126 engine "is not more costly to maintain" than the DT 466 engine. Further, there is no dispute that the CAT 3126 engine meets the District's other technical specifications (*i.e.*, "190 horsepower diesel", "throttle lock with RPM gauge", etc.).

[2] There is no dispute that a DT466 engine is more expensive than a CAT 3126B engine, as illustrated by the bid package of the Sheppard Bus Co., which offered to credit the District $980 per bus if it accepted a "parent-bore type engine" instead of a DT 466 engine.

ISSUE AND ANALYSIS

A school board has the statutory right to reject all bids. *N.J.S.A.* 18A:18A-22. A school board's decision to reject solicited bids and to rebid a project is entitled to a presumption of correctness. *Durling Farms, Inc., v. Bd. of Educ. of the Tp. of Montville*, 1975 *S.L.D.* 733, 736. The decision will stand in the absence of a statutory violation or an impropriety such as bad faith or collusion. *Ibid.*

In *Durling Farms, supra*, the school board solicited bids from milk suppliers. According to one part of the school board's specifications, bidders were required to post a check for five percent of the total amount of the bid. According to another part of the same specifications, bidders were required to post a check for five percent *or* five hundred dollars, whichever was less. Due to the discrepancy in its specifications, the school board rejected all of the bids and rebid the project. The lowest bidder appealed, arguing the school board's actions in rejecting the bids and rebidding the project were improperly motivated. The Commissioner found no evidence of impropriety, however, and upheld the school board's decision.

In the present matter, the District inadvertently may have violated the Public Schools Contract Law by specifying a DT 466 engine, which is manufactured only by Navistar International Transportation Corporation. As petitioner asserts, *N.J.S.A.* 18A:18A-15(d) prohibits a school District from requiring "brand name" materials, although the statute allows a school District to require "brand name *or equivalent*" materials, or to specify patented or copyrighted materials if there is a special need for those materials. There is no dispute that "DT 466" is a proprietary designation, *i.e.*, a brand name manufactured exclusively by Navistar International. The District did not allow for an equivalent to the DT 466 engine in its notice to bidders and its bid summary sheet, and its technical specifications do not refer to the DT 466 engine at all.

Under these circumstances, a rejection of the original bids and a rebidding of the contract is both necessary and proper. *See Williams Mobile Offices v. Bd. of Educ. of Logan*, O.A.L. Dkt. No. EDU 4007-90 (rebidding of project was necessary due to unclear specifications). In accordance with *N.J.S.A.* 18A:18A-15(d), the District may rebid the contract and specify either a

"DT 466 engine or equivalent" or (if the wet sleeve design is patented) authorize by resolution the purchase of a wet sleeve engine as a "special need" that is "directly related" to the performance of the buses.[3]

Although the District erred by specifying what amounts to a brand name without expressly allowing its equivalent in its notice to bidders and bid summary sheet, and further erred by failing to refer to a "DT 466 engine or equivalent" or a "wet sleeve design engine" in its technical specifications, there is no evidence of bad faith, collusion or improper motivation on its part. It is thus not precluded from rejecting all original bids and rebidding the project.

Petitioner argues that the CAT 3126B engine is the functional equivalent of the DT 466 engine, thereby obviating the need to rebid the project. However, it is not unreasonable for the District to believe that the wet sleeve design feature in the DT 466 has greater utility than the parent bore feature in the CAT 3126B. According to Mr. Pushkar's affidavit, a wet sleeve engine is more durable, retains a higher residual value, and allows for more efficient circulation around the cylinders, adding to the life of the engine. According to Mr. Boston's affidavit, a DT 466 wet sleeve engine requires lubrication and changes of oil and filters every 12,000 miles, whereas a CAT 3126B parent bore engine requires this service twice as often, every 6,000 miles. I note also that the bid of Sheppard Co., offered a credit of $980 per bus if the District would accept parent bore engines in lieu of DT 466 engines.

Petitioner further asserts that the CAT 3126B parent bore engine is the most widely used bus engine among New Jersey school districts and is the equivalent of (if not superior to) the DT 466 wet sleeve engine. However, petitioner submits no specific evidence to substantiate these claims. On the contrary, at this posture of the case all indications are that the District is exercising sound business judgment in its preference for a wet sleeve engine. *See Serenity Contracting Group, Inc., v. Borough of Fort Lee*, 306 *N.J. Super.* 151, 156-57 (App. Div. 1997) (rejection of bid for non-material defect must reflect sound business judgment).

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[3] Apparently, the District has since rebid the contract, specifying a wet sleeve engine in its technical specifications.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that the District should reject all of the original bids, correct the errors and inconsistencies noted above, clarify its specifications, and rebid the contract. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 2000
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

9-5-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 6 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 4012-00
AGENCY DKT NO. 156-5/00

H.A. DeHART AND SON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY AND SHEPPARD BUS SERVICE, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his determination herein.[1]

In its exceptions, petitioner argues that the Administrative Law Judge (ALJ) erred when he, *sua sponte,* issued a decision in this matter. Citing the ALJ's letter of July 13, 2000, petitioner notes that the letter gave no indication that a dispositive ruling or motion was being considered or that the ALJ was contemplating issuance of a decision based on the existing record. (Petitioner's Exceptions at 2) Petitioner argues that it was prevented from presenting evidence due to this procedural error, and that the ALJ erroneously relied on the conflicting affidavits of experts which were submitted in the previous emergent injunctive relief proceedings when rendering his decision. (*Id.* at 3)

[1] Respondents did not file reply exceptions.

Petitioner further asserts that the sole issue in this matter is whether it met the Board's specifications in its bid. Claiming that it met all specifications and was the lowest bidder, petitioner maintains that it is entitled to the bid award pursuant to *N.J.S.A.* 18A:18A:37. *(Ibid.)*

Finally, petitioner contends that the only purpose served by re-bidding would be to exclude all types of buses except that manufactured by International Harvester; thus excluding petitioner from bidding in violation of *N.J.S.A.* 18A:18A-15. Petitioner avers that, since its bus is widely used throughout the state, and its bid met the Board's published specifications, the Commissioner should reverse the recommended decision of the ALJ and award the bid to petitioner. (*Id.* at 3-4)

Upon a thorough review of the record, the Initial Decision and petitioner's exceptions, the Commissioner has determined to remand this matter for further proceedings consistent with his decision herein.

The Commissioner agrees that the Board erred by specifying a DT 466 engine -- what amounts to a brand name -- without expressly providing for an equivalent in its notice to bidders and bid summary sheet. The Board also created confusion when it failed to indicate the requirement of a DT 466 engine or equivalent or wet sleeve design engine in its technical specifications. (Initial Decision at 7) Since the bid specification does not reference the DT 466 engine, there is no disagreement that petitioner's bid met the bid specifications for engines, which stipulates:

> ENGINE: Minimum 190 horsepower diesel with plug-in block heater. Throttle lock with RPM gauge. Engine plug-in shall be mounted right-side, below the mirrors, by the entrance door. (Bid Specifications at 10)

Although the notice to bidders and bid summary sheet specify a DT 466 engine and the bid specifications do not, petitioner claims that under either scenario, its bid meets the criteria, since its CAT 3126B is an equivalent engine. The question of whether petitioner should be awarded the bid at issue, or whether the buses should be re-bid, therefore, turns on whether the CAT 3126B engine is equivalent to the DT 466 engine.

Central to the ALJ's conclusion that the appropriate remedy in this matter is to order the contract at issue to be re-bid, is his determination that the CAT 3126B, or parent bore, engine utilized by petitioner *is not* the functional equivalent of the DT 466, or wet sleeve, engine required by the Board in its notice to bidders and in the bid summary. Citing the advantages of the wet sleeve engine enumerated by respondent's experts, the ALJ finds that it is not unreasonable for the Board to believe that the wet sleeve engine has greater utility than the parent bore engine. (Initial Decision at 7) The ALJ, therefore, concludes that the Board is exercising sound business judgment by its preference for a wet sleeve engine. (*Id.* at 7) In making this assessment, however, the Commissioner notes that the ALJ relies solely on expert submissions provided by the parties in emergent relief proceedings.[2]

Further, the ALJ opines that petitioner did not submit specific evidence to substantiate its claims that the CAT 3126B parent bore engine is the most widely used engine by New Jersey school districts and that it is equivalent to the DT 466 wet sleeve engine. (*Id.* at 7) The Commissioner finds that, without specific evidence from *either* party beyond that attached to the parties' briefs in the emergent relief proceedings,[3] there is insufficient information in the

[2] The ALJ's Letter Order granting the Application for Emergent Relief found that petitioner met the standards set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), stating that "petitioner's argument indicates a reasonable probability of ultimate success on the merits". (Letter Order at 3)

[3] There was no plenary hearing in this matter nor briefing on the issue of whether the parent bore engine is equivalent to the wet sleeve engine. Therefore, the ALJ relied on expert opinions submitted in support of a prior motion in rendering his decision *sua sponte*.

record to make a determination as to whether the CAT 3126B parent bore engine and the DT 466 wet sleeve engine are equivalent.

Additionally, the Commissioner notes that the Board apparently re-bid its bus contract specifying a wet sleeve engine in its technical specifications, prior to the issuance of the Initial Decision in this matter,[4] thereby arguably rendering this matter moot and giving rise to a new cause of action. However, the Commissioner finds that it is not in the interest of justice or judicial economy to require petitioner to re-file or amend its petition. The question of whether the parent bore and wet sleeve engine designs are equivalent, which is central to petitioner's claim to the bid award at issue herein, is equally at issue in the Board's re-bidding of its bus contract. Further, it cannot be ignored that the ALJ made findings and prepared an analysis without providing the parties an opportunity to brief or introduce technical evidence central to the resolution of this matter.

Accordingly, with respect to both the original Bid for School Buses and the subsequent re-bid, the Commissioner re-affirms the ALJ's Order restraining the Salem County Special Services School Board of Education from taking any further action pursuant to any award of the Bid for School Buses, until there can be a plenary hearing conducted to resolve the issues as to the award of the contract to Wolfington Body Company, and remands this matter

[4] By letter of June 28, 2000, petitioner informed the ALJ that the Board had re-bid the contract for the buses at issue shortly after the May 30, 2000 grant of the temporary restraining order. According to petitioner, the Board modified its bid specification in the re-bid to require a wet sleeve engine.

for further proceedings as necessary to permit the parties an opportunity to provide a complete record for the resolution of the question of equivalency.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of decision: OCT 20 2000

Date of mailing: OCT 23 2000

[5] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

348-00

EDU #5492-00
C # 348-00L
SB # 70-00

BOARD OF EDUCATION OF NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT/APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON MOTIONS
NEW JERSEY DEPARTMENT OF EDUCATION AND MICHAEL AZZARA, ASSISTANT COMMISSIONER,	:	
RESPONDENTS.	:	

Decided by the Commissioner of Education, November 1, 2000

For the Appellants Hanns and Gertrudis Heiliger, Denbeaux & Denbeaux (Marcia W. Denbeaux, Esq., of Counsel)

For the Respondent/Appellant Board of Education of Northern Highlands Regional High School District, Strasser & Associates (William I. Strasser, Esq., of Counsel)

For the Respondents New Jersey Department of Education and Michael Azzara, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Intervenors/Respondents Russell and Kathleen Pepe, Harwood Lloyd, LLC (David Repetto, Esq., of Counsel)

In February 2000, Assistant Commissioner Michael Azzara notified the Northern Highlands Regional High School District that its request to the Department of Education

2/7/01

for review of its proposal to install lighting at the school's athletic field had been denied, concluding that such proposal did not fall under the purview of an "educational adequacy" review pursuant to N.J.A.C. 6:22-1.1 et seq. The Regional Board thereupon filed a petition with the Commissioner of Education challenging that determination. The Commissioner subsequently transmitted the case to the Office of Administrative Law.

In an oral decision rendered on October 6, 2000, the Administrative Law Judge ("ALJ") denied the requests by Russell and Kathleen Pepe and Hanns and Gertrudis Heiliger, whose homes abut the athletic field, to intervene in the matter. Both the Pepes and the Heiligers requested interlocutory review of the ALJ's determination by the Commissioner.

In a letter decision dated November 1, 2000, the Commissioner granted the Pepes' request to intervene, but denied the Heiligers' request.

On December 4, 2000, the Heiligers filed the instant motion with the State Board of Education for leave to appeal an interlocutory decision of the Commissioner, challenging the Commissioner's determination to deny their request to intervene. Since their motion was filed beyond the five-day filing period set forth in N.J.A.C. 6A:4-2.3, the Heiligers requested that their motion be considered nunc pro tunc.

On December 14, 2000, the Northern Highlands Regional Board filed a "cross-motion" for leave to appeal the Commissioner's interlocutory decision. Such motion challenged that portion of the Commissioner's decision granting the Pepes' request to intervene. By letter dated December 15, 2000, the Director of the State Board Appeals Office advised the counsel for the Regional Board that "the regulations governing appeals do not provide for a motion for leave to file a cross-appeal from an

interlocutory determination. N.J.A.C. 6A:4-2.3. Under the regulations, the State Board will be considering whether to grant your request for leave to appeal the Commissioner's interlocutory ruling nunc pro tunc."

After a careful review of the parties' submissions, we deny the instant motions.

N.J.A.C. 6A:4-2.3 requires that a "[m]otion for leave to appeal an interlocutory order, decision or action shall be made by filing a motion for leave to appeal to the State Board of Education within five days after the action or service of the interlocutory decision or order." In this case, the Heiligers' motion was filed on December 4, 2000, more than a month after the Commissioner's interlocutory decision was issued and mailed. The Regional Board's motion was filed ten days later on December 14.

Although the regulations permit relaxation of the rules governing appeals, N.J.A.C. 6A:4-1.19, we find that the parties have failed to provide sufficient cause in this case for relaxation. In a brief filed in support of the Heiligers' motion, their counsel contends that she had "erroneously regarded the [Commissioner's] order as final rather than interlocutory and filed a notice of appeal within the time for appeal." In a certification filed in support of her request to file the motion nunc pro tunc, counsel for the Heiligers avers that she had "not discovered a reference to support the five (5) day appeal deadline."

As previously indicated, N.J.A.C. 6A:4-2.3, which is contained in the regulations governing appeals to the State Board, is clear in providing a five-day filing deadline for a motion for leave to appeal an interlocutory decision. In addition, during the proceedings below, the Heiligers were expressly put on notice of the interlocutory nature of their challenge. On October 16, 2000, the counsel for the Heiligers was informed by the

Director of the Bureau of Controversies and Disputes that the Heiligers' letter to the Commissioner challenging the ALJ's October 6, 2000 oral ruling was "being construed as a request for interlocutory review." And, indeed, the Commissioner expressly indicated in his decision of November 1, 2000 that he had reviewed the submissions in connection with the Heiligers' request for interlocutory review of the ALJ's determination.

We stress, in addition, that the issue currently before the Commissioner is limited to whether the Regional Board's request for review of its lighting proposal involved "educational adequacy" issues so as to require review by the Department of Education. As pointed out by the Commissioner: "It should be clearly understood that this proceeding will not result in a determination as to whether the Board's application, if reviewable, is to be granted; rather, should the Board prevail at any level of inquiry outlined herein, the relief accorded would be an order directing the Department to review its application." Commissioner's Decision, slip op. at 2 (emphasis in original). Thus, the Heiligers' interest at this juncture of the proceedings is tenuous at best.

The Regional Board, which opposes the Heiligers' motion as untimely, has provided no basis for allowing its late filing other than to indicate that its motion had been "made necessary" by the Heiligers' motion. Under the circumstances, we can also find no justification for relaxing the rules so as to permit the Regional Board's motion.[1]

[1] We agree in addition with the Pepes, who, in their brief in opposition to the Northern Highlands Regional Board's motion, dispute the Regional Board's characterization of its submission as a "cross-motion." The Regional Board's motion challenges the Commissioner's determination to grant the Pepes' request to intervene, while the Heiligers' motion challenged the Commissioner's determination to deny their request, an issue entirely distinct and unrelated to the ruling challenged by the Regional Board. Thus, even if cross-motions were authorized by the rules, the Regional Board's motion could not properly be characterized as such.

Consequently, we deny the instant motions for leave to appeal the Commissioner's interlocutory decision of November 1, 2000.

February 7, 2001

Date of mailing FEB 09 2001

349-00

DONNA CUSTODE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In consolidated matter, petitioning tenured secretary challenged the reduction in her salary for the 1998-1999 and 1999-2000 school years. After fixing petitioner's salary by Board resolution in accordance with the negotiated salary guide, the Board adopted a resolution abolishing petitioner's position and transferring her to a lower paying secretarial position. Petitioner challenged the reduction in salary, arguing that she is entitled to the higher salary fixed by the Board regardless of whether she was transferred to another secretarial position. The Board argues that tenure laws permit a reduction in salary when an employee is transferred as a result of a reduction in force.

The ALJ agreed with petitioner and concluded that petitioner acquired a vested right in the higher salary once the Board established the salary. The ALJ concluded that the Board's subsequent transfer of petitioner to another secretarial position did not divest her of the right to the higher salary because petitioner remained in the same tenurable position (school secretary) after the transfer.

The Commissioner agreed with the ALJ and affirmed the Initial Decision for the reasons set forth therein, emphasizing that the Board could not reduce petitioner's salary in either year at issue absent meeting the requirements of *N.J.S.A.* 18A:17-2, which had not occurred in this case.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9827-98
AGENCY DKT. NO. 392-8/98

DONNA CUSTODE,
Petitioner,
v.
HACKETTSTOWN BOARD OF EDUCATION,
Respondent.

INITIAL DECISION
OAL DKT. NO. EDU 9576-99
AGENCY DKT. NO. 205-7/99

DONNA CUSTODE,
Petitioner,
v.
HACKETTSTOWN BOARD OF EDUCATION,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

David A. Wallace, Esq., for respondent

Record Closed: June 9, 2000 Decided: September 8, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

These are consolidated appeals by a school secretary from the reduction of her salary for the 1998-99 and 1999-2000 school years. Petitioner Donna Custode ("Custode") had been employed by respondent Hackettstown Board of Education ("Board") as an executive secretary to a department head. Prior to commencement of the 1998-99 school year, the Board adopted a resolution fixing her salary in accordance with its negotiated salary guide. On June 10, 1998, the Board abolished the position of Director of Special Services and transferred Custode to a lower-paying secretarial position. Basically, Custode contends that the transaction constitutes a transfer from one secretarial position to another and that the Board violated her tenure rights by reducing her salary. The Board maintains that the higher-paying position was no longer needed and, thus, that its action falls under a recognized exception to the tenure law for "a demotion as the result of a reduction in force."

Procedural History

On August 26, 1998, Custode filed a verified petition with the Commissioner of Education ("Commissioner") challenging her reduction in salary for the 1998-99 school year. The Board filed its answer on October 23, 1998. Subsequently, on October 29, 1998, the Commissioner transferred the matter to the Office of Administrative Law ("OAL") for determination as a contested case. Both parties agreed that the material facts are not in dispute and that the case could be decided on cross-motions for summary decision. The Board filed its motion for summary decision, together with supporting certification and brief, on June 1, 1999. Custode filed her motion for summary decision, together with supporting certification and brief, on July 9, 1999. Thereafter, the Board filed a reply on July 27, 1999. The OAL conducted oral argument by telephone on August 30, 1999.

Meanwhile, on July 26, 1999, Custode filed a second verified petition with the Commissioner concerning the freezing of her salary for the 1999-2000 fiscal year. The

Board filed its answer on August 26, 1999. The Commissioner referred this second matter to the OAL on August 31, 1999. Since both cases raise identical factual patterns and legal issues, the parties consented to be bound by the outcome of the pending motion. By order entered on June 9, 2000, the two cases were consolidated for disposition on the papers.

Findings of Fact

All of the material facts are undisputed. From the parties' pleadings and certifications, **I FIND**:

Donna Custode had been employed as a twelve-month secretary by the Hackettstown Board of Education for fifteen years and had acquired tenure in that position. During the 1997-98 fiscal year, she served in the title of "Secretary to the Director of Special Services." Her annual salary for that year was $31,753.

Under the agreement between the Board and petitioner's collective negotiating representative, the salary guide recognized two separate secretarial pay scales, one for certain higher-level secretaries, including Custode's title, and another for general secretaries. At a board meeting on May 13, 1998, the Board adopted a generic resolution approving the 1998-99 salaries for all professional and non-professional staff. In anticipation that Custode would continue in the title of Secretary to the Director of Special Services, Hackettstown authorized movement of Custode to the next step (Step 14) of the higher-level guide for the 1998-99 school year at an annual salary of $33,500. Shortly thereafter, on May 15, 1998, Custode signed a letter of intent prepared by her employer, which acknowledged her acceptance of employment on the terms offered for the upcoming school year.

One month later, on June 10, 1998, the Board resolved to "eliminate the position of Secretary to the Director of Special Services for the 1998-99 school year" and to

"appoint Donna Custode to the 12-month position of General Secretary." Custode does not challenge the Board's assertion that her former title was abolished in good faith "due to budgetary constraints." In the same resolution, the Board declared that "her salary be fixed at $31,753 so as not to constitute a reduction of current 1997-1998 salary." If Custode's salary had been set at the corresponding step of the general secretary's salary scale (Step 14), her salary would have been only $30,385. In effect, the Board retained her at last year's step (Step 13) on the higher scale, rather than move her up to next step (Step 14) or place her on the lower scale. Later, school officials informed her that her salary "would remain at $31,753.00 until the salaries of the other [general] secretaries caught up with [her] salary."

Consistent with that approach, the Board continued paying Custode at the annual salary of $31,753 for the 1999-2000 school year. Again, Custode contends that she is entitled to at least $33,500, the amount that the Board had originally approved for the 1998-99 school year.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board violated Custode's tenure rights when it reduced her compensation for the 1998-1999 and 1999-2000 school years.

N.J.S.A. 18A:17-2(c) provides that any person who has acquired tenure in any secretarial or clerical office, position or employment under the board of education of a school district "shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title." *[N.J.S.A.* 18A:6-9 to –29]. A long line of school law decisions has interpreted similar reduction-in-compensation language as prohibiting a local board from rescinding a resolution approving a tenured employee's salary in a given year, "unless the board successfully brings tenure charges or *the employee is laid off or demoted as a result of a reduction in force*." (Emphasis added). *Fedor v. Elmwood Park Bd. of Educ.*, 97 *N.J.A.R.*2d (EDFU) 96, 98 (Comm'r Sept. 26,

1996).[1] School officials do not suggest that the reduction in Custode's salary was intended as punishment for neglect, misbehavior or other wrongful act. Instead, they argue that the salary loss was the consequence of a demotion to a lower-paying position as the result of a reduction in force. That argument raises the question of whether Custode was really "demoted" to a new position or whether she was merely reassigned to another title within the same tenured position.

A staff member's tenure rights in the wake of a reduction in force must be gauged by evaluating "whether the individual has acquired tenure in the specific position." *Nelson v. Board. of Educ.*, 148 *N.J.* 358, 365-366 (1997). For professional educators licensed by the state, "the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment." *Ellicott v. Board. of Educ.*, 251 *N.J. Super.* 342, 348 (App. Div. 1991). Secretaries, however, are separately tenurable under *N.J.S.A.* 18A:17-2 and are not required to hold any educational certificate. Custode, urges, therefore, that she obtained tenure "as a secretary" and that "there are no separate categories of tenure for secretaries."

Support for Custode's analysis comes from *Bassett v. Board of Educ.*, 223 *N.J. Super.* 136 (App. Div. 1988), where a tenured teacher was offered a lower-paying hourly position after her full-time position had been eliminated by reason of a reduction in force. Agreeing with the State Board that she had not been transferred "from one tenurable position to another," but rather "reassigned within the same tenurable position," the Appellate Division held that she was entitled to statutory protection against reduction in her compensation. *Bassett*, at 142. Notwithstanding the fact that the collective negotiation contract contained lower pay schedules for hourly-rate and

[1]It is noteworthy that this interpretation is grounded on related statutory provisions, *N.J.S.A.* 18A:28-9 to –14, which apply to certified "teaching staff members", and, thus, would not necessarily extend to noncertified secretaries or clerical personnel. However, Custode does not seriously argue that the Board lacks authority to effectuate a reduction in force of employees whose services are no longer necessary. Accordingly, for purposes of this decision, it is assumed that the legal authority to lay off or demote unneeded staff falls within a school board's inherent managerial prerogative. See *N.J.S.A.* 18A:11-1.

part-time teachers, the Court ruled that the statutory mandate must prevail over inconsistent contractual provisions.

School law decisions apply the same logic to cases involving non-teaching staff members who gain tenure under *N.J.S.A.* 18A:17-2. Illustratively, in *Casey v. Cinnaminson Bd. of Educ., 95 N.J.A.R.2d* (EDU) 585, (Comm'r Oct. 5, 1995), the Commissioner decided that an employee switched from library clerk to office clerk "achieved tenure as a clerical employee" and, consequently, that his rate of compensation could not be reduced without a tenure hearing. Numerous administrative rulings have repeated that, as long as the newly-assigned position falls within the same tenure category, salary cannot be reduced but must be maintained at the same level until it matches or exceeds the salary guide for the new position. See, *e.g., Laufenberg v. Ramapo-Indian Hills Bd. of Educ.,* 1991 *S.L.D.* 2447 (Comm'r Dec. 12, 1991) (transfer of teacher within the scope of the same instructional certificate is not a different position allowing reduction in salary). See generally, *Schalago-Schirm v. Kearny Bd. of Educ.*, EDU 1449-97 Initial Decision (June 25, 1998) http://lawlibrary.rutgers.edu/oal/search.html *adopted* (Comm'r Aug. 6, 1998) *aff'd* (St. Bd. Dec. 2, 1998) http://www.state.nj.us/njded/legal/index.html (school board violated teachers' tenure rights when it acted to recoup amounts paid in excess of newly-created step on salary guide); *Cohen v. Borough of South River Bd. of Educ.*, 94 *N.J.A.R.*2d (EDU) 242 (Comm'r Jan. 28, 1994) (school board prohibited from placing teacher at a step on the new guide which would effectively reduce her salary from its previous level.)

Cases relied on by the Board for a contrary result are factually distinguishable and turn on different legal considerations. In *Gerity v. Woodbridge Twp. Bd. of Educ.,* 95 *N.J.A.R.2d* 522 (Comm'r Sept. 12, 1995), an employee holding a nontenurable supervisory position reverted to his tenured janitorial position and his salary was correspondingly reduced. Even under those circumstances, the Commissioner prohibited the district from reducing his salary until commencement of the school year following the demotion. Likewise, in *Schwartzkoff v. City of Camden Bd. of Educ.*, 1985 *S.L.D.* 130 (Comm'r Feb. 4, 1985), the Commissioner approved a reduction in salary for a supervisory employee who "bumped into a lower position" of school psychologist.

Vanderbeck v. Borough of Hamburg Bd. of Educ., 1976 *S.L.D.* 970 (Comm'r Dec. 2, 1976) involved a board secretary whose salary was cut in half when his working hours were reduced from full-time to half-time. Hence, the loss did not represent a reduction in rate of pay, but simply a proportionate adjustment of full-time salary to reflect a shorter workweek. *Kigerl v. Borough of South Plainfield Bd. of Educ.,* 1981 *S.L.D.* 895 (Comm'r Aug. 18, 1981), *aff'd* 1981 *S.L.D.* 896 (St. Bd. Dec. 2, 1981), does not address an involuntary transfer, but rather a situation in which a clerical employee rejected higher-paying assignments and chose to accept a lower-paying position.

Finally, the Board argues that salary entitlement attaches only after a tenured employee has begun work under the higher salary. But in *Fodor,* 97 *N.J.A.R.2d (EDU) at* 98, the Commissioner protected a teacher's vested interest as soon as the board adopted a resolution setting the higher salary, regardless of whether the teacher had yet worked under the new salary guide. *Accord*, *Docherty v. Borough of West Paterson Bd. of Educ.*, 1967 *S.L.D.* 297 (Comm'r Oct. 23, 1967).

In sum, the record demonstrates Custode moved from one secretarial assignment to another. While she appears to have worked for a higher-ranking school administrator in her first assignment, the Board makes no claim that the services she performed were substantially different, that her administrative responsibilities were any greater or that her working hours were significantly longer. Therefore, her tenure rights as a secretary preclude the Board from reducing her previously established salary level.

Order

It is **ORDERED** that the Board's action of June 10, 1998 reducing Custode's salary to $31,753 is null and void.

And it is further **ORDERED** that the Board reinstate Custode's salary of $33,500 for the 1998-99 and 1999-2000 school years and pay her the difference of $1,747 per year or a total of $3,494 within thirty days of the date of the final administrative decision.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 8, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

9-15-00
DATE

Debbie Contarsatis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

No.	Description
P-1	Certification of Donna Custode, dated June 28, 1999, with attachment
R-1	Certification of Dr. Rosalie S. Lamonte, dated June 21, 1999

OAL DKT. NOS. EDU 9827-98 AND 9576-99 (CONSOLIDATED)
AGENCY DKT. NOS. 392-8/98 AND 205-7/99 (CONSOLIDATED)

DONNA CUSTODE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge (ALJ). The Commissioner concurs with the ALJ that the Board's action on June 10, 1998 reducing petitioner's salary was without effect because petitioner, a tenured secretary, had acquired a vested right in the salary which the Board established for her on May 13, 1998 when it approved her movement to the 14th step on the "higher level" salary guide for the 1998-99 school year. (Initial Decision at 3) Thereafter, inasmuch as petitioner remained in the *same tenurable position* after the reduction in force, the Board was not permitted to reduce her compensation, absent meeting the requirements in *N.J.S.A.* 18A:17-2.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Board is directed to compensate petitioner, within 60 days of the date of this

decision, with back pay and related emoluments for the 1998-1999 and 1999-2000 school years, as set forth in the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: OCT 30 2000

Date of Mailing: NOV 01 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

350-00

EILEEN CERULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

October 30, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11006-99
AGENCY DKT. NO. 249-8/99

EILEEN CERULLO ,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for appellant
(Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: September 8, 2000 Decided: September 12, 2000

BEFORE **ELINOR R. REINER**, ALJ:

On August 17, 1999, petitioner, Eileen Cerullo, filed a verified petition of appeal with the Commissioner of Education, requesting that respondent restore three sick days to petitioner's sick leave bank which were wrongfully deducted for June 24, 25 and 28, 1999. On August 27, 1999, respondent filed an answer, contending that petitioner was not entitled to sick leave benefits pursuant to *N.J.S.A.* 18A:30-2.1. On September 28, 1999, the Department of Education, Bureau of Controversies and Disputes, transmitted

this matter was transmitted to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned administrative law judge on October 18, 1999, and a prehearing conference scheduled for December 13, 1999. The prehearing conference was adjourned and a status conference was held with counsel on December 22, 1999, during which the parties discussed possible resolution of this matter. The hearing scheduled for June 28, 2000 was adjourned for possible settlement and rescheduled to July 26, 2000. On that date, the parties failed to appear and thereafter informed the undersigned that the matter had been settled.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 12, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

9-15-00
DATE

Debbie Contanzaro/AP
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

EILEEN CERULLO, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 249-8/99 OAL Dkt. No. EDUOR 11006-99 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding petitioner's claim for restoration of certain sick days pursuant to N.J.S.A. 18A:30-2.1 for absences from work on June 24, 25 and 28, 1999, alleged to be due to work-related injuries. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

1. The parties agree that this Stipulation of Settlement represents the compromise of disputed claims and is not an admission of liability or wrongdoing by either party.

2. The petitioner withdraws her petition in the within matter.

3. The respondent Jersey City School District agrees to restore two (2) sick days to petitioner's sick bank as being due to injury on the job.

4. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

EILEEN CERULLO

DATED: Sept. 1-00

ALAN S. PORWICH, Esq.
Attorney for Petitioner

DATED: 9/5/00

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 9/6/00

OAL DKT. NO. EDU 11006-99
AGENCY DKT. NO. 249-8/99

EILEEN CERULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 30 2000

Date of Mailing: NOV 02 2000

351-00

NICOLE P. PORCELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 30, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9132-99

AGENCY DKT. NO. 202-7/99

NICOLE P. PORCELLA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for Petitioner
(Oxfeld & Cohen, attorneys)

Ellen S. Bass, Esq., for Respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: September 5, 2000 Decided: September 13, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 11, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 13, 2000
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

9-15-00
DATE

Bettie Austerlitz
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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Rand, Algeier, Tosti & Woodruff, P.C.
60 Washington Street
Morristown, NJ 07960
(973) 539-2600
Attorneys for Respondent, Mendham Township Board of Education

NICOLE PORCELLA, Petitioner, V. MENDHAM TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR 09132-99N **STIPULATION OF SETTLEMENT**

The parties hereby stipulate and agree as follows:

1. The Respondent, the Mendham Township Board of Education ("the Board"), will pay to the Petitioner, Nicole Porcella, ("Ms. Porcella"), the sum of three thousand five hundred dollars ($3,500.00), within thirty days of the execution of this stipulation of settlement by both parties. This payment represents full and complete satisfaction of all claims raised by the petition.

2. Upon receipt of the payment specified in paragraph one herein, Ms. Porcella agrees to the dismissal, with prejudice, of the petition currently pending before the Office of Administrative Law.

3. Ms. Porcella shall provide a General Release to the Board, its agents, servants and employees, contemporaneously with the execution of this Agreement. This release, which shall be in the form attached hereto as Exhibit A, shall forever release and discharge the Board and such individuals from any and all claims, liabilities and expenses arising from Ms.

Porcella's employment with the Board, including but not limited to claims for back pay, reemployment, tenure, and any contract benefits or emoluments of employment.

4. This Agreement incorporates and settles all claims and disputes which exist between Ms. Porcella and the Board arising from her employment. This Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Ms. Porcella. The Board will be obligated to make no further payments of any kind whatsoever to Ms. Porcella except as specifically stipulated herein.

5. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or "precedent" requiring or restricting the Board in providing any benefit to any person, group or association other than Ms. Porcella.

6. The parties have entered into this agreement solely and exclusively to avoid protracted litigation. Ms. Porcella does not admit any fault or wrongdoing, nor does she admit that her teaching performance was unsatisfactory. Likewise, the Board does not admit that it took any action which exceeded its legal authority or which violated Ms. Porcella's rights under applicable law.

7. The parties acknowledge that each has received independent legal advice of her or its own selection, that each fully understands this Agreement, that each has been fully informed as to her or its legal rights and obligations; and

having had such advice and such knowledge, each is signing this Agreement freely and voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 3 OF June 2000

Witness

LORI A. CAHILL
Notary Public of New Jersey
My Commission expires Dec. 2, 2003

Nicole Porcella
Nicole Porcella

Attest

Patricia A. Hayden
President
Mendham Township Bd. of Ed.

Dated:

RELEASE

This Release, dated July 1, 2000, is given

BY the Releasor, **NICOLE PORCELLA**, referred to as "**I**",

TO **MENDHAM TOWNSHIP BOARD OF EDUCATION, its members, agents, servants and employees**

referred to as "**You**".

1. Release: I release and give up any and all claims and rights which I may have against you resulting from anything which has happened up to now. This releases all claims, including those of which I am not aware and those not mentioned in this Release. I specifically release the following claims:

Any and all claims arising from my employment as a teacher for the Mendham Township Public Schools, Morris County, and which were raised or which could have been raised in the action, Porcella v. Mendham Township Board of Education, OAL Dkt No. EDUOR 09132-99N, including but not limited to claims for further employment, additional compensation, sick days, or any other benefit or emolument of employment. It is expressly understood that I reserve the right to bring an action to enforce the separation of employment agreement attached hereto.

2. Payment: In full payment for making this Release, I have been paid the sum of three thousand, five hundred dollars ($3,500.00). I agree that I will not seek any other payments from you.

3. Who is Bound: I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures: I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

_____

Nicole Porcella
NICOLE PORCELLA

STATE OF NEW JERSEY
:SS
COUNTY OF MORRIS,

I CERTIFY that on 7-1-00, 2000, NICOLE PORCELLA came before me and acknowledged under oath, to my satisfaction, that she:

a. is named in and personally signed this document; and
b. signed, sealed and delivered this document as her act and deed.

Elizabeth A. Dixon
NOTARY PUBLIC OF THE STATE OF NEW JERSEY

ELIZABETH A. DIXON
NOTARY PUBLIC STATE OF NEW JERSEY
MY COMMISSION EXPIRES 7-18-2003

Prepared By:
ELLEN S. BASS, ESQ.

OAL DKT. NO. EDU 9132-99
AGENCY DKT. NO. 202-7/99

NICOLE P. PORCELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: OCT 30 2000

Date of Mailing: NOV 02 2000

353-00 353-

C.K., on behalf of minor child, R.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF EGG HARBOR,
ATLANTIC COUNTY, :

RESPONDENT. :

November 02, 2000

OAL DKT. NO. EDU 4163-00
AGENCY DKT NO. 169-5/00

C.K., on behalf of minor child, R.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF EGG HARBOR,
ATLANTIC COUNTY, :

RESPONDENT. :

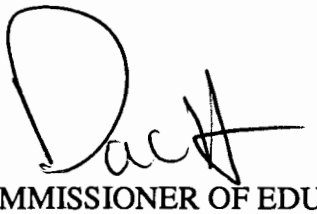
On June 20, 2000, the record and a notice of withdrawal of the Motion for Emergent Relief in this matter were transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2.

Prior to his review of the notice of withdrawal, the Commissioner received a letter from petitioner on July 3, 2000, seeking to vacate the above-mentioned withdrawal of her Motion for Emergent Relief. Accordingly, on July 24, 2000, the Commissioner determined to remand this matter to OAL for findings on the effect of petitioner's letter of July 3, 2000, and for further proceedings, as needed.

On August 10, 2000, however, prior to transmitting the matter to OAL on remand, the Commissioner received a letter from petitioner that appeared to be a withdrawal of both her motion for emergent relief and her appeal of the underlying issues in this matter. Therefore, on August 16, 2000, the Commissioner notified petitioner of the receipt of her apparent withdrawal of the entire matter and advised her to contact the Commissioner within 10 days if it was not her intent to withdraw her motion for emergent relief and her appeal of the underlying issues. Petitioner did not respond.

Accordingly, the Commissioner approved petitioner's August 10, 2000 letter as a withdrawal of the entire matter. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is, therefore, dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: NOV 02 2000

Date of Mailing: NOV 02 2000

354-00

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM ARERA,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF GARFIELD, BERGEN COUNTY.	:	DECISION
_____:		

November 03, 2000

AGENCY DKT. NO. 315-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM ARERA,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF GARFIELD, BERGEN COUNTY.	:	DECISION
_____:		

For the Board, Toni Belford Damiano, Esq.

William Arera, *Pro Se*

This matter having been opened before the Commissioner of Education on September 7, 2000, through certification of tenure charges of unbecoming conduct and other just cause against a tenured custodian by the Board of Education of the City of Garfield; and

The Commissioner having directed respondent via both certified and regular mail on September 14, 2000 -- the certified copy having been signed for on September 18, 2000 -- to file an Answer to the tenure charges against him; and

Such notice clearly having informed respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall **have 15 days from the date such charges are filed with the Commissioner** to file a written response to the charges with the Commissioner*" and that failure to answer within the prescribed period will result in the charges being deemed admitted; and

On September 18, 2000, respondent notified the Bureau of Controversies and Disputes that he would not file an Answer to the Board's charges; and

In that respondent has chosen not to oppose the charges filed against him, each count of such charges is deemed admitted; and

The Commissioner's review of the tenure charges against respondent by the Board, and the statement of evidence in support of those charges, indicates that:

1. On March 2, 2000, respondent reported to his custodian position noticeably uncoordinated, agitated, disheveled, having slurred speech, with blood on his shirt front and sleeve and smelling of alcohol, for which he was suspended by the Board, with pay, until further notice.

2. Respondent notified the Board of his intent to enter an alcohol abuse program and he was subsequently allowed to return to his duties on May 1, 2000, with the understanding that he submit to random alcohol tests as frequently as daily, if necessary.

3. On June 16, 2000, respondent was reported to be intoxicated on the job, with such condition being confirmed by a blood alcohol test performed at a local laboratory.

Having deemed such charges to be admitted by operation of rule, the Commissioner has determined, pursuant to *N.J.S.A.* 18A:6-16, that respondent's actions constitute unbecoming conduct and other just cause warranting his dismissal from his tenured position; now, therefore

IT IS ORDERED THIS 11-03-00 day of October that William Arera shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.

COMMISSIONER OF EDUCATION

DATED: NOV 03 2000

MAILED: NOV 03 2000

355-00

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

November 03, 2000

AGENCY DKT. NO. 501-10/96,
C.D. #241-98, S.B. #61-98,
APP. DIV. #A-1714-98T1, M-6122-98

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT.	:	

For Petitioner, Cooper, Perskie, April, Niedelman, Wagenheim & Levenson
(John R. Armstrong, Esq.)

For Respondent, John J. Farmer, Attorney General of New Jersey
(Mary E. Rubinstein, DAG)

This matter comes before the Commissioner of Education on remand by the State Board of Education based upon an order of the Appellate Division of Superior Court. However, petitioner has notified the Commissioner that there are no longer any issues in dispute between the parties.

Accordingly, the Commissioner deems this matter withdrawn and dismisses it as a contested case before him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DATED: NOV 03 2000

MAILED: NOV 03 2000

356-00

E.K., on behalf of minor children, K.K., Jr., and M.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's determination removing her children from the District's schools for nonresidency.

The ALJ concluded that petitioner abandoned her petition by failure to appear to prosecute her action. Nevertheless, the ALJ requested respondent to present evidence sufficient to establish a *prima facie* case on the issue *sub judice*. The ALJ found that, based upon certifications presented, the Board's determination that petitioner and her children were not domiciled within the District and were not entitled to a free education in the District for the period in question (commencing in the 1999-2000 school year) was to be upheld. The ALJ ordered petitioner to pay tuition for the children for the year 1999-2000, together with pro-rated tuition for the year 2000-2001 until the students were actually removed from the school.

Commissioner adopted the findings and determination in the Initial Decision and ordered petitioner to pay tuition for the period of ineligible school attendance.

November 03, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR/ORDER DENYING DOMICILE AND REQUIRING PAYMENT OF TUITION
OAL DKT. NO. EDU 2193-00
AGENCY DKT. NO. 44-2/00

E.K. ON BEHALF OF MINOR CHILDREN, K.K. JR., AND M.K.,,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Daniel S. Popovitch, Esq., for respondent (Popovitch & Popovitch, attorneys)

Record Closed: September 13, 2000 Decided: September 15, 2000

BEFORE **STEVEN C. REBACK**, ALJ:

This is an appeal by the petitioner, E.K,. from a residency determination arrived at by the Point Pleasant Borough Board of Education (Point Pleasant) removing petitioner's children K.K. Jr., and M.K. from the Point Pleasant Borough Schools. The basis of the determination by Point

Pleasant seeking such removal, and the attendant tuition costs incurred, is its assertion that neither child is domiciled in the district as is mandated pursuant to *N.J.S.A.* 18A:38-1. A board hearing was conducted on November 17, 1999 concerning the residency and domicile of the children at issue and, on January 13, 2000, based upon the evidence presented, and further certifications, the Board determined that the petitioner and children did not reside in and were not domiciled in the Borough of Point Pleasant. By letter of January 17, 1999 (apparently the letter is incorrectly dated the previous year) counsel for Point Pleasant advised the petitioner's then counsel of the determination. Counsel also advised that, pursuant to statute, the children may not be removed from the school during the twenty-one day period within which the parents may appeal the decision to the Commissioner of the Department of Education.

Thereafter, on January 17, 2000, Thomas J. Mallon, Esq., then counsel on behalf of the petitioner, submitted a written request to the Commissioner of Education appealing the determination of respondent. That request ultimately resulted in a decision by the Commissioner of Education to transmit, on March 21, 2000, the appeal to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to –13 and *N.J.S.A.* 52:14B-1 to –15. The matter was originally scheduled to be heard before another administrative law judge in December 2000 and, at the written request of counsel for Point Pleasant, the matter was expedited and rescheduled to be heard before me on August 23 and August 24, 2000 at the Office of Administrative Law, Mercerville, New Jersey. On or about the day prior to the hearing my office received a telephone request for an adjournment by the petitioner arguing lack of transportation and the unavailability of a neighbor to testify. By letter of the same date counsel for the Board vigorously opposed the adjournment request. For reasons stated I denied such request, as well as advising the petitioner to this effect.

Thereafter, on the following day August 23, 2000, the respondent appeared with its witnesses prepared to address the substance of aspects of this appeal. The petitioner neither appeared nor communicated with this office in any other fashion nor did any representative of hers appear at that time. Since that date my office has received no further communication from petitioner.

On September 13, 2000 my office received moving papers, submitted by the Point Pleasant Borough Board of Education, seeking a determination that the petitioner's children are not domiciliaries of respondent's school district and seeking further an order directing that tuition for the two children at issue be paid for their unlawful attendance.

In support of its motion the Board submits the certifications of Daniel S. Popovitch, Esq., Janet Baumeister, Attendance Officer, employed by respondent; and Edward Leibfried, Principal of the Ocean Road School in respondent district where the student M.K. was presently in attendance and where the student K.K., Jr., had previously been in attendance. These documents have been moved in evidence as Exhibits R-1, 2 and 3, respectively as an incident to the motion at issue.

It should, at the outset, be noted that the burden in this matter would rest with the petitioner E.K. to establish, by a preponderance of the relevant credible evidence, that the determination of respondent, challenging the residency of her children and the calculation of tuition due, is inaccurate. See *N.J.S.A.* 18A:38-1. As I have previously noted it is clear that by the failure and inaction of petitioner to pursue her appellate rights in this matter any challenge to the determination of the Board has been and, I **CONCLUDE**, is abandoned by her failure to appear to prosecute her action. Nevertheless, and in the interest of justice, I have requested that the respondent, the party upon whom the burden does not rest, to present evidence sufficient to establish a *prima facie* case on the issue *sub judice*.

In reviewing the various documents submitted it is clear, and I am convinced and so **FIND**, that based upon the certifications, the Board's determination that the petitioner and her children are not domiciled within the Point Pleasant Borough School District and are therefore not entitled to a free education in the district, at least for the period at issue which would commence in the 1999-2000 school year, be and is hereby upheld. Further it is **ORDERED** that as a consequence of the termination of non-residency it is **ORDERED** that E.K. pay tuition in the amount of $7,521 for K.K., who attends Memorial Middle School, and $7,174 for M.K., who attends Ocean Roads School, for the school year 1999-2000, which represents the rate fixed for tuition students in the District of Point Pleasant, together with pro-rated tuition for the year 2000-2001 until the students are actually removed from the school.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/15/00
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

9-19-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 20 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Certification of Daniel S. Popovitch, Esq.

R-2 Certification of Janet Baumeister

R-3 Certification of Edward Leibfried

OAL DKT. NO. EDU 2193-00
AGENCY DKT. NO. 44-2/00

E.K., on behalf of minor children, K.K., Jr., and M.K., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions essentially reiterate information contained in her Petition of Appeal and its accompanying documents. Additionally, petitioner submits a copy of a New Jersey driver's license, which bears her name and the 506 Hardenbergh Avenue, Point Pleasant address, and a copy of a property tax bill and water bill for that address which bears her name jointly with her husband and mother-in-law. Petitioner also submitted a copy of an unsigned letter from Thomas and Jean Marie Harris dated November 17, 1999 to petitioner's former attorney which reads in pertinent part:

> [Petitioner's sons] have been friends with our two sons for the past five years that we have been residents of 511 Hardenbergh Avenue, Point Pleasant. It has been our understanding that the boys have departed from 506 Hardenbergh Avenue when looking for a playmate and have returned to the same location when their playtime was completed.
>
> On several occasions over the past five years, our two sons have gone to 506 Hardenbergh Avenue, Point Pleasant, also looking for

> a playmate. Upon ringing the bell, they have been greeted by either [the sons], their mother, [petitioner], and on some occasions their grandmother.
>
> We are aware that [the parents] are separated at this time and sometimes "Grandma" baby-sits so that [petitioner] can go to work. The friendship between our two sons and [petitioner's] two sons remains the same.

Upon a thorough review of the record, including the parties' exceptions, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) which determine that petitioner's children do not meet the eligibility requirements for attending school free of charge in respondent's District pursuant to *N.J.S.A.* 18A:38-1.[1]

Upon examination of petitioner's submissions to the record, and even granting petitioner every inference in her favor, the arguments she sets forth and documentation she submits do not overcome the weight of the evidence presented by the Board through the surveillance reports and certification of Janet Baumeister, its Attendance Officer which provide documentation that petitioner's children are not domiciled in Point Pleasant Borough.

Accordingly, the Commissioner adopts the recommended order of the ALJ directing petitioner to pay tuition to the Point Pleasant Borough Board of Education in the amounts set forth in the Initial Decision for the period of ineligible school attendance by her sons during the 1999-2000 and the 2000-2001 school years.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: NOV 03 2000

Date of Mailing: NOV 03 2000

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[1] The Commissioner notes that there is nothing in the record of this matter indicating that an extraordinary circumstance prevented petitioner from attending the hearing, which was scheduled by the ALJ two months in advance; nor does petitioner make a claim of extraordinary circumstance for nonattendance at the hearing in her exceptions. Further, the Commissioner concurs with the ALJ that, under the particular circumstances of this matter, it was appropriate to request that the Board make a *prima facie* case in support of its position.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

356-00

EDU #2193-00
C # 356-00
SB # 69-00

E.K., on behalf of minor children, K.K., Jr. and M.K.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 3, 2000

For the Petitioner-Appellant, E.K., pro se

For the Respondent-Respondent, Popovitch & Popovitch (Daniel Popovitch, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

February 7, 2001

Date of mailing FEB 09 2001

2/7/01

357-00

A.B., on behalf of minor child, C.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

November 03, 2000

OAL DKT. NO. EDU 11818-99
AGENCY DKT. NO. 297-10/99

A.B., on behalf of minor child, C.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and a copy of a notification sent to petitioner by OAL on September 1, 2000, providing ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: NOV 03 2000

Date of Mailing: NOV 03 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

358-00

J.B., on behalf of minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 03, 2000

OAL DKT. NO. 4803-00
AGENCY DKT. NO. 234-7/00

J.B., on behalf of minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by the OAL on October 6, 2000 providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: NOV 03 2000

Date of Mailing: NOV 03 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

359-00

#359-00

M.G. AND M.G., on behalf of minor child, A.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents appealed the expulsion of their son, A.G., alleging inappropriate procedures prior to expulsion and denial of due process. The Board expelled him following two findings that he was under the influence of marijuana.

The ALJ found that based upon the circumstances of this case, the school's decision to require that A.G. be tested was fully supported by a reasonable suspicion that he was under the influence of drugs. The ALJ found that common sense and legal precedent supported the decision to follow the mandate of *N.J.S.A.* 18A:40A-12 and have A.G. examined. Moreover, the ALJ determined that although the hearing process was flawed to some extent, it was apparent that the flaws did not cause the Board to act arbitrarily. The ALJ noted that the Board only acted to expel A.G. after he received fair warning via the suspension following the first positive test that he had to refrain from marijuana use and that he would be subject to random testing; yet, when he underwent the random test, he was again shown to be under the influence of marijuana. The ALJ determined that the Board did not act arbitrarily given the strong State policy against drugs in school and its Substance Abuse Policy No. 5530. Petition was dismissed. A.G. was expelled from the school system.

The Commissioner affirmed in part, reversed in part the Initial Decision of the ALJ. Citing *In re Graceffo*, the Commissioner determined that A.G. was properly referred for a medical examination by a staff member who observed symptoms of drug use and advised the designated administrator (assistant principal) of such. (The principal or designee may not substitute his judgment for that of the referring staff member.) However, the Commissioner finds that the Board's decision to expel A.G. was not compelled by its policy; yet the Board turned to this ultimate sanction without considering all pertinent factors, including other options such as alternative education programs. The Commissioner directed the Board to readmit A.G. to its District and to determine, consistent with his decision, whether expulsion is the appropriate result under all the circumstances of A.G.'s case. The Commissioner did not retain jurisdiction.

November 6, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06743-00S
AGENCY DKT. NO. 316-7/00

M.G. & M.G., O/BO A.G.,
Petitioners,
v.
WASHINGTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Christopher M. Manganello, Esq., for petitioners

Joseph Betley, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: September 13, 2000 Decided: September 19, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

M.G. and M.G. ("petitioners"), the parents of A.G. ("A."), a minor, filed a petition seeking to overturn the decision of the Washington Township Board of Education ("Board") that their son be expelled from the respondent's school district. A. was fifteen years old at the time the decision was made in April 2000 and turned sixteen in August 2000.

The Board expelled A. following two drug tests that showed that he was under the influence of marijuana. The parents initially filed their petition with the Division of Special Education and an emergent relief application was heard at the Office of Administrative Law ("OAL") on August 9, 2000, which was denied by order dated August 10, 2000. *M.G. & M.G. o/b/o A.G., a Minor v. Washington Township Board of Education,* OAL DKT. EDS 04952-00S. At the plenary hearing held on September 7, 8 and 13, 2000, the sole issue regarding application of rights under the Individuals With Disabilities Education Act ("IDEA") was dismissed and the

remaining non-special education issues were bifurcated under the present docket number in order to permit the Commissioner of Education ("Commissioner") to review the initial decision of the administrative law judge ("ALJ") pursuant to the Commissioner's authority under the Administrative Procedure Act, *N.J.S.A.* 52:14B-10. A separate Final Decision regarding the IDEA claim is issued concurrently with this Initial Decision under docket number EDS 04952-00S.

ISSUES

Boards of education enjoy wide policy-making discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Here, the petitioners contend that the Board's decision to expel their son was arbitrary and capricious. Specifically, they assert that on December 21, 1999, the date on which A. was first tested, the school officials who ordered A. to undergo testing did not possess reasonable grounds for suspecting that A. was under the influence of drugs. They further assert that the school authorities had no consent from them for the testing of their son. In addition, they challenge the proceedings held below before the Board, objecting to limitations imposed on their ability to present proofs at the hearing. They do not challenge the accuracy of the tests performed on the blood sample drawn on December 21 or on the random sample collected on February 22, 2000. Finally, they raise issues regarding the Board's compliance with *N.J.S.A.* 18A:40A-10, which requires that the Board develop a "clear written policy statement which outlines the district's program to combat substance abuse and which provides for the identification, evaluation, referral for treatment and discipline of pupils who are substance abusers." The statute requires that "[C]opies of the policy statement shall be distributed to pupils and their parents at the beginning of the school year."

Applicable Statute and Policy

Before considering the specific facts of this case, it is helpful to examine the statute that provides for "examination" of those students suspected of being under the influence of alcohol or a controlled dangerous substance ("CDS"). *N.J.S.A.* 18A:40A-12 provides

> a. Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of substances as defined pursuant to section 2 of this act, other than anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector, if he is available. . . . The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence. A written report of that examination shall be furnished within 24 hours by the examining physician to the parent or guardian of the pupil and to the superintendent of schools or administrative principal. . . .

The Washington Township School District has adopted a "Substance Abuse" policy, identified as R5530. This policy, denoted as a "Regulation" for the District, is twenty-one pages in length and in general provides that "[w]henever it shall appear to any teaching staff member, school nurse or other educational personnel that a pupil may be under the influence of . . . drugs, they shall report the matter as soon as possible to a school nurse or medical inspector. . . ." The regulation requires that a suspected student is to be removed to a "protective environment for observation and care by the school nurse . . . until his or her parent or guardian can be contacted." The "principal shall request the assistance of the school nurse . . . in assessing the physical state of the pupil." The parents "shall be immediately notified of the incident and shall be provided a description of the situation" and "shall be requested to come to the school immediately. Parents will be informed of their responsibility in situations involving a policy violation." The regulation requires that "[T]he principal or his/her designee shall arrange for an immediate examination of the pupil, which will include a urine/drug analysis within two hours." The alternative choices of testing by the school's contracted "medical assessment provider," the school physician or the parent's selected physician are offered. In the instance of a refusal or failure of a parent to comply with the provisions of *N.J.S.A.* 18:40A-12, such failure "shall be deemed a violation of the compulsory education . . . and/or child neglect . . . laws." (Statutory citations omitted). "If

the student refuses to take a urine/drug analysis or if there is evidence of tampering . . . , the case will be handled as if the student tested positive for substance abuse."

Compliance with *N.J.S.A.* 18A:40A-10

Initially, petitioners argue that the Board failed to comply with the requirement of *N.J.S.A.* 18A:40A-10 to provide to them a copy of the Board's policy statement. The evidence provided by the Board includes a signed certification that Mrs. G. "read the discipline policy of your child's school." The Board's full policy statement, R-4, 21 pages in length, was admittedly not sent home to the parents of students. However, R-5, a document entitled "Washington Township High School Student Code of Conduct" was sent home. This document describes the infraction of being under the influence of a controlled dangerous substance, including marijuana, and describes in some detail the disciplinary results of a first offense and of a second offense, specifically that for a second offense an external suspension will be placed in effect pending a Board expulsion hearing. The Code of Conduct also details the full panoply of conditions of a student's return to school after a first offense, the random testing applicable to such a student, the counseling required and the risk of expulsion if further violations occur. This document, while not the entire Board policy, is a detailed notice to parents and students of the principal aspects of the discipline, evaluation and treatment policy. As the evidence is sufficient to establish that the parent received the Code of Conduct, there is no violation of the statutory provision.

Consent

In the present case the parents argue that they did not give their consent to the school authorities before their son was subjected to the December 21 blood test and that the test therefore cannot be used against him. The Board's primary witness, Jeffrey Spector, who at the time was the 9th grade assistant principal at the District's High School, testified that in the course of a telephone conversation with Mrs. G. held while A. was in the office on December 21, he advised her that her son was suspected of being under the influence and he told her of the options for testing. He testified that she told him to go ahead and have A. tested at Kennedy Hospital (the usual testing facility used by the Board). She testified that Spector never told her that she had the option to refuse to have A. tested. Additional evidence was presented on the question of

whether permission to test was denied and whether the option to refuse was mentioned. However, an examination of the statute indicates that the Legislature determined that where the student in question appeared to be under the influence the student "shall be examined."

N.J.S.A. 18A:40-12 allows alternatives for the administration of the examination itself, such that the parents are offered the opportunity to have their own choice of the examining physician, if their choice is readily available. However, nowhere does the language of the statute state that a parent has the right to refuse to have the student tested. The Board's own policy, which arises from the authority of this statute, does not state that the parent can refuse, although since it provides notice as to the consequence of such refusal by either the parent(s) or the student, it recognizes that such might occur. It does not state that an option to refuse and face the consequences is an option to be offered to the parents when they are notified of the suspicion that their child is under the influence. The Legislature apparently deemed the need to identify and then appropriately deal with students under the influence in the school milieu as of such vital importance that the examination of a student so identified was made mandatory. While the district might well decide that it would not test over the objection of a parent, and might choose, as this district chose, to consider any such refusal as a positive, there is no statutory right to refuse, and no constitutional right of refusal has been identified either. In the school context, the United States Supreme Court has recognized that there must be a balancing of individual rights with the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *New Jersey v. T.L.O.*, 469 *U.S.* 325, 339, 105 *S.Ct.* 733, 83 *L.Ed*2d 720(1985). The legislative command to examine an identified student does not except from its reach those students whose parent or guardian decide that they do not want their child tested. Therefore, while the Board insists it had consent and the parents deny that they gave it, there is no legal authority that demands that the Board obtain consent and no grounds for ignoring the results of the examination simply because the parents did not consent to it. Determination of the factual dispute is therefore unnecessary.[1]

[1] This statute is unlike *N.J.S.A.* 39:4-50.4a. In the statute providing for the testing of suspected drunk drivers, the Legislature specifically addressed the situation of refusal, providing that a municipal court "shall revoke" the right of a person to operate a motor vehicle who, after being arrested for a violation of *N.J.S.A.* 39:4-50, refuses to submit to a chemical test. The Legislature did not see fit to provide any statement regarding the issue of refusal in *N.J.S.A.* 18A:40A-12. Its language is mandatory in nature, and there being no constitutional right to refuse, there is no basis for finding any need for the Board's representatives to offer such an option to the parents of a student reasonably suspected of being under the influence. Again, there is certainly no mandate for the use of any force or coercion to effectuate the examination, and if a "refusal" does occur, the policy sets out consequences.

Reasonable Suspicion

The statute provides that a teaching staff member shall report the matter when he or she identifies a student who "appears" to be under the influence of drugs. An examination following upon identification of such a student constitutes a search of the student, and may, indeed generally will and here did, involve urine screening. The United States Supreme Court has acknowledged that the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment extends through the Fourteenth Amendment to searches conducted by and at the behest of state officers and more particularly to those involving students. *T.L.O., supra.*, at 469 *U.S.* 325, 334 (1985). However, the United States Supreme Court has stated that the

> legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search . . . one must consider "whether the . . . action was justified in its inception," *Terry v. Ohio*, 392 *U.S.* [1,] 20 [(1968)]; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," ibid.
> *[Id.* At 341-42 (footnotes omitted).]

As the Supreme Court has noted, the determination of "reasonableness" can be elusive. The definition of what constitutes "reasonable suspicion" involves a concept the precise definition of which the Court has labeled as "not possible." It is instead a "commonsense, nontechnical conception [ ]that deal [s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 *U.S.* 690, 695 (1996).

In this case, the local board was presented with a packet of documents for its consideration in the expulsion hearing. In that packet was a narrative that stated that on December 21, 1999, an unnamed teacher reported to Mr. Jeff Spector, the 9th grade assistant principal, that the teacher believed that A. was under the influence of drugs because A. was glassy eyed, sleepy and complained of nausea. The teacher was not called to testify before the Board and her name (she has been identified in this proceeding as Ms. Pasquarel, although she was not presented as a witness here either) was withheld from counsel for the G. family. Mr.

Spector testified below as to his observations, and has done so here as well. In addition, the school nurse and another assistant principal have testified here.

Mr. Spector testified here that after Ms. Pasquarel sent A. to the school office he observed A., and saw that A. had a disheveled appearance, with his shirt hanging out of his pants, lacked energy, but exhibited mood swings, sometimes being loud and at other times quiet, was crying and glassy eyed from the crying, seemed to lean back and lack stability. He did not appear to be or complain of being nauseous. The school nurse, Ms. Michalene Lubeski, testified that she was present in the office as well and observed that A., who was a regular visitor to her office and with whom she was quiet familiar, appeared disheveled, with his shirt hanging out of his pants, an appearance not usual for him, as in her experience he was "always neat." He was alert, but was hysterical, yelling, sobbing uncontrollably, running his hands through his hair and his eyes were red. Upon examination, she found his blood pressure extremely high and his pulse extremely rapid. He was "highly emotional," and "overly sensitive." Mr. Hoopes, another assistant principal present, observed A. to be crying, disheveled, very upset, with eyes that were "a little glassy" and bloodshot. Hoopes recalled some outbursts on A.'s part as well.

According to the Board's witnesses, in the course of A.'s stay in the office before his being transported by school bus to the emergency room at Kennedy Hospital, he made significant statements. Mr. Spector testified that Ms. Lubeski asked A. if he would test positive and he replied that he would, for marijuana, which he had used within the last week. Ms. Lubeski testified that the boy was sobbing and asking why "everyone was always picking on me." He then told her that he had "smoked a joint" and that his father was "going to kill him" when he found out about the drug use. She observed that he "was scared." He added that he was "going to test positive." She related to him that for the test to be positive it would have to register over 50 nanograms, and that the use would have to have been shortly before the test or a "lot of use." He was highly emotional, wondering aloud what his dad would do and insisting that he was going to test positive. Mr. Hoopes recalled that when A. was asked, he said that he had smoked recently, that he would get into "deep trouble" at home, that he would "get killed."

In his own testimony in this hearing, A. testified that he was asked in the office whether he had smoked or had been in contact with persons who did so. He related to the adults that he

"had been around" smokers at a party, that the marijuana "might be in his system." He then testified that he was not asked if he had smoked, but later testified that he was "not sure" if Spector had asked him in the office if he smoked. He did recall saying that he had smoked, and did not recall saying anything about smoking while being transported to the hospital for testing, although Mr. Spector testified that while they were on the bus they discussed the test and results to be garnered there from and A. said that "he'd be positive for marijuana." In fact, as A. admitted in his testimony, since June 1999 he was a frequent smoker of marijuana (one to three times a day, with some periods when he did not smoke for days or up to a week) and had smoked two days before the December 21 incident.

In assessing the evidence as to reasonable suspicion, it seems clear that if the situation is viewed concerning the circumstances presented to the three adults in the office, reasonable suspicion certainly existed. Even apart from the purported admissions and the acknowledged statements by A. in the office, he was exhibiting to these three school authorities mood swings, outbursts, hysterical crying, great emotionalism, glassy eyes, high blood pressure and pulse, and an appearance that was different from the neat image he normally exhibited. These factors by themselves could readily have raised reasonable suspicion that he was under the influence. I am convinced beyond any reasonable question that Spector, Hoopes and Lubeski each candidly and honestly identified the observations that they made that day, and while there are some differences between them in the exact observations related, there is absolutely no basis for discrediting the fundamental honesty and accuracy of their testimony. Particularly significant is the nurse's testimony. She testified that she did not diagnose, but merely observed and gathered her observations, and that she was particularly alarmed by the blood pressure and pulse readings. Of course, when coupled with admissions of smoking that I **FIND** A. made, the totality of the circumstances constituted a clear case of reasonable suspicion. Even without the statements, there was enough to permit the child's examination in accordance with the statute.

The topic of reasonable suspicion must, however, also consider the involvement of the previously unidentified teacher, Ms. Pasquarel. As noted, she did not testify at the Board's hearing and the Board did not choose to call her at the administrative hearing either. The Board was aware of her reported observations of A. only through the reference in the narrative of the incident provided in the packet of material made available to the Board and whatever testimonial

references may have been made at that hearing by Mr. Spector or others. In the OAL, counsel for petitioners never sought to compel discovery of the teacher's name, yet protests that the Board did not call her as a witness. Petitioners' counsel argues that the reported observations of the teacher were insufficient to provide reasonable suspicion and therefore all that followed, including whatever observations Spector, Lubeski and Hoopes noted, as well as any comments or admissions by A., cannot support the search that occurred.

According to the hearsay evidence presented below and here, Ms. Pasquarel observed that A. was sleeping in class, was glassy eyed and complaining of nausea. Obviously, more than one explanation might account for these circumstances. The teacher herself did not have the authority to order that A. submit to drug screening. Nevertheless, confronted with a student acting as if he was being affected by something out of the ordinary and that might be symptomatic of someone being affected by the use of drugs, she sent the student to the office in accordance with R5530. There, the student was assessed by assistant principals Spector and Hoopes and by school nurse Lubeski. Spector, authorized to act on the district's behalf in these situations, took into account the observations he and his associates made and determined that there was reasonable suspicion and notified Mrs. G., as per the policy. These included important observations about blood pressure and pulse, as well as observations of a student clearly reacting to and perhaps from the influence of some powerful influence. As the discovery of this new evidence occurred, above and beyond the teacher's identified signs, the level of search justified escalated. *Hedges v. Musco*, 204 *F.* 3d 109, (3rd Cir. 2000), *citing* Recent Case, 111 *Harv. L. Rev.* 1341, 1345-46 (1997).

Based upon the totality of the circumstances with which Mr. Spector was confronted, including the admissions of smoking that I **FIND** that A. made in the office, Spector's decision to require that A. be tested was fully supported by a reasonable suspicion that A. was under the influence of drugs. Common sense and legal precedent supported his decision to follow the mandate of *N.J.S.A.* 18A:40A-12 and have A. examined.

Deficiencies in the Hearing Below

As noted the petitioners argue that the hearing below was deficient. This allegation arises from two circumstances, the aforementioned withholding of the name of the teacher who first sent A. to the office under suspicion of being under the influence, and the refusal of the Board, on the advice of its counsel, to allow the petitioners' attorney to cross-examine Mr. Spector regarding the conversation he had with the petitioners and Mr. G.'s brother, B., at their request, a conversation that was secretly tape-recorded by B.G. As for the identification of Ms. Pasquarel, the Board received hearsay information as to her observations and corroborating evidence going to the issue of reasonable suspicion that was legally adequate to allow it to determine that such suspicion was indeed reasonable and adequate to mandate examination of the student. In addition, Board counsel was not legally required to call her: he was free to chose how to try his case, so long as he in fact presented facts sufficient to support the case he sought to prove. Finally, there is no evidence that counsel for the petitioners ever attempted to seek any remedy to force disclosure of the name, such as by a petition to the Commissioner or other such appropriate avenue. In summary, there is nothing about this issue that makes the Board's action arbitrary and capricious.

As for the denial of cross-examination, the tape reveals that at one point in a lengthy discussion regarding the possible options and avenues for the petitioners to consider in light of A.'s potential expulsion, including proceeding with the Board hearing or foregoing that hearing, and the possibility of enrolling A. in a private school, an alternative high school, or in another district's high school, Mr. Spector, who was aware that the G. s had some thought about A. attending Deptford High School, in the school district in which Mr. G.'s parents lived, said that while, in his opinion an attorney well-versed in education law could make very valid arguments to the Board against an expulsion, if, however, A. felt that he could not succeed in Washington Township, that the best option might then be for him to go to Deptford, which he said was a district better equipped to educate A. given his particular circumstances. Spector said that that choice was "the least evasive" and that "realistically he would be living home and I would never say that I said that." He then goes on to discuss the after-school hours situation and the fact that there would be supervision, a good thing in his mind. The petitioners argue that the comment by Spector that he would deny that he said that A. would be living at home, which suggested to

them that he was suggesting or perhaps acquiescing in the family's consideration of a scheme that would constitute a fraud on the Deptford Board of Education and possibly involve a violation of *N.J.S.A.* 18A:38-1, was evidence that could have helped to impeach Spector's credibility in regards to his testimony going to the consent and perhaps to the reasonable suspicion issues. The denial of the right to cross-examine Spector on this relevant evidence concerning his truthfulness was so egregious that it means that the Board consideration of the matter was arbitrary and capricious and must be overturned.

I have listened carefully to the entire recording of the meeting between Spector and the three G. s. It is fair to say that Mr. Spector, who clearly was concerned about the student's plight and the difficulties it presented to the family, and whom the parents had asked for a meeting, may have stepped into areas that were not necessarily the best for him to be discussing. On the tape he states very clearly that in that meeting he did not function as a spokesperson for the Board, or an agent of the Board (at least that was the position he expressed, legal considerations that might actually apply notwithstanding), but any fair reading of the entire tape, and the comment he made upon which counsel and the parents have seized, makes it abundantly clear that that comment in no reasonable manner compromises the integrity and credibility of Spector's testimony on the other matters. While there might be other reasons to doubt him, as consent is not an issue here and the totality of the evidence regarding reasonable suspicion, including the admissions made by A., is such that the existence of reasonable suspicion is clearly established, the error that I agree was made by Board counsel in restricting the cross-examination of the witness on a matter arguably relevant to credibility is nothing more than harmless error. This is so despite the extremely high place of cross-examination in the pantheon of rights fundamental to a fair hearing process. Although the hearing process was flawed to some extent, when the totality of the circumstances is viewed fairly, it is apparent that the flaws below did not cause the Board to act arbitrarily.

Expulsion of a student is an extreme remedy and visits a most unfortunate penalty upon the student, and indeed, on his family. In the case of this student, the Board only acted to expel him after he received fair warning via the suspension following the first positive test that he had to refrain from marijuana use and that he would be subject to random testing. When he underwent that random test, he was again shown to be under the influence of marijuana. Given

the strong State policy against drugs in school, the corrosive effects of drug use on students and on the school system, and the Board's own concern to rid its schools to the extent possible of drugs and, where persistent, those who use drugs, and given that in this case the initial testing was preceded by reasonable suspicion of such use, the Board cannot be said to have acted arbitrarily. Its decision, though a difficult one, must be upheld. The challenge to the expulsion is therefore **DISMISSED** and A. therefore is expelled from the Washington Township school system.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 19, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

9-22-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONERS:

P-1 Micro cassette tape recording of meeting between Mr. Spector and the G.s

P-2 Kennedy Memorial Hospitals medical records of A.G.

P-3 Handwritten notes of 12/21/99

P-4 Letter of 1/28/00 and unidentified material

FOR THE RESPONDENT:

R-1 Washington Twsp. School District Regulation, Attachment G, Substance Abuse Policy Violation Checklist

R-2 Washington Twsp. School District Regulation, Attachment B, Responsibilities of Parents When a Son/Daughter is Suspected of Being Under the Influence of Alcohol or Other Drugs

R-3 Expulsion Packet, Confidential, submitted 3/2/00, containing Recommendation fro Executive Assistant Principal, Narrative of Incident, List of Witnesses, Discipline Record, Drug Testing Results, Guidance Report, Summary of Child Study Team Intervention and Other Supportive Documents

R-4 Washington Twsp. School District Regulation, R 5530 Substance Abuse

R-5 Washington Twsp. High School Student Code of Conduct

R-6 Blank Washington Twsp. Public Schools Student Emergency Card

R-7 Agencies Providing Alcohol/Drug Treatment

R-8 Washington Twsp. Public Schools Student Emergency Card of A.G.

R-9 Addendum to Health Card dated 9/7/99

OAL DKT. NO. EDU 06743-00S
AGENCY DKT. NO. 316-7/00

M.G. AND M.G., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' exception arguments maintain that: (1) the Administrative Law Judge (ALJ) erred in ruling that the Board did not need to obtain parental consent "prior to performing A.G.'s first drug test" (Petitioner's Exceptions at 1, 2); (2) the ALJ improperly concluded that the Board did not act arbitrarily and capriciously in finding that "there was reasonable suspicion for A.G.'s first drug test" (*Id.* at 5); (3) the ALJ erred in ruling that the Board did not contravene *N.J.S.A.* 18A:40A-10; and (4) their due process rights were violated by the Board's failure to offer a transcript of the hearing conducted at the local level.

In reply, the Board asserts that: (1) with respect to the factual issue of whether M.G. gave her consent to have A.G. examined, petitioners "have no business mentioning unsupported testimony from a record they chose not to submit***," (Board's Reply at 1, 2); (2) the ALJ "accurately interpreted *N.J.S.A.* 18A:40-12 as not requiring a school district to present a parent with a choice of electing not to have a student tested who has met the reasonable

suspicion standard in the opinion of a staff member" (*Id.* at 4); (3) there was no need to present the referring teacher as a witness at the Board hearing (*Id.*); (4) the ALJ's discussion at page four of the Initial Decision with respect to the alleged violation of *N.J.S.A.* 18A:40A-10 should be affirmed; and (5) petitioners' due process argument lacks merit, since they never raised in their pleadings the issue of the absence of a record of the Board's proceedings and they are wrong in alleging that there was an unfair shifting of burdens. (*Id.* at 5)

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part and reverse in part the Initial Decision of the ALJ for the reasons set forth below.

This matter concerns a district's dual responsibility to arrange for the immediate *medical examination* of a pupil when a staff member suspects that he is under the influence of alcohol or other drugs at school or a school-sponsored function, and, where that suspicion is substantiated, to ensure that he receives appropriate follow-up services.

As the ALJ properly noted, the relevant statute, *N.J.S.A.* 18A:40A-12, as set forth in the Initial Decision, *does not* require that a parent's, or guardian's, consent be obtained before a pupil receives a medical examination for the purpose of diagnosing whether he is under the influence of alcohol or other drugs.[1] Instead, the statute provides a parent/guardian, upon notification, with the option of choosing that the examination be performed

> by a doctor selected by the parent or guardian, or if that doctor is not immediately available, by the medical inspector,[2] if he is available. If a doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil, if available. *N.J.S.A.* 18A:40A-12.

[1] In so finding, the Commissioner concurs that it is unnecessary to determine the factual dispute underlying this issue.

[2] A medical inspector is a physician licensed to practice medicine and surgery within the State who serves under contract with the Board. *See N.J.S.A.* 18A:40-1.

Further, it is the staff member's report of suspicion, based on articulated observations of specific indicators of alcohol or other drug use, which compels that a principal, or his designee, arrange for an immediate medical examination. As the Commissioner has recently instructed:

> ***N.J.S.A.* 18A:40A-12, is part of a larger enactment intended to establish a comprehensive public school program for prevention of substance abuse and provision of assistance to students affected by it. Within this context, it is clear that *N.J.S.A.* 18A:40A-12 is intended to provide a "safety net" for students through its requirement that the school system identify and obtain assistance for any student who may be under the influence of drugs, alcohol or other substances of abuse. By its own terms, the statute plainly envisions that not every student so identified will necessarily be found to be under the influence in fact, but the framework it establishes errs on the side of protecting the health and well-being of students by ensuring that no student falls through the cracks and that assistance is provided where needed, whether sought by the student or not.
>
> The framework established by the Legislature for this purpose assigns clear and distinct roles to various staff members. *N.J.S.A.* 18A:40A-12 initially requires "any teaching staff member, school nurse or other educational personnel" to whom it appears that a student may be under the influence of drugs or alcohol to "report the matter as soon as possible" to the school nurse, medical inspector or substance awareness coordinator, and to the principal or designee. Thereupon, the principal shall immediately notify the chief school administrator and the parent or guardian, and shall arrange for immediate medical examination of the pupil by the doctor selected by the parent/guardian, or if unavailable, the medical inspector, or if unavailable, the emergency room of the nearest hospital.
>
> Nowhere in the statute is the principal or designee given the authority to substitute his/her judgment for that of the referring staff member, *once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion.* *** There is nothing in the plain language of *N.J.S.A.* 18A:40A-12, nor in its legislative history, to indicate that the statutory provision requiring an immediate medical examination was not intended to be mandatory upon a staff report of a student who appeared, based on specific observed indicators, to be under the influence of alcohol or other drugs.[3] ***

[3] *N.J.A.C.* 6:29-6.5 (adopted, 1987; amended, 1989; effective, July 1, 1990) mirrors the statutory language. The Commissioner notes that the State Board of Education is currently considering recodification of this provision without change under *N.J.A.C.* 6A:16-4.3.

> Within this framework, the mandatory medical examination is, therefore, triggered upon referral from the teaching staff member based upon the *staff member's* observation of specific indicators and determination based upon them that the student appears to be under the influence of alcohol and/or drugs. There is nothing in *N.J.S.A.* 18A:40A-12 suggesting, much less authorizing, once a report has been made, that the designated administrator may first seek to validate the referring staff member's observations or judge the reasonableness of his or her conclusions before taking the actions required by statute. Instead, the administrator must act once the student has been reported, i.e., once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the basis for this conclusion so that the administrator may convey the necessary information to parents and medical providers when they are contacted as required by law. *** Additionally, while a nurse may examine the student and the principal may ask the referring staff member to more fully describe the observations leading to his or her report, it is the referral itself that, under *N.J.S.A.* 18A:40A-12 and *N.J.A.C.* 6:29-6.5, unequivocally requires the principal or his designee to arrange for an *immediate medical examination* of the student. (emphasis in text) (*In the Matter of the Tenure Hearing of Joseph Graceffo, School District of the Township of Wayne*, Passaic County, Commissioner Decision, September 21, 2000, Slip Op. at 54-57)[3]

Here, according to the record, "[t]he teacher cited sleeping in class, glassy eyes, and complaints of nausea as reasons for [A.G.'s] referral to the Assistant Principal." (Exhibit R-3, Expulsion Packet, Narrative of Incident) As stated above, once a staff member advises the designated administrator of his or her belief that the student is under the influence of alcohol or drugs and articulates the observations, symptoms and indicators underlying this conclusion, the principal or designee may not substitute his judgment for that of the referring staff member. *Graceffo, supra*, at 55. Therefore, although the observations of the vice principal and the school

nurse may have served to *reinforce* the referring teacher's suspicion in this instance, these observations are essentially irrelevant to the question of whether the referral itself was proper, since neither staff member is legally permitted to thwart the required medical examination. The Commissioner, therefore, determines that A.G. *was* properly referred for a medical examination on December 21, 1999.[4] Furthermore, even assuming, *arguendo*, that a medical examination conducted pursuant to *N.J.S.A.* 18A:40A-12 would constitute a search of a student so as to subject it to the standards set forth in *New Jersey v. T.L.O., supra*, contrary to petitioners' urging, there can be no doubt on this record that the "search" was "justified in its inception" (Initial Decision at 6 citing to *New Jersey v. T.L.O., supra* at 341-42) based upon the referring teacher's articulation of symptoms undisputedly exhibited by A.G. on December 21, 1999 which may reasonably be associated with substance use.

Once A.G. was determined by a physician to be under the influence of marijuana on December 21, 1999, the law required that his attendance at school could not resume until he submitted to the principal a written report, prepared by a personal physician, the medical inspector or the physician who examined him pursuant to the provisions of the enabling statute, that he was physically and mentally able to return to school. *N.J.S.A.* 18A:40A-12. Although it is not clear from the record that petitioners, in fact, presented the District with such a report,[5] *or* that the District adhered to its adopted procedures which conditioned a student's return to school

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[3] The Commissioner notes that his decision in the matter entitled *In re Graceffo, supra,* was issued on September 21, 2000 and the ALJ did not, therefore, have the benefit of reviewing it prior to issuing his initial decision in the instant matter.

[4] To the extent the Board's policy references "urine analysis," or "drug testing," the Board is cautioned, as noted in *Graceffo, supra,* that "*a drug test does not equate to a medical examination* within the requirements of the statute***." (emphasis in text) (*In re Graceffo, supra,* Slip Op. at 66)

[5] Exhibit P-3 in evidence appears to be a handwritten note of petitioners' conversation with Mr. Spector on December 21, 1999. The note details that A.G. would receive a five-day out of school suspension, followed by a five-day in-school suspension. It further reads, "Return to school Jan.14th *** Must have parent conference, referral to conselor (sic) (private too?) letter from Dr./or Hosp. to 'clear' for drugs. No charges but police write up. [Two] random drug tests (same as athletic students) when back in school. Mr. Spector—Bound to policy – no grey areas."

under these circumstances,[6] A.G. nevertheless returned to school on January 6, 2000, following a five-day out of school suspension, to serve his five-day internal suspension.

The Commissioner notes that *N.J.S.A.* 18A:40A-12 requires that, upon such student's return to school, a substance awareness coordinator (SAC) or other appropriately trained teaching staff member shall interview the student for the purpose of determining the extent of his involvement with substances and his possible need for treatment. After such investigation, if it is determined that his involvement with substances represents a danger to the student's health and well-being, the SAC or other appropriately trained staff member is obligated to refer the student to an appropriate treatment program. *N.J.S.A.* 18A:40A-12. Here, the record reflects that:

> [A.] returned for his internal suspension on January 6, 2000 where [Assistant Principal] Mr. Spector held a return conference with [A.] and his mother. Student Assistant Coordinator, Marjorie Chassels, was also in attendance. Mr. Spector presented Mrs. [G.] with the policy and procedures for a positive drug screen. Included in his presentation was the parents (sic) and students (sic) responsibility to: a) adhere to the treatment recommended by the testing center and b) agree to undergo two random drug screens during the next three months. As well, Mrs. [G.] was informed that a subsequent positive test or not adhering to the recommended treatment would result in a possible expulsion from school. Mr. Spector had Mrs. [G.] signed (sic) attachment H of policy 5530 acknowledging such.
>
> At the meeting January 6, Mrs. Chassels informed Mrs. [G.] that [A.] was recommended to undergo three days a week of intensive drug therapy.
>
> Student Assistant Coordinator, Rick Fanslau, met with [A.] each of the five days he was an (sic) internal suspension.

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[6] An attachment to the Board's policy entitled "Procedures for Mandated Alcohol/Drug Evaluation" (Exhibit R-4, Substance Abuse Policy No. 5530, Attachment C at 12) sets forth the parties' responsibilities in the event a student receives "a positive urine screening." Specifically, the student is *not permitted to return to school* until: the parents/guardians have submitted the physician's certification, noted *supra*; an evaluation is completed "by the contracted service provider to determine the extent of the student's involvement with alcohol/drugs and possible need for treatment"; the parents/guardians have agreed to participate in a preventive/intervention drug counseling program; and the student and parents/guardians have agreed to the student's participation in two random drug screenings. (*Id.*)

> On February 22, 2000, Assistant Principals Scott Hoopes and Jeff Spector took seven 9th and 10th grade students for random drug screens. This was per district policy for students who had previously tested positive for a controlled dangerous substance. This was the first of [A.]'s two random screens. ***
>
> The test result was positive for the same substance as the previous screen.
>
> Mr. Spector inquired of both Mr. and Mrs. [G.] and the Behavioral Health Center as to whether or not [A.] had been undergoing the prescribed intensive therapy. Both Mr. and Mrs. [G.] confirmed that [A.] had not undergone one day of substance abuse counseling from the date of his first positive test to the date of the second positive test. The Behavioral Health Center acknowledged that [A.] was not receiving counseling at their facility. In the best interest of [A.], Mr. Spector urged Mr. [G.] to enroll [A.] in counseling as quickly as possible.
>
> On February 23, 2000, one day after the second positive screen, Mr. [G.] informed Mr. Spector that [A.] was enrolled in counseling at the Behavioral Health Center. On February 29, 2000, Don Keller from the health center confirmed [A.] had begun counseling.
> (Exhibit R-3, Expulsion Packet, Narrative of Incident)

The Board's policy provides that if a pupil is found to be under the influence of alcohol or other drugs for *a second time* during his enrollment in Washington Township High School, then such pupil will be excluded from school *pending a Board of Education expulsion hearing*.[7] (Exhibit R-4, Substance Abuse Policy No. 5530 at 5) In this instance, the District's "Expulsion Packet" was apparently submitted to the Board on March 2, 2000, approximately one week after A.G.'s second positive finding of marijuana, and the Board conducted its expulsion hearing on April 17, 2000, evidently without further documentation as to A.G.'s progress, if any, in treatment. A.G. was placed on home instruction until his sixteenth birthday, when the Board

[7] In this regard, the Commissioner finds that the ALJ properly rejected petitioners' claim that the Board failed to comply with *N.J.S.A.* 18A:40A-10, which requires the Board to provide, to pupils and parents, copies of its policy statement concerning the identification, evaluation, referral to treatment and discipline of pupils who are substance abusers. (Initial Decision at 4)

terminated educational services to him.[8] (Petition of Appeal at 7, paragraph 31) The Board's Expulsion Packet details A.G's academic, disciplinary and attendance record. The Commissioner therein notes, *inter alia*, that A.G. was, in the 1999-2000 school year, a ninth grader with a disciplinary record which included one incident of cutting class on December 14, 1999, approximately one week before his medical examination, and one incident of cutting a teacher's detention on December 21, 1999, the same date as the medical examination.[9]

As to the actual expulsion hearing, petitioners claim deficiencies in the hearing which, they assert, compromised their due process rights. Here, the Commissioner first concurs with the ALJ that the Board's counsel was not obligated to call Ms. Pasquarel, the referring teacher, as a witness at the expulsion hearing. However, the Commissioner nonetheless finds that the Board's decision to conceal the identity of this teacher from petitioners, without explanation, is troubling, particularly, in light of the severe and permanent sanction which ultimately arose from her referral, albeit a proper one. Again, the Commissioner underscores that it was Ms. Pasquarel's belief that A.G. was under the influence of a substance, together with her identification of specific symptoms or indicators of alcohol or other drug use, which were to "trigger" the ensuing medical examination. For this reason, petitioners' attempt to impeach the testimony of Mr. Spector at the Board's expulsion hearing conducted on April 16, 2000 by cross-examining him on the issues raised in the tape produced by petitioners can be to no avail,[10] where petitioners do not refute *the observations* made by Ms. Pasquarel, notwithstanding that they challenge the *conclusion* which she drew from her observations, alleging that "A.G. was sleepy, nauseous, and had glassy eyes on or about December 21, 1999 because he had been up late the night before ***." (Petition of Appeal at 6, paragraph 23)

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[8] The record indicates that A.G.'s sixteenth birthday was August 15, 2000.

[9] Exhibit R-3 also includes A.G.'s disciplinary record from the eighth grade, which included one incident of refusing to come to school (March 3, 1999), one "misuse of pass" on March 8, 1999 and one incident where he was in possession of a knife, on May 3, 1999, for which he received five days of internal suspension. (Exhibit R-3)

Additionally, although petitioners claim that their failure to receive an "intelligible recording of the Board hearing" denied them due process "insofar as [they were] placed in the untenable situation during the plenary hearing of having the burden shifted to them in a proceeding where there was no means for effective cross-examination during the plenary hearing of respondent's witnesse[s] who were called during the Board hearing" (Petitioners' Exceptions at 7), it is noted that petitioners, who point to no authority which would compel the Board to provide them with such transcripts, at all times bore the burden of proof in their action before the Commissioner, irrespective of the Board's alleged improprieties.

Notwithstanding the above, however, the Commissioner notes that the record demonstrates that the Board, in applying its policy to A.G., perfunctorily turned to "the ultimate sanction of expulsion from the district" *C.S. v. Township of Piscataway*, 97 *N.J.A.R.* 573, *aff'd* State Board April 1, 1998, slip op. at 5, although its policy, as noted *supra*, did not *require* expulsion for a second offense of this kind, despite its mandate to conduct an expulsion *hearing.*[11] That hearing was petitioners' chance to make a case for A.G.'s continued enrollment in the district, while also allowing the Board the opportunity to fully consider A.G.'s circumstances and other options short of the ultimate sanction of expulsion. The Commissioner is particularly concerned that, notwithstanding the fundamental nature of an expulsion hearing, not only were petitioners dissuaded from attending the hearing and arguing on A.G.'s behalf, but there are also indications in the record that the Board may have deliberately failed to consider the viability of options other than expulsion, such as alternative educational programs, that might be suitable for him. (See Exhibit P-1, tape recording of Assistant Principal Spector's comments to

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[10] The Commissioner notes that he, too, reviewed the tape produced by petitioners of their conversation with Mr. Spector on March 6, 2000 wherein they discussed various options for A.G. prior to the expulsion hearing.

[11] A memorandum dated March 1, 2000 from the Executive Vice Principal to Dr. Robert Kern, Superintendent, affirms, "Per Board of Education policy, on a second offense for testing positive, I am recommending that this student be expelled from Washington Township High School, pending Board of Education approval. If approved, my recommendation for [A.]'s educational program is that home instruction be provided until June 30, 2000 with

A.G.'s parents, prior to the expulsion hearing, in response to their inquiries about what would happen at the hearing and various educational options for their son, including alternative programs.[12]) Thus, while the Commissioner is fully cognizant of his limited standard of review, *Thomas, supra, Kopera, supra,* he finds that, under these circumstances, the Board's decision to expel A.G. may not have been the result of sufficiently full deliberation, so as to warrant the extreme result of terminating his entitlement to a free public education in the district.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and reversed in part, for the reasons expressed herein. The Board is directed to readmit A.G. to its District and to determine, after considering pertinent factors, including available alternative educational options, whether expulsion is the appropriate result under all the circumstances of A.G.'s case.

The Commissioner does not retain jurisdiction.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: NOV 06 2000

Date of Mailing: NOV 06 2000

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expulsion becoming effective after his 16th birthday. Additionally, [A.] will not participate in any school activities for the remainder of the school year." (Exhibit R-3)

[12] In this regard, the Commissioner notes that alternative education programs "are specifically designed to serve the dual purposes of removing the disruptive student from the regular education program, thus, permitting the district to maintain an educational climate that is both safe and conducive to learning, and assisting the alternative education student to continue [his] educational program in a public school setting, satisfy credit-year curriculum requirements and develop more responsible patterns of behavior." *C.S. v. Township of Piscataway, supra* at 577

[13] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

360-00

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA FINN,	:	
BORDENTOWN REGIONAL SCHOOL	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
_____	:	

November 8, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2049-00
(EDU 4205-99 On Remand)
AGENCY DKT. NO. 96-5/99

BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
PATRICIA FINN,
Respondent.

Frank P. Cavallo, Esq., for petitioner (Parker, McKay & Criscuolo, attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Fagella & Nowak, attorneys)

Record Closed: August 18, 2000 Decided: September 21, 2000

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on May 3, 1999, when the Board of Education of Bordentown Regional School District (hereinafter petitioner) filed tenure charges against tenured teacher Patricia Finn (hereinafter respondent) alleging incapacity and other just cause. An answer on behalf of respondent was filed on May 20, 1999 and on May 21, 1999, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to –13. The case was assigned OAL Docket No. EDU 4205-99, and on February 10, 2000, the undersigned issued an initial decision on a motion

for summary decision concluding that the charges labeled A-1, 2, 3, 4 and B-1, 2, 3, 4 and 5, were actually charges of inefficiency, therefore requiring the provision of the 90-day remediation period mandated in *N.J.S.A.* 18A:6-11, and accordingly, dismissing those charges without prejudice. The initial decision further directed that the charges labeled B-6 and B-7, essentially charges alleging conduct unbecoming a teaching staff member, be administratively returned to the Commissioner of Education for a determination pursuant to *N.J.S.A.* 18A:6-16, whether the charges, if true, were sufficient to warrant dismissal or reduction in salary. On March 10, 2000, the Commissioner of Education adopted the initial decision in part, but declined to rule upon some of the issues discussed, finding them unnecessary for a resolution of the instant matter. The Commissioner further ordered that the remaining charges, B-6 and B-7, were sufficient standing alone, if true, to warrant dismissal or reduction in salary and remanded those charges to the Office of Administrative Law for determination. Accordingly, the only issues remaining for determination are as follows: "B-6, Repeatedly leaving classroom unattended, thereby denying students of direct instruction and supervision; and B-7, Permitting an Instructional Aid to deliver instruction directly to pupils without supervision in violation of New Jersey Administrative Code." A telephone conference call took place between counsel and the undersigned on April 6, 2000, following which hearing dates were scheduled for June 9 and June 16, 2000. Prior to the scheduled hearing dates, the parties advised that the remaining tenure charges had been amicably resolved between the parties. On July 5, 2000, the parties appeared and placed the settlement agreement upon the record, subject to approval of the Bordentown Regional Board of Education and subject to submission of a signed stipulation of settlement. The signed stipulation of settlement, which is attached hereto and made a part hereof as if set forth herein at length, was received on August 18, 2000, whereupon the record closed.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve this settlement as an appropriate voluntary resolution of this matter entirely consistent with law and the philosophy expressed in *Cardonick v. Board of Education of the Borough of Brooklawn*, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983, by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. As noted in the initial decision issued by the undersigned on February 10, 2000, and in the final decision, issued by the Commissioner on March 10, 2000, over her 28 years of teaching, petitioner received generally favorable performance evaluations and even during a more recent limited period of time wherein she received some negative evaluations, other evaluations continued to praise her efforts, excellence, enthusiasm and dedication to

helping students. The two remaining charges, although not *de minimis*, even if proven, would probably warrant some sanction less than removal. *N.J.A.C.* 6:11-3.5 requires petitioner to notify the State Board of Examiners of the circumstances concluding the within matter. That regulation provides:

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to *N.J.A.C.* 6:11-3.6(a)2. Should the Board of Examiners issue an Order to Show Cause, it shall be the responsibility of the district which reported the conduct to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying such allegations.

Whether to initiate action against petitioner's teaching certificate is, of course, within the discretion of the Board of Examiners, but considering the facts set forth in the previous initial decision and those described in the stipulation attached hereto, it is unlikely that the Board of Examiners would consider such action necessary or appropriate. Under all of the circumstances, the proposed settlement agreement appears to be an appropriate resolution of this matter.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Sept. 21, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

9-25-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 26 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, NJ 08608
(609) 392-8172
Attorneys for Respondent Patricia Finn

IN THE MATTER OF THE TENURE CHARGES AGAINST PATRICIA FINN BY THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY.	: BEFORE THE OFFICE OF ADMINISTRATIVE LAW : : : : OAL DOCKET NO.: EDUTH 004205-99S : : **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to this matter, the Bordentown Regional School District and Patricia Finn, having reached an agreement to resolve the matter amicably, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms as their settlement agreement.

1. The parties state and agree that their agreement to this agreement is contingent upon the approval by the Administrative Law Judge and the Commissioner of Education of all the terms of this agreement, and that if any of the terms of this agreement are rejected by the Administrative Law Judge or the Commissioner of Education, this agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for hearings in relation to tenure charges numbers 6 and 7, but that nothing in this paragraph or agreement shall, in such event,

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preclude the parties to agreeing to a new, revised or modified settlement agreement, provided that such agreement shall be subject to the approval of the Administrative Law Judge and of the Commissioner of Education.

2. The parties agree that based upon and subject to the terms and condition of this agreement, the petitioner shall withdraw tenure charges numbers 6 and 7. In addition, the petitioner has determined not to appeal and will not appeal the Commissioner's decision dismissing tenure charges 1 through 5.

3. Rationale for Settlement.

A. On or about April 30, 1999, petitioner filed tenure charges against the respondent. The Commissioner dismissed charges 1 through 5 on the grounds that such charges, even if true, would constitute inefficiency, not incapacity or incompetency, and because petitioner did not file such charges in accord with the procedures governing inefficiency charges. Petitioner has not appealed that decision and will not appeal that decision.

B. Tenure charge 6 alleges that respondent permitted her aides to give direct instruction to pupils in violation of New Jersey law. In the course of investigation, discovery, and preparation for hearing, information was provided to petitioner by respondent and by aides who worked with respondent which has demonstrated to petitioner's satisfaction that there is substantial doubt whether the allegation of tenure charge 6 is in fact true, and warranting the conclusion that it is unlikely that petitioner could sustain its burden of proof with respect to tenure charge number 6.

C. Tenure charge number 7 alleges that respondent left her class unattended on various dates and for various lengths of time. In the course of investigation, discovery, and hearing preparation, respondent has provided information regarding the circumstances of the alleged incidents to petitioner. As a result of the information provided and of petitioner's investigation, it is apparent that respondent has proffered reasons which may constitute substantial justification for her actions, or which constitute significant mitigating circumstances, thereby resulting in significant doubt whether petitioner could sustain its burden of proof on this charge, and whether, considering all of the circumstances of the case and the likely penalty which would be imposed if charge number 7 is proven, further prosecution of this charge is warranted.

D. Respondent, Patricia Finn, does not concede and has not conceded the validity of tenure charges 6 and 7. Nevertheless, respondent understands that given the nature of the litigation process, there is at least some risk that adverse findings could be made against her and she does not want to take that risk.

E. Both parties agree that the most substantial charges pursued by petitioner, and the basic reason that the charges were filed, relate to the allegations in tenure charges 1 through 5, which have been dismissed by the Commissioner.

F. Petitioner is aware of the public's interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the schools of New Jersey. However, upon its review of all of the circumstances, which include its evaluation of the time and expense in pursuing tenure charges, the uncertainty of the

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ultimate result which might be obtained, both in terms of sustaining the charges and any penalty which might be imposed, the lack of any allegation that respondent presents any threat to pupils, respondent's long service to the district and in many respects favorable record, the dismissal of tenure charges numbers1 through 5, and the matters recited in paragraphs A through E above, petitioner believes, and respondent concurs, that it is in the best interest of all parties and the public to resolve this matter by this settlement.

4. By settling this matter, respondent acknowledges that she is waiving her right to a hearing before the Office of Administrative Law and Commissioner of Education, in which she could obtain an adjudication of the merits of tenure charges numbers 6 and 7, and of the penalty, if any, if either of the charges was sustained. Respondent further acknowledges that she understands and agrees to the terms of this agreement and is fully satisfied with the legal representation that she received in this matter.

5. The parties agree that respondent shall be reinstated and returned to active service with respondent as a teacher of the handicapped, effective September 1, 2000, and shall be assigned to the Peter Muschal School.

6. The parties agree that respondent's employment and adjustment increment for the 2000-01 school year has been and shall be withheld, on the basis and for the sole reason that respondent did not render any teaching service to petitioner for the 1999-00 school year. The parties also agree that if this settlement is rejected,

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petitioner may file an appeal of the increment(s) withholding, and that any such appeal shall be deemed timely filed.

7. The parties further agree and reiterate that tenure charges numbers 6 and 7 shall be dismissed with prejudice, but that petitioner may place a written reprimand in respondent's personnel folder, in which event, respondent shall be afforded the opportunity to respond in writing to that reprimand, and such response shall also be placed in petitioner's personnel folder.

8. The parties agree that no further disciplinary action shall be taken against respondent as a result of the subject matter included in tenure charges numbers 6 and 7, and that if petitioner files any future disciplinary charges against respondent, included but not limited to reprimands, increment withholdings, tenure charges, or any other charges whatsoever, that the allegations of tenure charges 6 and 7, and the reprimand and the circumstances related thereto shall not be used as reflecting on respondent's employment record in any respect.

9. Attached hereto as **Exhibit A** is a copy of a letter sent to respondent by petitioner, dated June 28, 2000, which was placed in respondent's personnel file. The parties agree that that letter shall be removed from respondent's personnel file.

10. Petitioner will place a letter of reprimand in respondent's personnel file addressing the concerns raised by petitioner in tenure charges numbers 6 and 7, provided that respondent shall have the right to place a letter or other document in her personnel file in response or opposition to such letter of reprimand.

11. Petitioner shall place a letter in respondent's personnel file which states that respondent's increment was withheld for the reasons set forth in paragraph 6 of this agreement, provided that neither that letter nor the letters referred to in paragraphs 9 or 10 of this agreement shall be used against respondent adversely, for any purpose or reason whatsoever, and that this prohibition should apply to all uses, purposes, tribunals, and forums.

For Board of Education of the
Bordentown Regional School
District

By:_____ Dated: 8/13/00
Superintendent

Parker, McCay & Criscuolo
Attorneys for Petitioner

By:_____ Dated: 8/13/00
Frank P. Cavallo, Jr., Esq.

_____ Dated: 8/8/00
Patricia Finn, Respondent

ZAZZALI, FAGELLA & NOWAK
Attorneys for Respondent

By:_____ Dated: 8/8/00
Richard A. Friedman, Esq.

BORDENTOWN REGIONAL SCHOOL DISTRICT

GARY R. NUCERA
President

ANTHONY DILEMME
Vice President

48 DUNNS MILL ROAD
BORDENTOWN, NJ 08505

JOHN POLOMANO
Superintendent

PEGGY A. LANOALE
Business Administrator

Business Office (609)298-3066 Press 1, then 1
Fax (609)298-3615
Superintendent's Office (609)298-3041 Press 1, then 3

Internet Web Site: www.bordentown.k12.nj.us

June 28, 2000

Ms. Patricia Finn
15 Whitman Road
Trenton, NJ 08619

Certified Mail 7099 3220 0010 5168 0582

Dear Ms. Finn:

At its meeting on June 27, 2000, the Bordentown Regional Board of Education voted to withhold your salary increment for the 2000-01 school year. Your placement for 2000-01 will be at Peter Muschal School. It must be noted that there are a number of concerns about your classroom performance. Ms. Kate Napolitano-Burke, Peter Muschal building principal, and Ms. Louise Sullivan, Director of Special Services, will meet with you either in the late summer or at the beginning of the school year. At that time specific procedures will be outlined that must be followed. These procedures will include but not be limited to:

1. Appropriate form and reporting of lesson plans.
2. Appropriate record keeping for students.
3. Specifics on the requirements to follow each and every IEP.
4. School procedures including a review of your classroom responsibilities, use of instructional aide, communications with parents, and paper work requirements.

Failure to adhere to policies, procedures, and direction will result in disciplinary action.

Sincerely,

John Polomano (P)

John Polomano
Superintendent of Schools

c: Personnel file
Ms. Snyder
Ms. Blum-Bart
Ms. Burke
Ms. Sullivan

EXHIBIT A 49

OAL DKT. NOS. EDU 2049-00 AND EDU 4205-99 (ON REMAND)
AGENCY DKT. NO. 96-5/99

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA FINN,	:	
BORDENTOWN REGIONAL SCHOOL	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, BURLINGTON	:	DECISION ON REMAND
COUNTY.	:	
	:	

The record, Stipulation of Settlement and Settlement Agreement, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Exceptions to the Initial Decision were submitted by respondent objecting to that portion of the Initial Decision wherein the Administrative Law Judge (ALJ) finds and determines that petitioner is required to notify the State Board of Examiners of the circumstances concluding the within matter.[1]

Upon review of the record, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter.[2] *See In re Cardonick*, 1990 *S.L.D.* 842, 846 decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). Moreover, the Commissioner determines that referral of the matter to the State Board of Examiners, as determined by the ALJ, is not applicable herein because respondent has not been dismissed from

[1] *N.J.A.C.* 1:1-18.4(e) does not permit the filing of exceptions and cross-exceptions, unless permitted by the ALJ or agency head. Given that respondent is excepting to a determination by the ALJ which is set forth in the Initial Decision, but is not a part of the settlement terms, the exceptions have been accepted for review by the Commissioner.

[2] The Commissioner stresses that acceptance of the settlement in this matter is not in any way to be construed as an impediment to the Board pursuing tenure charges against respondent in the future for unsatisfactory performance, including those set forth in the charges previously dismissed without prejudice on March 10, 2000.

her tenured position; nor has she resigned, either unilaterally or as part of the Settlement Agreement. (*See In the Matter of the Tenure Hearing of Jerry Barshatky, School District of the Freehold Regional High School District, Monmouth County,* decided by the State Board May 1, 1996).

Accordingly, the matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 08 2000

Date of Mailing: NOV 08 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

361-00

SANDRA SCHMIDTKE,	:	
PETITIONER,	:	
V.	:	
		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the determination of the Board to charge her accumulated sick leave when she was absent from work because of what petitioner termed a work-related occurrence pursuant to *N.J.S.A.* 18A:30-2.1. Respondent denied that petitioner's absence was work-related.

At the OAL, respondent moved for summary decision based on the fact that petitioner failed to file a Workers' Compensation claim, arguing that such failure mandated dismissal of her petition. The ALJ concluded that the Division of Workers' Compensation is the proper forum to determine whether a work-related accident is the cause of an injury, except in limited circumstances, such as when Workers' Compensation lacks jurisdiction over a case. Because petitioner failed to file such a claim and the case did not fit within the limited exceptions to the requirement to seek a determination by Workers' Compensation, the ALJ dismissed the petition for lack of jurisdiction.

The Commissioner affirmed the ALJ, holding that, because the petition sought a determination whether petitioner's injury arose out of and in the course of her employment pursuant to *N.J.S.A.* 18A:30-2.1, she was required to file a Workers' Compensation claim, and that she did not fall within the limited exceptions to filing with Worker' Compensation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10756-98

AGENCY DKT. NO. 494-11/98

SANDRA SCHMIDTKE,

Petitioner,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF WOODBRIDGE,

MIDDLESEX COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

Andrew A. Valeriani, Jr., Esq., (Michals, Wahl, Silver & Leitner, attorneys) and **Elizabeth Farley Murphy**, Esq. (Wilentz, Goldman & Spitzer, attorneys), for the respondent

Record Closed: August 9, 2000 Decided: September 25, 2000

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the assertion of the petitioner, Sandra Schmidtke, that the respondent, the Board of Education of the Township of Woodbridge, Middlesex County, charged absent days to either her annual or accumulative sick leave which violated *N.J.S.A.* 18A:38-2.1 since her absences resulted from a work-related occurrence. The petitioner requested a hearing

and the matter was transmitted to the Office of Administrative Law on December 15, 1998, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to –15 and *N.J.S.A.* 52:14B-1 to-13.

The matter was scheduled for a telephone prehearing conference on March 3, 1999. At that time, the parties jointly requested that the matter be placed on the inactive list for a period of six months pending a determination in the workers' compensation case.

After considering the representations made by the parties, I determined that just cause existed for placing this matter on the inactive list, and I issued an order of inactivity on March 5, 1999. After the lapse of the period of inactivity, I had several telephone conferences with the parties. The respondent filed a motion for summary decision and argues that the matter should be dismissed since the petitioner has not filed a workers' compensation case regarding the incident in issue. The respondent argued that the petitioner is not entitled to paid sick leave pursuant to *N.J.S.A.* 18A:30-2.1 unless there is a finding of a compensable injury pursuant to the workers' compensation act.

For purposes of this motion, I **FIND** that the relevant facts are:

(1) The petitioner was out of work from April 22, 1998 to August 12, 1998, and alleges that she got sick after a student placed a drug into her coffee mug.

(2) The respondent reported the petitioner's absences to its workers' compensation insurance carrier and she was not allowed to return to work until "cleared" by the carrier's doctor.

(3) The respondent used the petitioner's personal sick days for the period she was out of work.

(4) The petitioner did not file a workers' compensation claim regarding the incident in issue.

The petitioner opposes the motion and argues that there are disputed facts relevant to the petitioner's allegation of her eligibility for sick time pursuant to *N.J.S.A.* 18A:30-2.1, and that summary decision is not appropriate. I disagree and I **CONCLUDE** that there are no factual disputes as to the threshold issue raised by the respondent as the basis for its motion to dismiss, namely, whether the matter should be dismissed since a workers' compensation claim was not filed.

The pertinent statute, *N.J.S.A.* 18A:30-2.1, provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in *N.J.S.A.* 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

The respondent argues that the case law clearly establishes that the proper forum for the resolution of whether a work-related accident is the cause of an injury is the Division of Workers' Compensation and not the Commissioner of Education (Commissioner), and cited the decisions in *Kristiansen v. Morgan*, 153 *N.J.* 298 (1998), *Fogash v. Lower Camden County School,* 208 *N.J. Super.* 461 (App. Div. 1985). Since the decision of the State Board of Education in *Verneret v. Board of Education of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134, cases involving benefits pursuant to *N.J.S.A.* 18A:30-2.1 have to be filed within the 90-day period as required by *N.J.A.C.* 6:24-1.2(c), but are placed on the inactive list until there is a workers' compensation determination. Since a workers' compensation claim was not filed in the matter, the respondent argues that the matter should be dismissed.

The petitioner argues that the petitioner is entitled to pursue her benefits pursuant to *N.J.A.C.* 18A:30-2.1 even though she did not pursue a workers' compensation claim and cited the decisions in *Russo v. Burlington Twp. Bd. of Ed.* (Commission decision September 29, 1997), *Marino v. Willingboro Bd. of Ed.* (State Bd. decision March 1, 2000), *Hern v. Bd. of Ed. Of the City of Union City*, DKT. No. A-339-91T3 (App. Div. October 23, 1992). The petitioner argues that at least part of her absence was due to the delay in getting the approval to return to work from the doctor for the workers' compensation carrier.

In reply, the respondent argues that in the *Russo* and *Marino* cases, the petitioner had filed workers' compensation claims and that this is a critical factual distinction since a workers' compensation case was not filed in this matter.

Having reviewed the arguments of the parties, I agree with respondent's argument.

In the *Russo* case, the workers' compensation case was dismissed for lack of prosecution. Thereafter, the board filed a motion to dismiss the education case regarding Russo's claim pursuant to *N.J.S.A.* 18A:30-2.1. In dismissing the matter, the administrative law judge stated:

> Both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute same. Petitioner cannot be awarded any damages under 18A30-2.1 until the compensation claim has been determined because under the statute the Board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Verneret* the question of whether the injury arose out of and in the course of his employment is to be determined by a proceeding in the Division of Workers' Compensation. As petitioner has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute will be dismissed with prejudice.
>
> [OAL DKT. No. 6470-96, initial decision, dated August 8, 1997, p.3]

On September 29, 1997, the Commissioner concurred and dismissed the appeal. In a footnote to his decision, the Commissioner clarified the above cited portion of the initial decision and stated that:

> Awards under *N.J.S.A.* 18A:30-2.1 are not necessarily conditioned upon presentation of a Workers' Compensation claim, as, for example, when the duration of the absence is insufficiently long to be eligible for such presentation. See *Steven B. Hern v. Board of Education of the City of Union City, Hudson County*, decided by the Commissioner May 8, 1991, aff'd State Board of Education August 7, 1991, rev'd and remanded Appellate Division, A-339-91T3, October 23, 1992, remanded State Board of Education March 3, 1993.

In the *Hern* case, the Appellate Division noted that if Hern had filed a workers' compensation claim it would have been dismissed for failure to satisfy the seven-day waiting period required by the Workers' Compensation Act. The Appellate Division stated that it could "perceive no valid reason to require petitioner to engage in a futile gesture or to manufacture an unfounded workers' compensation claim," *Hern*, *supra*, slip op. at 4. In such circumstance, the Appellate Division concluded that the Commissioner of Education has jurisdiction to decide the teacher's request for benefits under *N.J.S.A.* 18A:30-2.1, including a determination as to whether the claim arose out of and in the course of his employment.

In the *Marino* case, the State Board of Education held that a settlement in *Marino's* workers' compensation case did not preclude Marino from pursuing his claim for benefits under *N.J.S.A.* 18A:30-2.1. The State Board of Education stated:

> It is true, as pointed out by the Assistant Commissioner, that a determination with regard to whether an injury arose "out of and in the course of" employment within the meaning of *N.J.S.A.* 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act. It is also true that in those instances in which entitlement to relief under *N.J.S.A.* 18A:30-2.1 is dependent upon whether the injury arose out of and in the course of employment within the meaning of *N.J.S.A.* 34:15-7 of the Workers' Compensation Act, the Commissioner should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation. *Verneret*, *supra*. However, the Commissioner does not lack the jurisdiction to make

> such a determination himself. Indeed, the Appellate Division has held that, under appropriate circumstances, the Commissioner has "original exclusive jurisdiction" to decide a claim for benefits under *N.J.S.A.* 18A:30-2.1 despite the need to determine in the first instance whether the claim arose out of and in the course of the staff member's employment. *Hern v. Board of Education of the City of Union City*, Docket #A-339-91T3 (App. Div. 1992).
>
> [State Board of Education decision, p. 4-5]

It is clear from these decisions that the proper forum for the resolution of whether a work-related accident is the cause of an injury is the Division of Workers' Compensation except for limited cases such as when the Division of Workers' Compensation has no jurisdiction or when there is a settlement of the workers' compensation case. In this matter, the petitioner's case was placed on the inactive list in order to give the petitioner the time to pursue a workers' compensation claim and the petitioner elected not to file such a claim.

Therefore, I **CONCLUDE** and **ORDER** that the motion for summary decision be **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 25, 2000
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

9-25-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 27 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

OAL DKT. NO. EDU 10756-98
AGENCY DKT. NO. 494-11/98

SANDRA SCHMIDTKE,	:	
PETITIONER,	:	
V.	:	
		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions aver that the Administrative Law Judge (ALJ) erred in finding that the Commissioner does not have jurisdiction, pursuant to *N.J.S.A.* 18A:30-2.1, to hear the instant matter. Initially, she restates her argument that the matter should not have been considered by way of a Motion for Summary Decision because a dispute of material fact exists which defeats the summary decision motion; *i.e.*, the Board's Answer to the Petition of Appeal alleges it lacked sufficient information regarding the events set forth in the petition. As such, petitioner contends that she should be allowed to go forward at plenary hearing to demonstrate that she wished to return to work prior to the superintendent's telephone call on August 12, 1998, and reiterates that the reason for not returning to work sooner was a result of her case "falling through the cracks" with the Board's insurance carrier. Of this, petitioner states:

> Petitioner should be allowed to go forward at a hearing to demonstrate that she should not be charged for sick leave days since it was respondent who reported the matter to the insurance carrier, it was the insurance carrier who assigned the case manager and it was the case manager who did not notify petitioner that she was "cleared" to work, despite her repeated efforts. (Petitioner's Exceptions at 2)

Next, petitioner reiterates her position that *Russo, supra; Marino, supra; and Hern, supra,* establish that the awarding of days pursuant to *N.J.S.A.* 18A:30-2.1 is not necessarily contingent upon a determination of a Workers' Compensation judge, and urges that the present matter is one of the situations noted in *Russo* and *Marino* which is not conditioned upon the presentation of a Workers' Compensation claim; namely, that if the insurance carrier is at fault for her being on sick leave longer than necessary, then she should be permitted to make her claim for the return of sick days pursuant to *N.J.S.A.* 18A:30-2.1. In closing, petitioner "requests that the Commissioner reject the Initial Decision and remand the matter to the Administrative Law Judge for a plenary hearing as to whether or not petitioner is entitled to a return of her sick days *pursuant to N.J.S.A.* 18A:30-2.1." (emphasis supplied) (Petitioner's Exceptions at 4)

The Board's reply exceptions aver that the entire thrust of petitioner's claim is whether or not an accident/incident occurred arising out of and in the course of her employment which bespeaks a Workers' Compensation claim; consequently, exclusive jurisdiction is vested with the Division of Workers' Compensation (DWC) pursuant to *N.J.S.A.* 34:15-49, not the Commissioner. Further, the Board urges rejection of petitioner's reliance on the dicta set forth in *Russo, supra,* Slip Opinion at 6, footnote, which states that "***awards under *N.J.S.A.* 18A:30-2.1 are not *necessarily* conditioned upon presentation of a Workers' Compensation claim, as, for example, when the duration of an absence is insufficiently long to be eligible for such presentation. [*citing Hern, supra*]." The Board argues that the language in *Hern,* which petitioner quotes, relates to circumstances wherein a person does not satisfy the seven-day waiting period required by Workers' Compensation statute. The Board likewise urges rejection of petitioner's assertion that the Appellate Division in *Hern* concluded the Commissioner has original and primary jurisdiction to decide sick leave issues pursuant to *N.J.S.A.* 18A:30-2.1.

The Board argues that, while there is no dispute that the Commissioner has jurisdiction under this statute, the Workers' Compensation statute, *N.J.S.A.* 34:15-1 *et seq.*, pursuant to the New Jersey Supreme Court's decision in *Kristiansen, supra*, vests exclusive jurisdiction to determine work-related injuries in the Workers' Compensation court.

Upon review of the record in this matter, the Commissioner fully agrees with the ALJ's legal conclusions that there are no factual disputes as to the *threshold* issue raised by respondent, *i.e.*, whether the matter should be dismissed, regardless of any claim by petitioner with respect to the role of the insurance carrier in determining the *length* of her absence, since a Workers' Compensation claim was not filed. Both the petition and exceptions request a determination of whether petitioner's injury arose out of and in the course of her employment pursuant to *N.J.S.A.* 18A:30-2.1, which is within the authority of Workers' Compensation. Further, the Commissioner is in full agreement with the ALJ's legal analysis of the *Russo, Hern, and Marino* matters as set forth in the Initial Decision and the conclusion that "the proper forum for the resolution of whether a work-related accident is the cause of an injury is the Division of Workers' Compensation *except for limited cases such as when the Division of Workers' Compensation has no jurisdiction or when there is a settlement of the workers' compensation case.*" (emphasis supplied) (Initial Decision at 6). The legal principle set forth in *Russo,* which was relied upon by the ALJ in this matter, bears repeating herein. Not only is the principle applicable to the instant matter, but the factual circumstances in both cases are similar in that the petitioners in each case voluntarily chose not to pursue a claim for work-related injury with the DWC.[1] In *Russo, supra,* the ALJ held that:

> Both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute

[1] The petitioner in *Russo* filed a claim but subsequently failed to prosecute it, while, in the instant matter, petitioner simply chose not to file a claim with DWC, notwithstanding that the matter, upon transmittal to the OAL, was put on the inactive list until such claim was determined by DWC.

> same. Petitioner cannot be awarded any damages under 18A:30-2.1 until the compensation claim has been determined because under the statute the Board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Vernet* [sic] the question of whether the injury arose out of and in the course of his employment is to be determined by a proceeding in the Division of Workers' Compensation. As petitioner has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute will be dismissed with prejudice. (*Russo* Initial Decision at 3)

Notwithstanding petitioner's arguments to the contrary, the Commissioner finds and determines that the instant matter does not present circumstances, such as were found in the *Hern* and *Marino* cases, which would create an exception to the legal requirement that the Commissioner refrain from exercising jurisdiction in matters alleging entitlement/damages under *N.J.S.A.* 18A:30-2.1 due to an injury/illness arising out of and in the course of employment until the DWC makes a determination of a work-related injury/illness pursuant to *N.J.S.A.* 34:15-1.1 *et seq.* *See Verneret, supra*, and *Rotella-Suarez v. Bd. of Ed. of the Town of West New York*, decided by the State Board December 3, 1997.

Accordingly, for the reasons well-stated in the Initial Decision, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: NOV 08 2000

Date of Mailing: NOV 08 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

363-00

#363-00

G.A., on behalf of minor child, B.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought to compel the Board to provide transportation to his son, B.A. The Board denied responsibility to transport B.A.

At the OAL, the parties stipulated that B.A., a seventh grade student, lives on a heavily traveled state highway with no pedestrian walkway or sidewalk and that for him to walk home he would have to walk with traffic which would be a violation of existing law. The ALJ concluded that, because B.A. lives more than two miles from the school as measured by a route other than State Highway 46, he is entitled to transportation from respondent Board.

The Commissioner affirmed the determination of the ALJ that B.A. is entitled to transportation from the Board *under the factual circumstances presented in this matter.*

November 9, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 3121-00
AGENCY DKT. NO. 51-2/-00

G.A. o/b/o B.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Nylema Nabbi, Esq., for Petitioner (Schepisi & McLaughlin, attorneys)

Stanley Turitz, Esq., for Respondent (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: September 19, 2000 Decided: September 19, 2000

BEFORE **THOMAS R. VENA**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, G.A. o/b/o his son B.A., filed a petition with the Commissioner of Education (Commissioner) on or about February 2, 2000 wherein he seeks an Order directing the Respondent Ridgefield Board of Education (Board) to provide public transportation to and from Memorial High School in Ridgefield, or in the alternative,

reimburse Petitioner for expenses associated with said transportation pursuant to its obligation to provide free transportation to students "who live more than two miles from their public school of attendance." *N.J.S.A.* 18A:39-1. Subsequently, on March 22, 2000 the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case.

At a prehearing conference on June 7, 2000 the parties agreed to file a joint stipulation of facts and agreed that those facts would constitute all facts "material" to this dispute. That joint stipulation of facts was filed on July 7, 2000.

By notice dated August 24, 2000, Petitioner filed a Motion for Summary Decision pursuant to the provisions of *N.J.A.C.* 1:1-12.5. An amendment to the motion was thereafter filed on September 7, 2000. No opposition has been received and the matter is now ripe for summary decision.

FINDINGS OF FACT

All of the facts needed for summary disposition of this matter are stipulated. I, therefore, **FIND**:

1. Petitioner, B.A. has just completed the seventh grade and is currently enrolled at Memorial High School, located in the Borough of Ridgefield, County of Bergen, State of New Jersey.

2. B.A. presently resides with his father, G.A., at the Turnpike Motel (Motel) located on U.S. Route 46 West, in the Borough of Ridgefield, New Jersey. The Motel is located on U.S. Route 46, which is a four to six lane highway with two to three lanes in each direction separated by a median barrier.

3. The Motel has no other ingress or egress apart from the highway known as U.S. Route 46. There are no sidewalks on Route 46 adjacent to the Motel. There is no way in or out of the Motel without traveling onto Route 46. There exists no

pedestrian sidewalk or footpath along Route 46 at the point where Route 46 intersects with Petitioner's residence. There is a narrow walkway as one approaches Broad Avenue.

4. U.S. Route 46 is a heavily traveled New Jersey State Highway.

5. In order for Petitioner to walk to school, he would have to walk against traffic onto Route 46. However, in order for Petitioner to walk home from school he would have to walk with the traffic which would be a violation of existing law.

6. As such, U.S. Route 46 cannot be measured with respect to remoteness from school because Petitioner would violate existing law by walking with traffic on his way home from school.

7. Petitioner's father, G.A., drives Petitioner to school when class is in session. The driving distance between Petitioner's residence and Memorial High School is greater than two miles.

CONCLUSIONS OF LAW

Based on the foregoing facts and applicable law, I **CONCLUDE** that the only safe and legal manner of transportation to and from B.A.'s public school is via vehicle transport. Since the shortest route measured by vehicle transport exceeds two miles, Petitioner is eligible for transportation under *N.J.S.A.* 18A:39-1.

New Jersey Law requires local boards to provide transportation for children living "remote" from their schools. Remote is defined as "beyond two miles for elementary pupils (grades kindergarten through eight)." *N.J.A.C.* 6:21-1.3. Measurement is required to be made "by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or public walkway to the nearest public entrance of the assigned school." *N.J.A.C.* 6:21-1.3(b). Since the parties have stipulated that there is no safe and legal way for B.A. to be transported via

"public walkways" then the measurement is required to be made via "public roadways." In that the parties have stipulated that transportation via public roadway exceeds two miles then transportation or the cost thereof must be provided by the Respondent Board pursuant to *N.J.S.A.* 18A:39-1.

The logic here is inescapable. It is uncontestable that the two miles cannot be measured "as the crow flies" since, quite obviously, children do not fly. It is, therefore, equally uncontestable that the route cannot be measured in a manner that would be unsafe and/or contrary to motor vehicle laws. In a decision dubbed "thoughtful and well reasoned" by the Superior Court of New Jersey Appellate Division, ALJ Ken R. Springer said with reference to transportation eligibility route measurements:

> The regulations themselves do not expressly specify that the route must be drawn in compliance with applicable motor vehicle laws. But that meaning is inherent in the nature of a law-abiding society. . . . "To decide differently is tantamount to requiring the child to violate the law when returning home from school." (citation omitted.)
>
> . . .
>
> Teaching elementary school children to obey traffic rules is an educational as well as a safety aspect. More importantly, it serves to protect them from avoidable risks on the way to school. But also, it conveys an important civics lesson on waiting one's turn, respecting the rights of others and cooperating with social norms for the betterment of all. . . . Literature published by the National Association of Elementary School Principals urging parents to "teach your child . . . to use crosswalks when crossing streets" and also "to use designated sidewalks when walking to or from school or the school bus stop." It is difficult to imagine telling a young child to stay always on the sidewalk, except when going to or coming from school.
>
> . . .
>
> . . . School routes are not some theoretical abstraction, but must be capable of being walked by real children.
>
> *Nichols v. Wayne Township Board of Education*, 93 *N.J.A.R.* 2*d* (EDU) 701, 703, *affirmed* 94 *N.J.A.R.* 2*d* (EDU) 277, *affirmed* 95 *N.J.A.R.* 2*d* (EDU) 157 (App. Div. 1994).

As did Judge Springer in the *Nichols* case, it is important to emphasize the narrowness of the holding to the facts to this particular case. Neither he then nor I suggest that local school districts have an obligation to enforce traffic laws or to provide sidewalks, overpasses, *etc.* to meet the requirements of safe travel. Districts also have no affirmative duty to seek the safest route. Nevertheless, if the only safe and legal means of transportation when measured from door to door exceeds two miles, children are entitled to transportation under *N.J.S.A.* 18A:39-1.

ORDER

For the reasons aforesaid, it is hereby **ORDERED** that respondent District either provide public transportation to and from Memorial High School for the Petitioner or, in the alternative, reimburse the Petitioner for the expenses associated with the transportation to and from school for the Petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 21, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

9-25-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 28 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 3121-00
AGENCY DKT. NO. 51-2/00

G.A., on behalf of minor child, B.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with and adopts as his own the determination of the Administrative Law Judge that petitioner's child, B.A., is, *under the factual circumstances presented herein*, entitled to transportation pursuant to the requirements of *N.J.S.A.* 18A:39-1 for the reasons set forth in the Initial Decision.

Accordingly, respondent is directed to provide petitioner's child public transportation to and from Memorial High School pursuant to the provisions of *N.J.S.A.* 18A:39-1 *et seq.*[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: NOV 09 2000

Date of Mailing: NOV 09 2000

[1] The Commissioner notes that the provisions of *N.J.S.A.* 18A:39-1 *et seq.* that authorize parental reimbursement relate to pupils who attend *nonpublic* schools.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

364-00

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATES OF	:	
TERESE BELLO-VALDES, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF PARAMUS BOROUGH,	:	DECISION
BERGEN COUNTY.	:	

November 13, 2000

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Petitioner,
Paramus Board of Education

00 OCT 30 AM 11:15

PARAMUS BOARD OF EDUCATION,

Petitioner,

-v-

TERESE BELLO-VALDES,

Respondent.

BEFORE THE NEW JERSEY
COMMISSIONER OF EDUCATION

Civil Action

STIPULATION OF SETTLEMENT

Petitioner, Paramus Board of Education, with offices located at 145 Spring Valley Road Paramus, New Jersey (hereinafter "the Board") and respondent, Terese Bello-Valdes, residing at 419 Racetrack Road, Ho-Ho-Kus, New Jersey (hereinafter "respondent" or "Ms. Bello-Valdes"), hereby stipulate and agree as follows:

1. Ms. Bello-Valdes was hired by the Paramus Board of Education as a non-tenured teacher of business related courses for the 1999-2000 school year. Respondent was to perform those duties pursuant to a written contract with the Board which included a clause requiring 60 days' advance notice of resignation.

2. Respondent acknowledges that she failed to give the Board 60 days' notice of her decision to resign her employment as a teacher in the Paramus school district as of April 15, 2000.

3. The parties agree that, pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6:11-3.8, the appropriate penalty for respondent's failure to give the Board the contractually specified 60 days' notice is a suspension of all of her educational certificates for a period of one calendar year.

4. Mr. Bello-Valdes hereby consent to the entry of an Order by the Commissioner of Education suspending all of her educational certificates for a period of one calendar year from the date of the approval of this settlement by the Commissioner of Education, pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6:11-3.8. The following is a list of all of respondent's certificates:

(a) Teacher of Marketing Education
#00083791

(b) Teacher of General Business Studies
#0083790

(c) Principal / Supervisor
#00144109

5. In consideration thereof, the Board hereby withdraws and dismisses its claim for payment of counsel fees and costs by respondent. Each party will be responsible for their own counsel fees and costs and neither party will seek any reimbursement or payment from the other party.

6. Ms. Bello-Valdes understands that notice of this suspension may be circulated to the County Superintendents of Schools of New Jersey, to the States and territories of the United States, and to local school authorities and that it is a matter of public record.

7. Ms. Bello-Valdes hereby releases and discharges the Board, any and all of its former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as its heirs, executors and administrators, from

liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which Ms. Bello-Valdes may have had, now has or may hereafter have for any reason whatsoever on account or arising out of or in consequence of her employment relationship with the Board, including, but not limited to:

(i) Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977;

(ii) Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

(iii) Any claims arising out of the terms and conditions of Ms. Bello-Valdes's employment with the Board, the cessation of such employment, and/or any of the events relating directly or indirectly to or surrounding that cessation;

(iv) Any and all claims related to compensation of any kind, except as set forth in this Agreement;

(v) Any and all claims for damages of any kind;

(vi) Any and all claims arising out of the execution of this Agreement;

(vii) Any and all claims for attorney's fees, costs, disbursements or the like which Ms. Bello-Valdes ever had, or has or hereafter can, shall or may have against the Board for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Agreement.

8. The Board hereby releases and discharges Ms. Bello-Valdes, her agents, representatives, predecessors, successors and assigns, as well as her heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which the Board may have had, now has or may hereafter have for any reason whatsoever on account or arising out of or in consequence of Ms. Bello-Valdes's employment relationship with the Board, including, but not limited:

(i) Any claims or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977;

(ii) Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

(iii) Any claims arising out of the terms and conditions of Mr. Bello-Valdes's employment with the Board, the cessation of such employment, and/or any of the events relating directly or indirectly to or surrounding that cessation;

(iv) Any and all claims related to compensation of any kind, except as set forth in this Agreement;

(v) Any and all claims for damages of any kind;

(vi) Any and all claims arising out of the execution of this Agreement;

(vii) Any and all claims for attorney's fees, costs, disbursements or the like which the Board ever had, or has or hereafter can, shall or may have against Ms. Bello-Valdes for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Agreement.

9. Entire Agreement - This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or reviewed in any way except in writing executed by all parties and referring specifically to this Agreement.

10. No Admissions - Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

11. Binding Effect - This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefits of the parties hereto, as well as their respective successors and assigns.

12. Governing Law and Choice of Forum - This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

13. Partial Invalidity - In the even any provision of this Agreement is held to be contrary to or invalid under the laws of any country, state, municipality or other jurisdiction, such

illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect.

14. Captions - The captions set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent of this Agreement.

15. Signature in Counterpart - This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

16. Authorization - The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Agreement on the Board's behalf.

17. Investigations - The parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representations, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

18. Construction and Enforcement - The terms of this Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date written below.

Terese Bello-Valdes

Dated: 10/30/00

Paramus Board of Education

Anthony Bucco, President

Jerome Bohnert, Board Secretary / Business Administrator

Dated:

AGENCY DKT. NO. 294-8/00

IN THE MATTER OF THE SUSPENSION :		
OF THE TEACHING CERTIFICATES OF :		
TERESE BELLO-VALDES, SCHOOL :		COMMISSIONER OF EDUCATION
DISTRICT OF PARAMUS BOROUGH, :		DECISION
BERGEN COUNTY. :		

For Petitioner, Joann L. Lynch, Esq. (Sills, Cummis, Radin, Tischman, Epstein & Gross)

For Respondent, Louis P. Bucceri, Esq. (Bucceri & Pincus)

On August 4, 2000, the Paramus Borough Board of Education served Terese Bello-Valdes with an Order To Show Cause, signed by the Commissioner, and an accompanying affidavit. The Order notified respondent that she had 20 days to submit a written answer addressing why an Order should not be entered suspending her certificates for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10.

On August 22, 2000, respondent requested an extension of time to file her answer, explaining that the parties were in settlement negotiations. Additional extensions were granted to the parties on September 6, 2000 and September 29, 2000.

On October 30, 2000, the parties submitted a settlement agreement, which is attached and incorporated herein. The settlement provides for a one-year suspension of all certificates held by Respondent Teresa Bello-Valdes, *i.e.,* Teacher of Marketing Education,

Teacher of General Business Studies, and Principal/Supervisor, and disposes of all other controverted issues.

Upon review, the Commissioner approves the settlement terms, which have been voluntarily agreed to by the parties, as they are consistent with the law and dispose of all issues in the controversy. The Commissioner, therefore, adopts the parties' settlement agreement as the final decision in this matter. Accordingly, the matter is dismissed, subject to compliance with the terms of the settlement. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating the within suspension of certificates as specified in the settlement agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 13 2000

Date of Mailing: NOV 13 2000

365-00

GERALD BATTLE *ET AL.*	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Twenty-one petitioning teachers alleged that the District's withholding of their increments for the 1997-98 school year was violative of education law. Fifteen petitioners withdrew their appeals; six petitioners remained.

The ALJ concluded that the District had reasonable basis to withhold their increments based on less than satisfactory performances and that petitioners failed to prove by a preponderance of the credible evidence that the District's action was arbitrary, capricious and unreasonable.

The Commissioner adopted the findings and determination in the Initial Decision as his own, noting that it is well-established that the scope of the Commissioner's review in increment withholding matters was not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions. (*Kopera*) With this applicable legal standard in mind, the Commissioner's review persuaded him that the record here amply established that the District's action in withholding the increment of each of the petitioners was based on validly perceived deficiencies in his or her performance during the 1996-97 school year. Petition was dismissed.

November 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9849-97
Agency Docket No. 320-9/97

GERALD BATTLE ET AL.

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: August 9, 2000 Decided: September 22, 2000

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF CASE AND PROCEDURAL HISTORY

On September 3, 1997, twenty-one (21) teachers employed by the State Operated School District of Jersey City, Hudson County (District) appealed the decision of the State District Superintendent to withhold their salary increment for the 1997-98 school year. On October 21, 1997, the matter was transmitted to the Office of Administrative Law (OAL), as a contested case pursuant to *N.J.S.A.*

52:14B-1 to - 15 and *N.J.S.A.* 52:14F-1 to -13. Subsequently, fifteen (15) petitioners withdrew their appeals. The remaining six petitioners are Juanita Brown, Hortense DuBose, Alfred Morgan, Deborah Robinson, Margaret Frederick and William Warren.

Hearings were held on February 22, 23, 25, 26, April 8, 1999 and March 15, 2000. At the conclusion of the hearing, the parties filed post hearing briefs and the record closed on August 9, 2000.

ISSUE

Petitioners' employment and salary increments were withheld for less than satisfactory performance ratings during the 1996-97 school year. Thus, the issue is whether petitioners are entitled to salary increments for the 1997-98 school year. The scope of review on appeal is limited to whether there exists a reasonable basis for the District's decisions.

FINDINGS OF FACTS

Based on a review of the relevant evidence I **FIND** the following as **FACT**:

The District uses the "Jersey City Public Schools Instructional Observation Report" to rate the performance of staff. The evaluation covers five performance areas:

1. Demonstrates proficiency in subject matter.
2. Assesses needs and evaluates progress of pupils.
3. Employs effective organization and planning.
4. Utilizes effective instructional techniques.
5. Addresses affective domain.

There are four ratings for each performance area:

O - Outstanding
S - Satisfactory

I.N. - Needs Improvement
U - Unsatisfactory
N/A - Not Applicable

Juanita Brown

Juanita Brown, a teacher of the handicapped, was hired in 1973. She was assigned to Snyder High School to teach special education to students with disabilities.

On February 21, 1997, Vice-Principal James Burke observed Brown's "Study Skills" class. Burke acknowledged that Brown demonstrated knowledge of the subject matter. However, she did not demonstrate proper preparation for planning and instruction. For example, the objective of the lesson or "SWAT" (student will be able to) was not written on the black board. Further, all the students were working at the same level without regard to their individual needs. Additionally, Brown's lesson plan was not available until the end of the day and her roll book was incomplete as showed no measurement of the student's performance.

Due to his observations Burke rated Brown's performance as follows:

U 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
I.N. 4. Utilizes effective instructional techniques.
I.N. 5. Addresses affective domain.

[R-1]

On April 11, 1997, W. Ronzitti evaluated Brown's Health/Life Science class and rated her "Satisfactory" in all categories.

On June 2, 1997, Burke again evaluated Brown's performance. Burke noted his prior evaluation in February and the evaluation conducted by Dr. Ronzitti. (R-4). Burke rated Brown as follows:

U	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
U	5. Addresses affective domain.
IN	6. Exhibits professional attitudes and manner.
S	7. Establishes rapport with pupils, staff and/or parents.
IN	8. Implements and enforces school rules, regulations and Board policy.

[R-4]

On June 16, 1997, Brown received notice from the State District Superintendent that her salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-5)

Hortense DuBose

Hortense DuBose has been employed by the District for thirty-four (34) years and was assigned to teach second grade at P.S. 39. On December 3, 1996, Patricia Bryant, Supervisor of Language Arts, evaluated Dubose's teaching performance in Integrated Studies (Health and Language Arts). Twenty-five (25) students were in the second grade class. Bryant believed that DuBose had not demonstrated proficiency in teaching. For example, the students' progress could not be assessed because their assignments were performed on undated ditto worksheets.

Bryant rated DuBose as follows:

I.N.	1. Demonstrates proficiency in subject matter.
I.N.	2. Assesses needs and evaluates progress of pupils.
I.N.	3. Employs effective organization and planning.

I.N. 4. Utilizes effective instructional techniques.
I.N. 5. Addresses affective domain.

[R-7]

During the school year, Marie Morrissey, Principal of P.S. 38, made several informal observations of DuBose's classes. On April 4, 1997, Morrissey conducted a second formal observation and rated DuBose as follows:

I.N. 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
I.N. 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

[R-8]

Based on the observations, Morrissey prepared an annual performance report, identified several areas for improvement in performance, and recommended that DuBose's increment be withheld. (R-9).

On June 16, 1997, DuBose received notice from the State District Superintendent that her salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-10)

Alfred Morgan

Alfred Morgan was assigned to teach physical education at three schools in the District: P.S. 25, P.S. 39 and P.S. 23. On December 17, 1996, Anne Butler, Principal of P.S. 25, evaluated Morgan and rated his performance as follows:

S 1. Demonstrates proficiency in subject matter.
S 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and

planning.
S 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

[R-11]

On April 9, 1997, Butler met with Morgan. She gave him advice on preparing lesson plans adequately. Also, she reminded him that he had been warned previously to improve his performance in this category. Butler testified that Morgan's performance on December 17, 1996 showed no improvement in this area from the prior year. Consequently, on June 3, 1997, she recommended that he not receive a salary increment for the school year 1997-98. (R-12). Butler acknowledged that she was unaware that on March 13, 1997, Dorian Skeete, Principal of P.S. 39, had evaluated Morgan and rated him "Satisfactory" in all areas. (R-13). Butler maintained, however, that she would have made the same recommendation to withhold Morgan's salary increment, notwithstanding the evaluation by Skeete.

On June 16, 1997, Morgan received notice from the State District Superintendent that his salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-15)

Deborah Robinson

Deborah Robinson was assigned to teach fifth grade at P.S. 34 for school year 1996-97. On December 19, 1996, Principal Delores Foster evaluated Robinson's performance and rated her "Satisfactory" in all areas. (R-16). On January 22, 1997, Naser Neshiewat, Supervisor of Mathematics, evaluated Robinson and rated her performance as follows:

I.N. 1. Demonstrates proficiency in subject matter.
I.N. 2. Assesses needs and evaluates progress of pupils.
I.N. 3. Employs effective organization and

planning.
I.N. 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

[R-17]

At a post-observation conference held on January 28, 1997, Neshiewat and Robinson discussed her evaluation and the areas where she needed to improve her performance. In April 1997, Neshiewat returned to Robinson's class for an informal observation and found no significant improvement in her performance.

On May 27, 1997, Noemi Velasquez, Supervisor of Language Arts, conducted a formal observation of Robinson's Language Arts class. Velasquez rated her performance as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
I.N. 3. Employs effective organization and planning.
S 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain

[R-18]

On June 4, 1997, Velasquez and Robinson discussed the evaluation at a post-observation conference.

On June 1, 1997, Principal Delores Foster recommended that Robinson's salary increment be withheld. (R-20). On June 16, 1997, Robinson received notice from the State District Superintendent that her salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-21).

Margaret Frederick

Margaret Frederick was assigned to teach sixth grade mathematics at P.S. 39 in school year 1996-97. Ester Lawz, Supervisor of Mathematics,

conducted informal observations of Frederick's class on September 26, October 3, and October 8, 1996. On February 19, 1997, Lawz evaluated a geometry class. From 8:45 a.m. to 9:30 a.m., Frederick taught an opening exercise. Lawz believed that the exercise should have taken ten minutes to complete, not forty-five minutes. Lawz also testified that the students were inattentive and roaming around the room. Furthermore, during the lesson two students began to fight. A teacher from another class entered the room to separate the students. Lawz rated Frederick's performance as follows:

I.N.	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
U	5. Addresses affective domain.

[R-22]

On March 4, 1997, Lawz and Frederick discussed the evaluation at a post-observation conference. Thereafter, Lawz made an informal evaluation of Frederick's class and observed no change in her performance.

On June 1, 1997, the Principal of P.S. 34 recommended that Frederick's salary increment be withheld. (R-24). On June 16, 1997, Frederick's received notice from the State District Superintendent that her salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-23).

William Warren

William Warren taught business and economics at Snyder High School for school year 1996-97. On February 27, 1997, Connie Piatkowski, Supervisor of Business Education, evaluated Warren teaching a business law class on contracts. Piatkowski believed that the lesson was fragmented and lacked

continuity. She opined and that the students lost interest in the lecture. Piatkowski rated Warren's performance as follows:

S 1. Demonstrates proficiency in subject matter.
NI 2. Assesses needs and evaluates progress of pupils.
NI 3. Employs effective organization and planning.
NI 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain
[R-26]

On December 16, 1996, Henry Perasky, Vice-Principal at Snyder High, observed Warren teaching an economics class. Prior to the meeting, Perasky gave Warren a checklist of the items that would be included in the evaluation, *e.g.*, lesson plans, folders, grades. Perasky observed the students taking a quiz on the gross national product. Perasky believed that Warren instruction did not challenge the students' academic abilities as the questions were very simple. Perasky rated Warren's performance as follows:

S 1. Demonstrates proficiency in subject matter.
S 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
S 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

[R-25]

In his report, Perasky noted that Warren's plan book did not have a lesson plan for December 16, and that the roll book recorded only student attendance. Warren did not record student grades for tests and class participation. Further, on occasion, Warren permitted the students to leave their seats before the completion of the class period and stand by the door, waiting for the bell to ring. Perasky spoke to Warren about early dismissal. On June 2, 1996, Perasky rated Warren as follows:

S 1. Demonstrates proficiency in subject matter.
NI 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
NI 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.
S 6. Exhibits professional attitudes and manner.
S 7. Establishes rapport with pupils, staff and/or parents.
U 8. implements and enforces school rules, regulations and Board policy.

[R-27]

Further, Perasky recommended that Warren's salary increment be withheld. *Ibid.* On June 16, 1997, Warren received notice from the State District Superintendent that his salary increment would be withheld for school year 1997-98 due to less than satisfactory performance. (R-23).

Argument of the Parties

Petitioners contend that in each case (1) the withholding of their increment was arbitrary, (2) the evaluations punish the teacher rather than provide direction and instruction to improve performance, (3) there were no standards as when the increment would be denied, (4) the teachers were not given advance notice that their increments were in jeopardy, and (5) Judy Granik, Executive Assistant/Human Resources did not have the authority to deny teachers' increments.

Respondent counters that in each of the appeals, an administrative and/or supervisory staff conducted a formal observation and applied the standard form prescribed by the District to measure the teacher's performance. Thereafter, the performance was rated according to five criteria. Based on the assessments, it was reasonable and not arbitrary to for the evaluators to conclude that the teacher's performance was less than satisfactory. Therefore, it was reasonable

and not arbitrary for the State District Superintendent to withhold their increments for substandard performance for the 1996-97 school year.

DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:29-14 provides that a teacher's salary increment may be withheld for inefficiency or other good cause. Conversely, the approval of a salary increment is "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.,* 127 *N.J.* 518, 527 (1992). Indeed, the purpose of *N.J.S.A.* 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n*, 79 *N.J.* 311, 321 (1979). Consequently, an annual increment is not a statutory right; it is a reward for good performance and the acknowledgment that the teacher's overall performance has met the high standards of performance required by the District. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.,* 96 *N.J.* 587, 594 (1984)

The Legislature has vested local boards and state district superintendents with the power to withhold increments from teachers who have not performed satisfactorily during the previous year. *Probst v. Haddonfield Bd. of Educ., supra*, 127 *N.J.* at 526. Indeed, a decision to withhold an increment is a matter of management prerogative. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., supra*, 96 *N.J.* 587; *Bernard Twp. Bd. of Educ., v. Bernard Twp. Educ. Ass'n, supra,* 79 *N.J.* 311. Accordingly, the Commission is prohibited from substituting his judgment for that of the board or state district superintendent.

The scope of review on appeal is limited to whether there exists a reasonable basis for the District's decision. The exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). Thus, the Commissioner must determine: "(1)

whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts." *Id.* at 296-97. The burden proof proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Kopera* at 297.

Therefore, I have considered the claim of each petitioner, the underlying facts, and the arguments of the parties. Each claim challenged the District's procedure in conducting the evaluation of the teacher's performance. I agree with petitioners' assertion that each evaluator "was not necessarily looking for the same things in the teacher's performance." Indeed, some subjectivity is contained in an evaluator's judgment. Therefore, in each appeal I have carefully considered the teacher's overall performance for the 1996-97 school year, the remarks of each evaluator and reviewed the instructional reports within the context of five performance areas: (1) Demonstrates proficiency in subject matter; (2) Assesses needs and evaluates progress of pupils; (3) Employs effective organization and planning; (4) Utilizes effective instructional techniques; and (5) Addresses affective domain. In all cases the evaluators made formal observation and in some incidence they also conducted informal observations. Thereafter, the teacher was rated on his or her cumulative performances.

The method of evaluating teachers was reasonable because it allowed the evaluator to consider the cumulative assessment of teacher, and not rely merely one day's performance. The District recognized that although a teacher may perform well on one day, that performance is not reflective of his/her overall ability. Conversely, a teacher's poor performance on one day does not necessarily reflect his teaching ability. I **FIND** and **CONCLUDE** that the evaluation procedure was consistent with *N.J.A.C.* 6:3-4.3.

Juanita Brown

Brown was evaluated twice during the school year. Vice-Principal Burke credibly testified that on February 21, 1996 he evaluated her performance and found that she was unprepared to provide meaning instruction. He observed poor records of the students' attendance, grades and their progress. The lesson plan presented was not reflected in her plan book. Brown's instructional techniques did not address the individual needs and abilities of the students. Moreover, the evidence reflects a discrepancy in Brown's roll book concerning student attendance on February 17, 1997, a legal holiday. (R-6, R-6A, P-3). The notations appearing on the page at the time of the observation were "whited-out" on the date of the hearing. The book had been altered. *Ibid.* Neither party presented Mr. Ronzitti, who rated Brown "Satisfactory" in all areas.

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold Juanita Brown's salary increment for less than satisfactory performance in the 1996-97 school year.

I further **CONCLUDE** that Juanita Brown has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

Hortense DuBose

Petitioner argues that she was evaluated on December 5, 1996 and April 4, 1997. Thereafter, on May 20, 1997, "she learned for the first time that her increment was not being recommended." Petitioner's Brief at 2.

The District contends that during the 1996-97 school year, DuBose did not demonstrate proficiency in teaching. During formal and informal evaluations, she

and her students were observed seated at their desks with no "active instruction." Respondent's Brief at 19. Further, DuBose did not properly assess the needs of her students. For example, there were no planned activities for students who completed their work early or portfolio's showing the student's progress. Marie Morrissey, employed by the District for thirty-four (34) years, has experience as a teacher, reading specialist, assistant principal and the current Principal of P.S. 38. Morrissey credibly testified that DuBose's plan book did not always reflect the class lesson. Based on her observation, Morrissey opined that DuBose failed to deliver meaningful instruction to her students.

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold Hortense DuBose's salary increment for less than satisfactory performance in the 1996-97 school year..

I further **CONCLUDE** that Hortense DuBose has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

Alfred Morgan

Morgan was assigned to three schools in the District. He was evaluated on December 17, 1996 by Anne Butler and March 13, 1997 by Dorian Skeete. Petitioner contends that Butler was "unperturbed" by the "Satisfactory" ratings given by Skeet. Petitioner's Brief at 6. Thus, Butler's recommendation to withhold his salary increment was arbitrary. *Ibid.*

The evidence reveals that on December 16, 1996, Butler reviewed Morgan's plan book and found it deficient. Further, in the prior school year, Morgan's lesson plans needed improvement. They discussed the problems and some solutions such as his attendance at the Teacher's Academy during the summer. Butler observed no improvement in Morgan's lesson plan. The District

argues that proper lesson plans are critically important for teaching because they identify the goals and objectives of what is to be learned. Morgan "had been warned of the need to improve his planning." Respondent's Brief at 25. Consequently, Morgan's "failure to work towards improvement" does not "warrant the reward of an increment." *Ibid.*

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold Alfred Morgan's salary increment for less than satisfactory performance in the 1996-97 school year.

I further **CONCLUDE** that Alfred Morgan has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

Deborah Robinson

Robinson received all "Satisfactory" ratings by Principal Doris Foster. In a second evaluation by Naser Neshiewat, the Supervisor of Mathematics, she received four "Needs Improvement" and one "Satisfactory". I reject petitioners' arguments there is no standard to evaluate a teacher's performance and that "this school district is engaged in sophistry and the consequence of its sophistry is to use the evaluation process to punish teacher,...[not] to help the teachers of the district improve their delivery of education." Petitioner's Brief at 6.

Neshiewat, employed by the District for twenty (20) years, earned a Bachelor of Science Degree in Engineering and a Master of Art Degree in Math and Computer Science. He found Robinson's fifth grade class disorganized and the pupils inattentive. He also believed that Robinson needed to be more knowledgeable in the subject matter and use techniques that that would better assist and encourage the students. For example, math is a subject requiring

critical thinking. Robinson should use teaching aids such as calculators and cooperative learning rather than isolated learning.

Robinson has been employed in the District for nineteen (19) years. She was recently assigned to teach fifth grade. She testified that there was a discipline problem in the classroom and that the older students lacked basic skills. She was not expecting Neshiewat to observe her performance on December 16, 1996.

Moreover, the students' records could not properly evaluate their needs or progress. For example, the student portfolios contained only math papers shows test scores. And, there were no student papers for Language Arts. Further, Noemi Velasquez credibly testified that the room lacked wall decorations and there was no display of the students' work. Additionally, credible evidence revealed that at a workshop in September 1997, Velasquez distributed a wall decoration of the "apple core" Thus, the "apple core" project was not on the walls of Robinson's classroom in May 1997, as she claimed. I am persuaded by the preponderance of the credible evidence that Robinson's overall performance for school year 1996-97 was less than satisfactory.

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold Deborah Robinson's salary increment for less than satisfactory performance in the 1996-97 school year.

I further **CONCLUDE** that Deborah Robinson has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

Margaret Fredrick

Fredrick has been employed with the District since 1963 and taught Home Economics. For school year 1996-97 she was assigned to teach six-grade mathematics. Frederick believed that the District did not provide her with adequate time to prepare to teach a new subject matter. Indeed, she was given the assignment two days before school began. She maintained that her requests for assistance from the Principal and other staff members went unanswered. Moreover, her request to attend a conference at Rutgers University was denied. Petitioner opined that she did not have the experience her evaluators desired. Thus, the evaluation process was not used "as a device for improvement of instruction, but as a device to punish its staff." Petitioner's Brief at 7. On the other hand, Frederick acknowledged that she was certified to teach all subjects from Kindergarten through eighth grade, but had not taught math. Further, Frederick conceded that she was not aware that teachers had to maintain portfolios on students. She testified that she felt isolated and helpless.

The District presented credible evidence that Frederick's overall performance was deficient. She was twice evaluated in school year 1996-97. She did not maintain student portfolios or student journals. Thus, she could not assess the students' progress. Additionally, she was unable to control the students' behavior and attempted to continue the class lesson when two students began to fight.

Respondent contends that although Frederick had not previously taught math, " she did not even try to help herself, genuinely ask for assistance or heed the suggestions given to her." Respondent's Brief at 43.

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold Margaret Frederick's salary increment for less than satisfactory performance in the 1996-97 school year.

I further **CONCLUDE** that Margaret Frederick has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

William Warren

Petitioner maintained that he was "not aware of what the standard was for the granting or denial of an increment." Petitioner's Brief at 7.

The evidence reveals that on December 16, 1996, Vice-Principal Henry Perasky observed Warren teaching an economics class. Moreover, prior to the meeting, Perasky gave Warren a checklist of the items that would be included in the evaluation. Thereafter, on December 23, 1995, Perasky met with Warren and they discussed the written report, R-25.

On February 27, 1997, Connie Piatkowski, Supervisor of Business Education, held a second observation. Warren was teaching a class on contracts. Thereafter, on March 18, 1997, Piatkowski reviewed her report with Warren at post-observation conference.

Respondent presented credible evidence that the evaluators met with Warren and discussed what areas he needed to improve. Notwithstanding the advice, Warren failed to keep adequate records of pupil progress and attendance and did not improve in those areas.

Based on a careful review of the record, I **CONCLUDE** that the District had reasonable basis to withhold William Warren's salary increment for less than satisfactory performance in the 1996-97 school year.

I further **CONCLUDE** that William Warren has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

ORDER

It is hereby **ORDERED** that the District's determination to withhold Juanita Brown's increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

It is hereby **ORDERED** that the District's determination to withhold Hortense DuBose salary increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

It is hereby **ORDERED** that the District's determination to withhold Alfred Morgan's salary increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

It is hereby **ORDERED** that the District's determination to withhold Deborah Robinson's salary increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

It is hereby **ORDERED** that the District's determination to withhold Margaret Frederick's salary increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

It is hereby **ORDERED** that the District's determination to withhold William Warren's salary increment for school year 1997-98 for less than satisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE	**MUMTAZ BARI-BROWN**, ALJ
	Receipt Acknowledged:
DATE	DEPARTMENT OF EDUCATION
	Mailed to Parties:
DATE	OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioners:

Juanita Brown
Hortense Dubose
Alfred Morgan, Jr.
Deborah Robinson
Margaret Fredrick
William Warren

For Respondent

James Burke
Marie Morrissey
Patricia Bryant
Anne E. Butler
Naser Neherwat
Noemi Velazquez
Connie Piatkowski
Henry Pekarski

Exhibits:

P-1 Payroll Print Out dated 1996-97

P-2 Roll Book Page dated February 1997

P-3 Roll Book Page dated February 1997

P-4 Evaluation Guideline

P-5 Roll Book Page dated December 1996

P-6 Roll Book Page dated November 1996

P-7 Letter from Debose

P-8 Photo – Ducks

P-9 Photo Conflict Resolution

P-10 Photo Writers Spot

P-11 Photo – Goals

P-12 Photo

P-13 Photo

P-14 Photo

P-15 Photo

P-16 Photo

P-17 Photo

P-18 Letter from K. Cordals

R-1 Staff Report of Juanita Brown dated February 21, 1997

R-2 Response of Juanita Brown dated June 6, 1997

R-3 Staff Report of Juanita Brown dated April 11, 1997

R-4 Annual Performance of Juanita Brown dated June 2, 1997

R-5 Withholding Letter dated June 16, 1997

R-6 Roll Book Pages of Juanita Brown dated February 17

R-7 Observation Report of H. Debose dated December 5, 1996

R-8 Observation Report of H. Debose dated April 4, 1997

R-9 Annual Report of H. Debose dated May 20, 1997

R-10 Withholding Increment of H. Debose dated June 17, 1997

R-11 Observation Report of A. Morgan dated December 17, 1996

R-12 Increment Withholding Letter dated March 26, 1997

R-13 Observation Report dated March 13, 1997

R-14 Performance Report dated June 3, 1997

R-15 Increment Withholding Letter dated June 16, 1997

R-16 Observation Report of D. Robinson dated June 1, 1997

R-17 Observation Report of D. Robinson dated January 22, 1997

R-18 Observation Report of D. Robinson dated May 27, 1997

R-19 Letter of D. Robinson dated March 17, 1997

R-20 Observation Report of D. Robinson dated June 1, 1997

R-21 Increment Withholding Letter of D. Robinson, dated June 16, 1997

R-22 Observation Report of M. Frederick dated February 19, 1997

R-23 Letter

R-24 Observation Report

R-25 Staff Observation of Warren dated December 16, 1996

R-26 Observation Report dated February 27

R-27 Annual Performance Report dated May 23, 1995

R-28 Letter to Warren dated June 16, 1997

R-29 Increment Withholding Letter of Warren dated May 13, 1993

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 22, 2000
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

9-29-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT - 3 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 9849-97
AGENCY DKT. NO. 320-9/97

GERALD BATTLE *ET AL.*	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record, which it is noted did not include transcripts of the hearings below,[1] the Commissioner determines to affirm the Administrative Law Judge's (ALJ) recommended decision as he finds that the District's action in withholding the 1997-98 increments of each of the within petitioners was a valid exercise of its discretionary authority. In so determining, the Commissioner was mindful, as was aptly recognized by the ALJ, that it is well-established that the scope of the Commissioner's review in increment withholding matters is not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions. (*Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960)) As such, there are *only two*

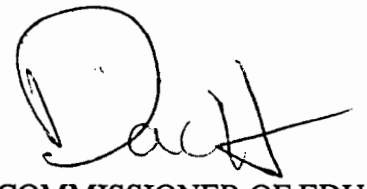
[1] It is further noted that the record transmitted to the Commissioner did not include petitioners' exhibits, listed in the Initial Decision as P-1 through P-6 and P-8 through P-17. OAL's attempts to locate these exhibits was unsuccessful. However, even according these particular exhibits every inference and weight for the propositions for which they were introduced, the Commissioner is persuaded, from his comprehensive review herein, that no alteration of his

determinations to be made when reviewing the District's decision to withhold the increment of each of these teaching staff members, *i.e.,* 1) whether the underlying facts were as those who made the evaluations claimed, and 2) whether it was unreasonable for them to conclude as they did based upon those facts. Moreover, it is likewise well-established that the burden of proving unreasonableness lies with the petitioners. (*Kopera* at 296-297)

With this applicable legal standard in mind, the Commissioner's review persuades him that the record here amply establishes that the District's action in withholding the increment of each of the within petitioners was based on validly perceived deficiencies in his or her performance during the 1996-97 school year. Consequently, the Commissioner agrees with the ALJ that these petitioners have failed to sustain their burden of establishing, by a preponderance of the credible evidence, that the District's action was arbitrary, capricious, unreasonable, or an abuse of its discretion.

Accordingly, the recommended decision of the OAL is affirmed for the reasons well-stated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: NOV 13 2000

Date of Mailing: NOV 13 2000

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ultimate determination in this matter would result from review of the actual exhibits. The record also contained one additional exhibit which was not listed in the ALJ's Initial Decision, *i.e.*, R-6A – Original Roll Book.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

366-00

M.M. AND V.S., on behalf of minor children, N.M. AND R.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT	:	
	:	

November 13, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8785-99

AGENCY DKT. NO. 274-9/99

M.M. AND V.S. ON BEHALF OF
MINOR CHILDREN N.M. AND R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF MILLTOWN,
MIDDLESEX COUNTY,

Respondent.

Philip Borow, Esq., for petitioner

Alan J. Schnirman, Esq., for respondent

Record Closed: September 27, 2000 Decided: September 27, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 27, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

An in-person prehearing conference was held on April 18, 2000 and various hearing dates, including February 17th, 18th, April 5th, 6th, and July 18th and 20th, 2000, were scheduled but were adjourned for various reasons. The parties ultimately settled the matter and have

prepared a consent order indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

9/27/00
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

9-29-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 2 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

Philip Allan Borow, Esq.
24 Kirkpatrick Street
Post Office Box 1844
New Brunswick, New Jersey 08903
(732) 220-1200
Attorney for Petitioner(s)

M.M. AND V. S. O/B/O MINOR CHILDREN, N. M. & R.M.	:	OFFICE OF ADMINISTRATIVE LAW
	:	OAL DOCKET NO.: EDUOS 08785-99S
Petitioner(s),	:	
V.	:	
BOE OF MILLTOWN, MIDDLESEX COUNTY	:	**CONSENT ORDER**
Respondent(s).	:	

The matter having been brought between counsel Philip Allan Borow, Esq., attorney for the petitioners, and Alan J. Schnirman, Esq., attorney for the respondents, and both counsel consenting thereto, and the Court having considered the Order and for good cause having been shown;

IT IS ON THIS _____ DAY OF _____, 2000;

IT IS HEREBY ORDERED

1. The minor children, Natalie Masciulli and Raquel Masciulli, having agreed to voluntarily withdraw from the Milltown school system.
2. The petitioners agree to waive any and all claims they may have against the Milltown Board of Education arising out of this matter.

3. The respondent, Milltown Board of Education, agrees to waive any and all claims they may have against the petitioners arising out of this matter.

IT IS FURTHER ORDERED, that a copy of this Order shall be served upon all counsel with _____ days from the date hereof.

_____
KATHRYN A. CLARK, A.L.J.

I hereby consent to the form
and entry of the within Order

_____
PHILIP ALLAN BOROW, ESQ.
Attorney for Petitioner(s)

_____
ALAN J. SCHNIRMAN, ESQ.
Attorney for Respondent

OAL DKT. NO. EDU 8785-99
AGENCY DKT. NO. 274-9/99

M.M. AND V.S., on behalf of minor children, N.M. AND R.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT	:	
	:	

The record, Consent Order, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 13 2000

Date of Mailing: NOV 13 2000

367-00

ARLENE FAUL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 03770-98
AGENCY DKT. NO. 32-2/98

ARLENE FAUL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/28/00

Date Of Mailing: 11/15/00

368-00

JAMIE DISPOTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 950-98
AGENCY DKT. NO. 14-1/98

JAMIE DISPOTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/15/00

369-00

BARBARA ANN NOON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 1683-99
AGENCY DKT. NO. 552-12/98

BARBARA ANN NOON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/15/00

370-00

A. B., on behalf of minor child, S. B., :

:

PETITIONER,

:

V. : COMMISSIONER OF EDUCATION

:

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, : DECISION

:

RESPONDENT.

:

September 28, 2000

OAL DKT. NO. A EDU 336-99
AGENCY DKT. NO. 17-1/99

A. B., on behalf of minor child, S. B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/15/00

371-00

DARIUS TRANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 6172-98
AGENCY DKT. NO. 185-6/98

DARIUS TRANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision:. 09/28/00

Date of Mailing: 11/15/00

~~378-00~~
372-00

J.D., on behalf of minor child, E.D.S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, : DECISION

:

RESPONDENT.

:

September 28, 2000

OAL DKT. NO. EDU 11653-98
AGENCY DKT. NO. 410-9/98

J.D., on behalf of minor child, E.D.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/15/00

373-00

ELLEN PRESSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 3902-99
AGENCY DKT. NO. 77-4/99

ELLEN PRESSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

374-00

J.P., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BOROUGH OF BOTOTA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 03338-99
AGENCY DKT. NO. 3-1/99

J.P., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BOROUGH OF BOTOTA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

375-00

ABBEY AZNAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 09639-96
AGENCY DKT. NO. 345-8/96

ABBEY AZNAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

376-00

ROBERT STRUCK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 12110-99
AGENCY DKT. NO. 365-12/99

ROBERT STRUCK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

377-00

LETITIA COX-RIVERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 6486-98
AGENCY DKT. NO. 156-5/98

LETITIA COX-RIVERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

378-00

JACQUELINE HOLMES-WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENTS.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 2388-98
AGENCY DKT. NO. 57-3/98

JACQUELINE HOLMES-WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 11/16/00

381-00

M.R. AND O.R., on behalf of minor child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

November 17, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3599-00
AGENCY DKT. NO. 81-3/00

M.R. and O.R. by and on behalf of their daughter A.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE,
Respondent.

Louis C. Rosen, Esq., for petitioners
(Michael I. Levin & Associates, attorneys)

Robert T. Tessaro, Esq., for respondent

Record Closed: September 27, 2000 Decided: September 28, 2000

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 14, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-13 and *N.J.S.A.* 14F-1 to –15.

The parties have agreed to settle this matter and have prepared the attached Stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Sept. 28, 2000
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10-4-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT - 5 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

MICHAEL I. LEVIN AND ASSOCIATES, P.C.
BY: Louis C. Rosen, Esq.
5505 Route 70 West
Pennsauken, N.J. 08109
(856) 921-8920
Attorney for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEP 27 3 33 PM '00

M.R. and O.R., by and on behalf of their daughter, A.M.,	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioners	:	
v.	:	Agency Docket No. 81-3/99 OAL Docket No EDUOS 03599-00N
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE	:	**STIPULATION OF SETTLEMENT**
Respondent	:	

The above matter having been amicably adjusted between the parties hereto, it is hereby stipulated and agreed that the above matter be dismissed with prejudice and without costs on the following terms and conditions:

1. This stipulation of settlement does not and shall not be construed as an admission of liability and/or wrongdoing on the part of either party. It is being entered into for the purpose of resolving the issue of the education of A.M. without additional expenditure of time and money for legal fees and costs which will be incurred should the matter proceed.

2. As a condition of this Stipulation of Settlement, and solely for the purposes as set forth above, Petitioners agree to pay to Respondent, Fort Lee Board of Education, the sum of $4,653.21 in lieu of tution in three equal installments of $1,551.07, which installments shall be paid on June 1, July 1 and August 1, 2000.

3. It is further stipulated and agreed that, for the 2000-2001 school year, Petitioners' minor child, A.M., shall re-enroll, if at all, in Respondent's school system from a domicile located entirely and totally within the geographic boundaries of the Borough of Fort Lee on the same terms and under the same conditions as any other student enrolling in the school system of Respondent for the first time..

MAURICE RECCHIA

DATED:

ODALIS RECCHIA

DATED:

LOUIS C. ROSEN
Attorney for Petitioners

DATED: 6/5/00

ROBERT T. TESSARO
Attorney for Respondent
Fort Lee Board of Education

DATED: 9/21/2000

OAL DKT. NO. EDU 3599-00
AGENCY DKT. NO. 81-3/00

M.R. AND O.R., on behalf of minor child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 1 ? 2000

Date of Mailing: NOV [illegible] 2000

382-00

S.S., on behalf of minor child, B.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

November 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3591-00
AGENCY DOCKET NO. 52-2/00

S.S., o/b/o B.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT,

Respondent.

S.S., petitioner, *pro se*

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: September 19, 2000 Decided: September 26, 2000

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves an appeal by petitioner S.S. on behalf of B.S. from the residency determination made by respondent Board of Education of the South Orange and Maplewood School District. Respondent filed an Answer and Counterclaim and the Department of Education, Bureau of Controversies and Disputes, subsequently transmitted the matter to the Office of Administrative Law (OAL) where it was filed on April 14, 2000 for an expedited hearing. Subsequent to the assignment of the matter to

the undersigned on May 30, 2000, a hearing was scheduled for July 18, 2000. Prior to the scheduled hearing counsel for respondent advised the undersigned, by letter received on June 16, 2000, that the matter had been resolved. Following a telephone conference with the parties on July 12, 2000 regarding the status of the settlement, the parties executed, in counterparts, the attached Stipulation of Settlement and Mutual Dismissal, indicating the terms of agreement which was received on September 19, 2000. Having reviewed the record and the terms of settlement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT - 5 2000

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and Maplewood Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEP 19 10 28 AM '00

S.S. ON BEHALF OF THE MINOR CHILD, B.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 52-2/00
OAL DKT NO. EDUOS 03591-00N

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioner Sem Salomon and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. If requested by Petitioner, the Respondent Board will provide up to a maximum of twenty (20) hours of academic support home instruction or after-school tutoring to B.S. during the 2000-2001 school year. If Petitioner does not request such instruction, the Board will not provide it.

3. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

4. As a result of the foregoing, Petitioner Sem Salomon withdraws his Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

_____	Richard Rosenberg 9/1/00
SEM SALOMON Date	SOUTH ORANGE/ MAPLEWOOD Date BOARD OF EDUCATION

Document #: 414243/JLB

OAL DKT. NO. EDU 3599-00
AGENCY DKT. NO. 52-2/00

S.S., on behalf of minor child, B.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Mutual Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms as agreement between the parties that B.S. is entitled to attend school in respondent's District free of charge as an affidavit student.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 2 1 2000

Date of Mailing: NOV 2 1 2000

383-00

DOUGLAS E. WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BERNARDS TOWNSHIP, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning resident and taxpayer contended that the Board's bidding specifications for roof replacement for its schools were unduly restrictive in violation of *N.J.S.A.* 18A:18A-1 *et seq.*, the Public School Contracts Law. Petitioner further alleged that the Board violated *N.J.A.C.* 6:22-1.7 by not having its plans for construction drawn to scale and approved by the local code official or the School Facility Planning Service. Petitioner withdrew from proceedings.

Since petitioner failed to produce competent evidence, testimonial or documentary, to support his allegations, the ALJ determined that petitioner did not demonstrate by a residuum of legally competent evidence that the Board advertised for bids without having specifications; that the Board violated some specific statute in *N.J.S.A.* 18A:1-1 et seq., or any other state law it is bound to uphold by having "not to scale" drawings in its specifications; and, that the Board prepared specifications which inhibited free and open competitive bidding. The ALJ dismissed the petition and the amended petition.

The Commissioner adopted the findings and determination in the Initial Decision as his own, noting that it is well settled that boards of education in New Jersey have broad discretion with regard to the operation and management of a local district, pursuant to *N.J.S.A.* 18A:11-1. The amended petition was dismissed. However, because of the nature of the allegations raised, the Commissioner forwarded a copy of this decision to the Department's Office of Compliance Investigation for review and such action, if any, as it deems necessary.

November 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4006-00

AGENCY DKT. NO. 80-3/00

DOUGLAS E. WICKS,

Petitioner,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

Douglas E. Wicks, petitioner *pro se*

Philip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein, & Gross, attorneys)

Record Closed: September 21, 2000 Decided: October 4, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

INTRODUCTION

Douglas E. Wicks, (petitioner), is a resident of Bernards Township who represents himself in this action filed against the Bernards Township Board of Education (Board). Petitioner's complaints center on roofing projects and related work with which the Board is presently engaged. Because of the unusual position taken by petitioner when he determined he submitted sufficient proofs that he would no longer participate or even be present when and if the

Board put on its case, it is necessary to recite the procedural history of the matter before addressing the merits and the Board's motion to dismiss.

PROCEDURAL HISTORY

On March 6, 2000 petitioner filed a "Request for Declaratory Judgment" before the Commissioner of Education in which he alleges, among other charges, that the Board caused specifications to be prepared for roof replacement and related work for three of its schoolhouses which prohibited free, open and full market competition among potential bidders contrary to the Public School Contracts Law, *N.J.S.A.* 18A: 18A-1, et seq. The Commissioner notified petitioner by letter dated March 8, 2000 that his request for declaratory judgment was rejected, but that the would proceed as a petition of appeal and that the Board should file an answer to the petition. The Board filed its answer to the petition on April 13, 2000 by which it neither admits nor denies the allegations but leaves petitioner to his proofs. In the meantime, on April 10, 2000 petitioner filed an "addition to motion of appeal" before the Commissioner In this document which is considered an amended petition of appeal, petitioner alleges the Board advertised for bids before its plans for the project were prepared. The Board filed its answer to the amended petition on April 17, 2000 in which it neither admits nor denies the allegations, but leaves petitioner to his proofs. [1]

On May 10, 2000 the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13. On May 26, 2000 the undersigned was assigned as an administrative law judge, temporarily assigned, to conduct proceedings as necessary in the matter. A telephone conference call was conducted June 22, 2000 during which discovery matters were addressed and the matter then proceeded to hearing on July 14, 2000 at the Office of Administrative Law, Mercerville. At the conclusion of testimony on July 14, petitioner was granted a continuance

[1] The record discloses petitioner filed letters on April 5, April 14, May 9, May 18, and June 6, 2000 protesting the lack of discovery received from the Board. Whatever absence of discovery was then occurring was eventually corrected.

he testified he is not knowledgeable about legal requirements for public school roofing specifications or the award of bids. He did explain that in his view it is important to have schematic drawings of projects to be completed under public works be drawn to scale and did not meet the New Jersey Uniform Construction Code by which state projects are advertised for bid. In this case, Mr. Das testified that the letters "NTS" in the box, "Scale", accompanying the drawings in the Board' specifications mean that such drawings are 'not to scale.'

ANALYSIS

Actions taken by boards of education carry the presumption of correctness. One who challenges an action taken by a board of education carries the burden of persuasion to demonstrate by a preponderance of competent, credible evidence that the complained of action is arbitrary, capricious, or unlawful.

Having considered the testimonial evidence offered by petitioner, I find no basis in the separate or collective testimony of the three individuals to support petitioner's claim that the Board's specifications impaired free and open competitive bidding on the roofing work. Petitioner chose not to call a contractor to testify who may have felt that the specifications impaired free and open competition. Petitioner did testify to explain how he arrived at his conclusion based on the foregoing evidence. The documents petitioner relies upon include newspaper clippings he attached to his letters, his reference to a recent report from the state commission of investigation on fraud in public school roofing repairs; allegations of sweetheart deals and unscrupulous actors without supporting evidence; and, his admonition that he has presented enough evidence to warrant the Commissioner of Education to pick up the investigation into this Board of Education where he, petitioner, left off.

Petitioner seeks to support his allegation that the Board solicited bids for the project before the specifications were prepared by two claims: one, he attached to his amended petition a copy of an advertisement which appeared in the Bernardsville News regarding the solicitation of bids. Underneath the name of the Board Secretary who ostensibly was delegated by the Board to

run the advertisement is a legend which petitioner asserts is the date of 2-10-00. However, upon close inspection of that legend, it appears to read 2-10-TI. Petitioner offered no evidence to show his view of that legend is intended to be read as he says it should.

But, even if his reading is correct and the advertisement ran February 10, 2000, petitioner says the specifications were not prepared until February 15, 2000. I have searched the specifications (C-1) in vain for any mention of a date when they were approved by the Board. Consequently, on the basis of the record developed by petitioner in support of his case, I find no evidence to support the allegation that the Board ran an advertisement for bids prior to having the specifications for the project prepared. But even if the date February 15, 2000 does appear somewhere on the specifications, the date by itself without more proves nothing. In short, petitioner failed to establish the truth of the allegation he makes.

BOARD'S MOTION TO DISMISS

The Board seeks dismissal of the petition of appeal and the amended petition on the grounds petitioner failed to carry his burden of persuasion through competent, credible evidence to show it acted improperly, unlawfully, or abused its discretion regarding the roofing project and related work. Absent a residuum of legally competent evidence upon which a finding of wrongdoing may be entered against it, the Board seeks dismissal of petitioner's complaints against it, with prejudice. Petitioner opposes the motion on the grounds he has provided sufficient evidence to show the specifications must be redrawn to conform to what he says are their improper provisions. He says he demonstrated that the Board advertised for bids before it had the specifications; he says he demonstrated the drawings in the specifications are not drawn to scale as he says is required in the New Jersey Building Code at *N.J.A.C.* 5:23-2.15; and, that the Board's specifications inhibited free and open competitive bidding.

Petitioner did not demonstrate by a residuum of legally competent evidence that the Board advertised for bids without having specifications; petitioner did not demonstrate by a residuum of legally competent evidence that the Board violated some specific statute in N.J.S.A.

18A: 1-1, et seq., or any other state law it is bound to uphold by having 'not to scale' drawings in its specifications; and, petitioner did not demonstrate by a residuum of legally competent evidence that the Board prepared specifications which inhibited free and open competitive bidding. In large measure, petitioner relies upon hearsay evidence of newspaper clippings, reports emanating from the state investigation of school roofing contracts, and his own unsubstantiated allegations of wrongdoing.

Therefore, in the absence of legally competent evidence offered by petitioner to support his claims of wrongdoing against the Board and because he failed to carry his burden of proof to show the truth of the allegations he makes, the Board's motion to dismiss must be and is granted. The petition of appeal and the amended petition of appeal is and are dismissed.

A final word. Petitioner demands the Commissioner of Education pick up the investigation into the Board of Education which he says he started. That is not the function of the Commissioner when he is called upon in his quasi-judicial capacity under *N.J.S.A.* 18A:6-9 to hear and determine controversies and disputes which arise under school law. His function is to be the arbiter of contested cases based solely on the proofs presented by the parties and made part of the record. Petitioner called upon the Commissioner of Education in his quasi-judicial capacity when he filed the petition of appeal against the Board and essentially requested a hearing to entertain the proofs petitioner says he had.

CONCLUSION

The Petition of Appeal, and the Amended Petition of Appeal is and are hereby **DISMISSED, WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/4/00
DATE

Daniel B McKeown by
DANIEL B. MCKEOWN, ALJ

Receipt Acknowledged:

10-5-00
DATE

Debbie Mastamaitis /lm
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 6 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

C-1 Specifications

P-1 Letter

P-2 (Identification Only) Schematic

OAL DKT. NO. EDU 4006-00
AGENCY DKT. NO. 80-3/00

DOUGLAS E. WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BERNARDS TOWNSHIP, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

In his exception arguments, petitioner disputes the Administrative Law Judge's (ALJ) statement that petitioner's burden herein is to demonstrate by a preponderance of competent, credible evidence that the actions taken by the Board are arbitrary, capricious or unlawful. Instead, petitioner contends that he need only demonstrate the "*possibility* of fraud, favoritism or corruption," which standard he argues was satisfied by the testimony of his witnesses. (emphasis in text) (Petitioner's Exceptions at 2) Petitioner also objects to the ALJ's summary of the testimony provided by Mr. Dass, a Licensed New Jersey Professional Engineer, maintaining such testimony properly established that scaled drawings *are* required for roofing projects. (*Id.* at 4) Finally, petitioner refutes the ALJ's finding that his discovery problems were eventually corrected, (Initial Decision at 2, footnote 1) averring that there are still "public documents" which he has been denied for use as evidence. (Petitioner's Exceptions at 4)

In reply, the Board argues that "[p]etitioner continues to insist that pure supposition and baseless allegations can form the basis of overturning an award under the Public Bidding Laws" (Board's Reply at 2), and urges affirmance of the Initial Decision which was, in all respects, correct.

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the factual findings and conclusions of the ALJ. As the ALJ properly noted, it is well settled that boards of education in New Jersey have broad discretion with regard to the operation and management of a local district, pursuant to *N.J.S.A.* 18A:11-1. When a local school board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). Further, contrary to petitioner's urging, it is his burden to so demonstrate by a preponderance of credible evidence, since "[in] the absence of any administrative rule or regulation to the contrary, the traditional preponderance of the evidence standard applies to administrative agency matters." *SSI Medical Serv. v. State Dept. of Human Serv.*, 146 *N.J.* 614, 622 (1996). *See, also, In re Polk License Revocation*, 90 *N.J.* 550, 561(1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962).

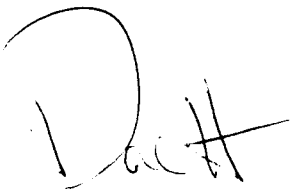
Like the ALJ, the Commissioner must find on the record before him that petitioner has not demonstrated by a preponderance of the competent, credible evidence that the Board's specifications inhibited free and open competitive bidding in violation of state school bidding laws, that the Board improperly advertised for bids without specifications, or that the Board violated state education law or regulation with "not to scale" drawings in its specifications. (Initial Decision at 8, 9) To the extent petitioner challenges the facts determined

by the ALJ based on the testimony of the witnesses and the weight he ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. *See In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

Finally, the Commissioner concurs with the ALJ's characterization of the Commissioner's role when called upon to adjudicate school law disputes pursuant to *N.J.S.A.* 18A:6-9. However, in the instant matter, although petitioner fails to meet his burden of proof in this forum, the Commissioner nonetheless concludes, based upon the nature of petitioner's allegations, that further review by the Department's Office of Compliance Investigation is appropriate.

Accordingly, the Initial Decision of the ALJ, dismissing the Amended Petition of Appeal, is adopted for the reasons expressed therein. A copy of this decision shall be forwarded to the Office of Compliance Investigation for review and such action, if any, as that office may deem necessary.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: NOV 20 2000

Date of Mailing: NOV 20 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

384-00

DEBORAH ZAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

November 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6435-99

AGENCY DKT. NO. 138-5/99

DEBORAH ZAK,

Petitioner,

v.

PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Gidian R. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: September 28, 2000 Decided: October 3, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 10, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

any claim, charge, suit, complaint, grievance, action, or cause of action against the BOARD. MS. ZAK further represents, promises, and agrees that she will not file, refile, initiate, or cause to be filed, refiled or initiated any claim, charge, suit, complaint, grievance, action, or cause of action based upon, arising out of, or relating to any claim, demand, or cause of action released herein.

6. MS. ZAK covenants that she has made no assignment and will make no assignment of the claims, demands or causes of action released herein and agrees that she will not institute legal proceedings based upon, arising out of, or relating to any claim, demand or cause of action released herein.

7. MS. ZAK acknowledges that: (a) the consideration provided pursuant to this Settlement Agreement is in lieu of any consideration that she would otherwise be entitled to receive and the receipt of the consideration set forth in this agreement by MS. ZAK is full and complete satisfaction of any and all claims MS. ZAK had, has, or may have against the BOARD; (b) she has been and is hereby advised in writing to consult with an attorney prior to signing this Settlement Agreement; and (c) she has been provided a full and reasonable opportunity to study and consider this Settlement Agreement with legal counsel of her choice before signing it.

8. MS. ZAK and the BOARD expressly understand and agree that the payments to and benefits received by MS. ZAK pursuant to this Agreement shall be in lieu of any and all other amounts to which MS. ZAK might be entitled from the BOARD as of the date of her execution of this Agreement and, without limiting the generality of the foregoing, MS. ZAK hereby expressly waives any right or claim that she may have or assert to attorneys fees.

9. MS. ZAK understands that the foregoing payments and consideration are received in settlement and for compromise of disputed claims and that neither this Settlement Agreement

nor the aforesaid promises are to be construed as an admission on the part of any of the BOARD of any wrongdoing or liability, nor to be admissible as evidence in any proceeding other than for enforcement of the provisions of this Settlement Agreement. The BOARD does not admit, and specifically denies, any liability, wrongdoing or violation of any law, statute, regulation, agreement or policy. The BOARD is entering into this Agreement solely for the purpose of (a) amicably resolving any and all matters in controversy, disputes, causes of action, claims, contentions and differences of any kind whatsoever between MS. ZAK and the BOARD and (b) avoiding the attorneys' fees and other expenses that will result from litigation.

10. MS. ZAK understands that this Settlement Agreement represents the entire agreement and understanding between the parties and supersedes any prior agreement, understanding or negotiations respecting such subject. No change to or modification of this Settlement Agreement shall be valid or binding unless it is in writing and signed by MS. ZAK and a duly authorized officer of the BOARD.

11. This Settlement Agreement shall be governed and construed under the laws of the State of New Jersey.

12. No waiver of any breach of any term or provision of this Settlement Agreement shall be construed to be, nor shall be, a waiver of any other breach of this Settlement Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

13. This Settlement Agreement shall inure to the benefit of and be binding upon the heirs, representatives, successors and assignees of each of the parties to it. Each of the RELEASEES who is not a signatory to this Settlement Agreement is hereby agreed to be a third party beneficiary of this Settlement Agreement and shall be entitled to all rights, benefits and

protections of this Settlement Agreement and shall further be entitled to enforce this Settlement Agreement and each of its terms.

IN WITNESS WHEREOF, this Settlement Agreement is executed by the parties hereto as of the date indicated by the signature.

Dated: Dec 31, 1999

Deborah Zak
DEBORAH ZAK

Dated: Dec. 27, 1999

Gidian R. Mellk
GIDIAN R. MELLK, ESQ.
ATTORNEY FOR DEBORAH ZAK

Dated: Jan 11, 2000 ~~1999~~

Ed. D.
FOR PRINCETON REGIONAL SCHOOLS

Dated: _____

_____

OAL DKT. NO. EDU 6435-99
AGENCY DKT. NO. 138-5/99

DEBORAH ZAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and General Release of All Claims, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

Date of Decision: NOV 20 2000

Date of Mailing: NOV 20 2000

* In accepting the within settlement, the Commissioner notes that no finding is hereby made with regard to the threshold issue of jurisdiction.

385-00

385-00SEC

IN THE MATTER OF ANTONIO CIRILLO, :

MOONACHIE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

BERGEN COUNTY. : DECISION

SYNOPSIS

This matter arose from a complaint alleging that respondent Board President violated the School Ethics Act (Act) when he failed to disclose that his wife worked part time for a company that had a contract with the Board and additionally failed to disclose that she also worked for an insurance company.

The Commission found probable cause that respondent violated *N.J.S.A.* 18A:12-25 and 26 when he omitted facts on his 1999 personal/relative and financial disclosure statements thereby filing a false statement. Finding that misrepresenting or omitting material information from one's disclosure statement was a serious offense, and considering that the amount of the contract in question was very small, the Commission found that a penalty of censure was sufficient to ensure that respondent understood that his omissions were improper and to ensure that they would not occur again. Moreover, the Commission directed respondent to amend his 1999 return in accordance with the Commission's findings, and transmitted the recommendation of censure to the Commissioner for action.

Initially, the Commissioner emphasized that the determination of the Commission as to violation of the Act is *not reviewable by the Commissioner*. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of violation by the Commission. Upon independent review of the record, the Commissioner found that, in recommending the penalty of censure, the Commission was in the optimum position to determine whether respondent inadvertently or knowingly violated the Act, and to weigh the effects of any mitigating circumstances. Thus, the Commissioner did not disturb the recommended penalty of the Commission. The Commissioner ordered respondent censored as a school official found to have violated *N.J.S.A.* 18A:12-25(a)(3) and *N.J.S.A.* 18A:12-26(a)(1).

November 20, 2000

IN THE MATTER	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
OF	:	
	:	
ANTONIO CIRILLO,	:	**DOCKET NO. C26-99A**
Moonachie Board of Education,	:	
Bergen County	:	**DECISION**
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed against Moonachie Board member, Antonio Cirillo for violating the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Although the complaint was filed against two respondents, Mr. Cirillo and another Board member, James Campbell, the Commission rendered separate decisions since the cases did not present the same facts or issues.[1] At its meeting of July 25, 2000, the Commission found probable cause that Mr. Cirillo submitted false information on his personal/relative and financial disclosure statements in violation of N.J.S.A. 18A:12-25 and 26. The Commission found that the material facts were not in dispute and invited Mr. Cirillo to file a written statement on whether his conduct violated the Act. The Commission now finds Mr. Cirillo in violation of the Act and recommends a penalty of censure.

The Commission initially scheduled this matter for discussion at its March 28, 2000 meeting. After two adjournments for cause, the Commission notified the parties that it would discuss this matter at its May 23, 2000 meeting. The complainant and the respondents were invited to attend. The respondents appeared at the meeting with counsel, Thomas Murphy, Esquire. The complainant appeared pro se. The Commission requested additional information that was reviewed at the Commission's June and July meetings.

At its meeting on July 25, 2000, the School Ethics Commission found no probable cause and dismissed the allegations in the complaint against Mr. Cirillo. However, during the course of the investigation, the Commission found discrepancies in Mr. Cirillo's filing of disclosure statements. Specifically, in response to question number "three" of the personal/relative disclosure statement, Mr. Cirillo did not set forth that his wife received compensation from a business that was a party to a contract with the Board, i.e., Cirillo Electric, Inc. Also, on question number "one" on the financial disclosure statement, he did not set forth that his wife received income in excess of $2,000.00 from Cirillo Electric. The Commission therefore found probable cause to find that Antonio Cirillo violated N.J.S.A. 18A:12-25(a)(3) and N.J.S.A. 18A:12-

[1] The decision pertaining to Mr. Campbell is contained in School Ethics Commission Decision Docket No. C26-99B dated September 27, 2000.

26(a)(1) of the School Ethics Act when he omitted material facts on his 1999 personal/relative and financial disclosure statements.

The Commission found that the material facts were not in dispute as to the aforementioned conduct and therefore, provided Mr. Cirillo with an opportunity to file a written statement as to whether that conduct constituted a violation of the Act. Respondent submitted a timely statement. At its September 27, 2000 meeting, the Commission found Mr. Cirillo in violation of N.J.S.A. 18A:12-25 and 26 of the Act and recommended the penalty of censure.

FACTS

The Commission finds the following facts to be undisputed.

At all times relative to this matter, Antonio Cirillo was President of the Moonachie Board of Education.

Antonio Cirillo signed his 1999 personal/relative disclosure statement on April 26, 2000. Question number "three" on the form asks, in pertinent part:

> Do you or does any relative receive compensation from or have any interest in any business which is a party to a contract with the school district in which you hold office or are employed? ... If so, list the name of the each business and if applicable, school district.

The form then leaves spaces for the school official to list the name of the person(s) who receives such compensation, his or her relationship to him or her, the name of the business and the school district. Mr. Cirillo left these spaces blank. In contrast, when Mr. Cirillo filed his 1998 personal/relative disclosure statement, he responded "N/A" for "not applicable" in the space provided.

Mr. Cirillo's 1999 financial disclosure statement was also signed on April 26, 2000. Question number "one" of that form asks the school official to list the name and address of each source of income in excess of $2,000, earned or unearned, received by him or her or a member of his or her immediate family. Mr. Cirillo listed only his own source of income ("SSI") and did not list any source of income for his wife. Documents obtained during the course of the Commission's investigation showed that Mr. Cirillo's wife made over $2,000.00 from Cirillo Electric in 1999. She also made over $2,000.00 from her employment with an insurance company. On the 1998 form, Mr. Cirillo also listed only his own income.

On March 26, 1998, Cirillo Electric bid on a contract with the Moonachie School District to perform electrical work to the media center in the Robert L. Craig School. Since the Commission requested, but did not receive, board minutes showing the Board's approval of a contract with Cirillo Electric, the Commission must infer that such minutes do not exist. Instead,

the Commission received minutes of the September 8, 1998 meeting showing that the Board approved a payment to Cirillo Electric in the amount of $7,200.00, the amount of the company's bid. Mr. Cirillo abstained from that vote.

Cirillo Electric also performed work for the Board in 1999 installing an outlet for a television monitor in an office for $120.00.

ANALYSIS

As set forth above, the Commission found probable cause that Mr. Cirillo violated N.J.S.A. 18A:12-25(a)(3) and N.J.S.A. 18A:12-26(a)(1) of the School Ethics Act when he omitted facts on his 1999 personal/relative and financial disclosure statements. The Commission specifically found that, on question number "three" of the personal/relative disclosure statement, Mr. Cirillo did not set forth that his wife received compensation from a business that was a party to a contract with the District. Also, in response to question number "one" on the financial disclosure statement, he did not set forth that his wife received income in excess of $2,000.00 from Cirillo Electric.

N.J.S.A. 18A:12-25(a)(3) provides, in pertinent part:

> On a form to be prescribed by the commission and filed annually with the Commission, each school official shall state:
>
> ...
> (3) whether the school official or a relative is employed by, receives compensation from, or has an interest in any business which is a party to a contract with the school district with which the school official holds office or employment...

N.J.S.A. 18A:12-25(c) provides, in pertinent part:

> A school official who fails to file a statement or who files a statement containing information which the school official knows to be false shall be subject to reprimand, censure, suspension, or removal pursuant to the procedures established in [N.J.S.A. 18A:12-29.]

In response to the Commission's finding of probable cause, Mr. Cirillo argues that the charges on which the Commission found probable cause should be dismissed for several reasons. First, he argues that the charges are procedurally defective. He states that the Commission found no probable cause and dismissed the allegations in the complaint. Therefore, he argues, under N.J.S.A. 18A:12-29, there would have to be a new complaint signed under oath setting forth the aforementioned conduct. He argues that, since the entire Commission has decided to bring the charges regarding the disclosure statements, they must all recuse themselves from further consideration of the violations.

The Commission finds this argument to be unpersuasive. The Commission has the right to determine probable cause based upon a potential violation that comes to light in the course of its investigation of a complaint. When members of the public file complaints without counsel, the complaints are not always drafted precisely. The Commission considers the aforementioned conduct to be an extension of the complaint. This type of extension is especially permissible, where, as here, the information upon which the probable cause finding is based is contained in disclosure statements, which, by law, must be filed with the Commission. Mr. Cirillo's statements came to light during the course of the investigation of the complaint. They are not completely new allegations, but allegations that arose from the charges in the initial complaint. Given the Commission's statutory duty to oversee the filing of statements and the fact that the statements speak for themselves, there is no need to have one Commission member file a complaint who would then have to recuse him or herself from hearing the case.

Mr. Cirillo next argues that his failure to note that his wife received compensation from a business that is a party to a contract with the Board was not intentional. He notes that his wife was only a part-time employee with Cirillo Electric and the only contract that Cirillo Electric had with the Board in 1999 was for the installation of an outlet for a TV monitor for $120.00. The written submission provides, "Given the status of Respondent's wife as a part-time secretarial worker and, more importantly, the insignificance of the invoice terms of both dollars and services performed by Cirillo Electric, Inc. in 1999, there can be, it is respectfully submitted, no possible finding of probable cause as to a knowing violation of the Act in this regard." The Commission disagrees.

N.J.S.A. 18A:12-25(c) prohibits a school official from filing a statement containing information that he knows to be false. Mr. Cirillo does not deny knowing that his wife worked for Cirillo Electric, but denies knowing that Cirillo Electric had a contract with the Board in 1999 until the Commission requested further information in connection with the complaint. The Commission rejects this argument. This is not the first contract that Cirillo Electric performed for the Board. Cirillo Electric had a contract for $7,200.00 with the Board in 1998. At that time, it appears that Mr. Cirillo's wife was not working for Cirillo Electric. For that time period, Mr. Cirillo answered the question regarding whether his spouse received compensation from any business that was a party to a contract with the Board, he wrote, "N/A" for "not applicable." If Mr. Cirillo believed that Cirillo Electric did not have a contract with the Board in 1999, the Commission believes that he would have again answered, "N/A." Instead, he left it blank. The Commission also notes that he signed the 1999 disclosure statement in April 2000, after the complaint had been filed on December 20, 1999 alleging that the Board had a contract with a company owned by Mr. Cirillo's brother. In Mr. Cirillo's answer, he responded that he did not work for Cirillo Electric. He never said that Cirillo Electric did not have a contract with the Board. For these reasons, the Commission believes that Mr. Cirillo filed a statement that he knew to be false in violation of N.J.S.A. 18A:12-25(a)(3) and N.J.S.A. 18A:12-25(c).

Further, N.J.S.A. 18A:12-22(a) provides:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

Given the Legislature's purpose for enacting the School Ethics Act set forth above, the Commission does not believe that N.J.S.A. 18A:12-25(c) should be read strictly. It should not preclude finding a violation in situations where the school official should know, and there is ample evidence that he did know, that the information provided was false. As the Commission stated in its probable cause finding, omitting material information required under N.J.S.A. 18A:12-25 defeats the purpose of the disclosure forms, which is to allow the public access to information to ensure that school officials do not violate the public trust. N.J.S.A. 18A:12-22. Mr. Cirillo had a duty to disclose that his wife received compensation from a business that was a party to a contract with the Board. Therefore, the Commission finds that Mr. Cirillo violated N.J.S.A. 18A:12-25 by omitting material information from his personal/relative disclosure statement.

With respect to the probable cause finding under N.J.S.A. 18A:12-26, which requires the disclosure of all sources of income of the school official and members of his immediate family, Mr. Cirillo argues that the omission was inadvertent and caused by the part-time nature of the employment and the small amount of business Cirillo Electric did with the Board in 1999.. A spouse is an immediate family member pursuant to N.J.S.A. 18A:12-23. Mr. Cirillo was required by the Act to list all such sources of income for himself and members of his immediate family over $2,000.00. He does not deny that he should have listed his wife's source of income, but denies that he had any intent to falsify the statement.

N.J.S.A. 18A:12-26 requires the disclosure of any source of income for a school official and his immediate family members in an amount greater than $2,000.00. The question of whether employment is full-time or part-time does not affect a school official's duty to disclose the source. The amount of the corporation's contract with the Board is also not relevant to the question posed by N.J.S.A. 18A:12-26. The source of income refers to any source, not merely to sources that have a contract with the Board. Mr. Cirillo's statement showing only his own source of income represented to the Commission and the public that his wife had no source of income. This is a material misrepresentation. Given that the statement was signed while the complaint was pending alleging unethical conduct due to Cirillo Electric's contract with the Board, the Commission does not believe that the omission was inadvertent. Therefore, the Commission finds that Mr. Cirillo violated N.J.S.A. 18A:12-26 by misstating information on his financial disclosure statement.

CONCLUSION

For the foregoing reasons, the School Ethics Commission finds that Antonio Cirillo violated N.J.S.A. 18A:12-25(a)(3) and 26(a)(1) of the Act when he omitted material information on his 1999 disclosure statements and thereby filed a false statement.

In determining the penalty to recommend, the Commission considered several factors. The Commission finds that misrepresenting or omitting material information from one's disclosure statement is a serious offense. However, the Commission also considered that, with respect to the violation of N.J.S.A. 18A:12-25, the amount of the contract with Cirillo Electric was very small as compared to the year before. While the amount of the contract does not excuse Mr. Cirillo's failure to disclose that his spouse worked for the company, the Commission believes that it mitigates the penalty. Therefore, the Commission finds that a penalty of censure is sufficient to ensure that Mr. Cirillo understands that his omissions were improper and to ensure that they will not occur again. Furthermore, Mr. Cirillo has represented that he will amend his 1999 return in accordance with the Commission's findings. If he has not yet had the opportunity to do so, the Commission is hereby directing him to do so.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C26-99

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, the Commission has found that Antonio Cirillo violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act; and

Whereas the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission authorized the dissemination of this decision at its public meeting on September 27, 2000.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 366-10/00

IN THE MATTER OF ANTONIO CIRILLO,	:	
MOONACHIE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (Commission), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Antonio Cirillo, President of the Moonachie Board of Education, based upon findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-25(a)(3) and *N.J.S.A.* 18A:12-26(a)(1) of the School Ethics Act when he failed to disclose that his wife worked as a part-time secretary for a company that had a contract with the Board for the installation of an outlet for a TV monitor for $120[1] and additionally failed to disclose that his wife also worked for an insurance company.[2] Therefore, respondent was found to have filed a false statement by the omission of material information on his 1999 disclosure statement.

Upon issuance of the decision of the Commission, respondent was accorded thirteen days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent's comments were filed in accordance with such timeline.

[1] Cirillo Electric, which is owned by respondent's brother, received $7,200 from the Board for work performed in 1998; however, respondent's wife was apparently not working for Cirillo Electric at that time.

[2] The Commission's investigation revealed that respondent's wife received over $2,000 in compensation from Cirillo Electric and over $2,000 in compensation from an insurance firm in 1999. Respondent did not list any source of income for his wife on his 1999 disclosure statement.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c), the determination of the Commission as to violation of the School Ethics Act is *not reviewable by the Commissioner.* Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of violation by the Commission. Therefore, this decision is restricted solely to a review of the recommended penalty.

In his comments, respondent urges the Commissioner to impose the lesser sanction of reprimand, arguing that failure to disclose his wife's sources of income was "an isolated incident in an otherwise selfless period of uncompensated service" to the Board from 1997 to the present. (Respondent's Comments at 2) Respondent also points out that he cooperated fully with the Commission's investigation by providing extensive responsive pleadings, affidavits, exhibits, and all other materials requested by the Commission. *(Ibid.)*

Upon a thorough review of the record, the Commission's decision in this matter, respondent's comments on penalty and the penalties assessed for similar violations of the School Ethics Act, the Commissioner determines to adopt the Commission's recommendation to impose the penalty of censure on respondent.

The Commissioner agrees that respondent's misrepresentation or omission of material information from his disclosure statement is a serious offense. The Commissioner also acknowledges that the penalty must be sufficient to impress upon respondent the gravity of his offense to ensure that it will not reoccur. A review of the penalties assessed against other board members for similar instances of violations of the School Ethics Act, including violations which touch on the employment of family members, reveals that the penalties assessed have generally been less severe than censure. In contrast to those matters, however, where the Commission

found board members' violations were inadvertent or otherwise explained, the Commission in this instance found that Mr. Cirillo *knowingly* filed a false statement. *See, for example, In the Matter of Michael J. DeBartolo,* settlement approved by the Commissioner February 7, 1995, the board member received a reprimand for *inadvertently* failing to list certain rental property as an additional source of income on his 1993 financial disclosure statement; *In the Matter of Wayne Wurtz*, 96 *N.J.A.R.*2d (EDU) 843 (1996), an *inexperienced* board member was reprimanded for *inadvertently* voting to approve a list of teacher aides which included his spouse; *In the Matter of Frank Montagna, 96 N.J.A.R.*2d (EDU) 1039 (1996), the board member was reprimanded for *inadvertently* voting on a list of game personnel which included his spouse; *In the Matter of Matilda Touw,* 97 *N.J.A.R.*2d (EDU) 343 (1997), a board member, who believed that it was permissible to do so because her son was a grown man, was reprimanded for voting on her son's reappointment as Assistant Head Custodian; and *In the Matter of Katherine Mallette*, decided by the Commissioner February 9, 1999, the board member was reprimanded for participating in discussions concerning the Board's purchase of property when one of the parcels was owned by her brother-in-law, receiving the lesser penalty because she was found to have exerted no influence on the Board's purchase.

The Commissioner further notes that, in recommending the penalty of censure, the Commission was in the optimum position to determine whether respondent inadvertently or knowingly violated the School Ethics Act, and to weigh the effects of any mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Antonio Cirillo be censored as a school official found to have violated *N.J.S.A.* 18A:12-25(a)(3) and *N.J.S.A.* 18A:12-26(a)(1) of the School Ethics Act, under the circumstances set forth by the Commission.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: NOV 20 2000

Date of Mailing: NOV 20 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

386-00

IN THE MATTER OF THE TENURE	:	
HEARING OF SHEREE BAKER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

November 20, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1743-97
AGENCY DKT. NO. 551-11/96

IN THE MATTER OF THE TENURE HEARING OF SHEREE BAKER, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Sheree Baker, *pro se*

Philip E. Stern, Esq., appearing for Respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: August 22, 2000 Decided: October 3, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

The Board charged a tenured teacher with conduct unbecoming a public school teacher for her participation in conduct intended to defraud the State Health Benefit Program (SHBP). This case was transmitted to the Office of Administrative Law (OAL) on February 10, 1997, along with other cases dealing with similar charges.

A prehearing order was issued on June 10, 1997. On September 2, 1997, an order was entered suspending salary payment of this Respondent Sheree Baker from September 1997 until the plenary hearing on the merits of the charges in the matter. Subsequently, the matter was placed on the inactive list in the OAL pending the outcome of related criminal matters which were under investigation by the Attorney General's office.

The matter continued on the inactive list until December 1999, when it was removed from the inactive list and scheduled for hearing. Subsequently, counsel for the District requested adjournments of the hearings scheduled in order to permit Ms. Baker the opportunity to resolve the outstanding criminal matters against her. According to documents I have before me, Ms. Baker pled guilty to charges of conspiracy in the second degree and charges of theft by deception in the third degree both premised on her participation in a scheme to defraud the SHBP.

FINDINGS OF FACT

This matter had been scheduled for peremptory hearing on Monday, August 21, 2000. Ms. Baker contacted the undersigned to indicate that she would be unavailable; moreover, she had resigned from the Newark Public School prior to receiving the notice of the hearing date. Ms. Baker asked if a letter of withdrawal of the appeal of the tenure charges would be acceptable. Ms. Baker was advised that her appearance would be necessary and the matter would be rescheduled for Tuesday, August 22, 2000, 9:30 a.m. at OAL, 185 Washington Street, Newark, New Jersey for her convenience, since she was unable to attend the August 21 hearing.

On August 22 Ms. Baker failed to appear, although counsel for the District was present and prepared to proceed.

Based on the fact that Ms. Baker had notice of the rescheduled hearing at 9:30 a.m. on Tuesday, August 22, as well as the fact that the record was not opened in this

matter until 10:15 a.m. and the letter dated August 17 which Ms. Baker faxed to the undersigned indicating that she wished to withdraw the charges, I **FIND** that Ms. Baker was aware of the scheduled hearing. Moreover, Ms. Baker did not object to the rescheduled date.

Although Ms. Baker indicated that she wished to withdraw as a party to the tenure charges, that application must be made by the District which initiated the charges. In this case, however, there is a final resolution of the matter in that Ms. Baker failed to appear. Accordingly, I deemed the charges contained in the petition submitted by the District to be uncontested. Moreover, there is a judgment of conviction before me in which indicates that Ms. Baker pleaded guilty to conspiracy in the second degree and theft by deception in the third degree.

The record, however, reflects that Respondent has resigned her tenured position with the District. (See Respondent's letter of August 17, 2000 to the undersigned). Accordingly, there is no basis in which this matter can move forward. Based on the resignation, as well as Respondent's intention to withdraw, I **CONCLUDE** that the matter is no longer a contested case before the Commission. *In the Matter of the Tenure Charges of Paula Yancy-Dykes*, *OAL Dkt. No. EDU* 1745-97, *Agency Dkt. No.* 586-12/96.

ORDER

It is, therefore, hereby **ORDERED** that this matter be and hereby is **DISMISSED** as moot.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2000
DATE

Marcia M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10-6-00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 10 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibit:

C-1 Letter of August 17, 2000

OAL DKT. NO. EDU 1743-97
AGENCY DKT. NO. 551-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF SHEREE BAKER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ). Therefore, the recommended decision of the ALJ is adopted as the final decision in this matter for the reasons expressed in the Initial Decision.

Accordingly, the matter is dismissed. It shall, however, be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: NOV 20 2000

Date of Mailing: NOV 20 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 et seq., within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

389-00

IN THE MATTER OF PATRICIA HAINES,	:	
HADDONFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

SYNOPSIS

The Commission recommended reprimand of respondent Board member for participating in a vote on a Board resolution authorizing the issuance and sale of new bonds with Commerce Bank designated as the paying agent when she was a vice president of Commerce National Insurance Services, a wholly owned subsidiary of Commerce Bank/North. The Commission found that this vote presented an indirect financial involvement that created the appearance that respondent could not be objective.

The Commissioner determined to accept the Commission's recommendation that reprimand was the appropriate penalty in this matter, in view of the Commission's determination that a violation of the School Ethics Act occurred.

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C07-00**
PATRICIA HAINES,	:	
HADDONFIELD BD. OF EDUCATION	:	**DECISION**
CAMDEN COUNTY	:	

00 OCT 10 PM 2:19

PROCEDURAL HISTORY

This matter arises from a Complaint alleging that Haddonfield Board of Education (Board) Member Patricia Haines violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. when she voted on a Board resolution authorizing the issuance and sale of new bonds with Commerce Bank designated as the paying agent and when, as Board President, she named herself as a member of the Board's Finance Committee. Ms. Haines is a Vice-President of Commerce National Insurance Services, a wholly owned subsidiary of Commerce Bank/North. At its meeting of July 25, 2000, the School Ethics Commission found probable cause to credit the allegations that Ms. Haines violated N.J.S.A. 18A:12-24(c) when she participated in the vote on a Board resolution authorizing the issuance and sale of new bonds with Commerce Bank designated as the paying agent. The Commission did not find probable cause that the above conduct violated N.J.S.A. 18A:12-24(f) or that Ms. Haines' act of naming herself as a member of the Board's Finance Committee when she served as Board President violated the Act. It therefore dismissed those allegations.

The Commission found that the material facts were not in dispute. Therefore, the Commission decided to review this matter on the basis of written submissions pursuant to N.J.A.C. 6A:28-1.12. If the Respondent disagreed with the Commission's recitation of the facts and the determination that the material facts were not in dispute, she was provided the opportunity to set forth the facts with which she disagreed. Respondent submitted a timely written statement agreeing with the stated facts, but arguing that the Commission did not give sufficient weight to them. Respondent also submitted the 1999 Annual Report of Commerce Bancorp to assist the Commission in understanding the relationship between Commerce National Insurance Services and Commerce Bank, N.A.

At its September 27, 2000 meeting, the Commission found that Ms. Haines violated N.J.S.A. 18A:12-24(c) of the Act and recommended a penalty of reprimand.

FACTS

The Commission found the following facts to be undisputed. Patricia Haines is a member of the Haddonfield Board of Education. She is employed as a Vice President of Commerce National Insurance Services, a wholly owned subsidiary of Commerce Bank/North. Prior to December of 1997, Ms. Haines worked for an independent benefit consulting firm that specialized in the design, administration, funding and communication of employee benefits. In December 1997, the firm was acquired by Commerce Bancorp and merged into the existing Commerce National Insurance Services, Inc. division. Ms. Haines' functional title is Director of Consulting Services. She is a salaried employee who has no responsibility to procure new business.

Respondent requested that the Commission add to the facts set forth in the probable cause determination that Commerce Bank/North and Commerce Bank, N.A. are both direct subsidiaries of Commerce Bancorp, the parent company. The two banking entities have different boards of directors and executive officers. In addition, Commerce National Insurance Services has its own executive officers that are separate from those of Commerce Bank, N.A.

At the January 27, 2000 Board meeting, Patricia Haines voted in favor of a resolution authorizing the issuance and sale of new bonds with Commerce Bank, N.A. designated as the paying agent. The minutes of the January 27, 2000 public meeting show that Board member Mr. Katz moved Business and Finance resolutions "A" through "I" and Ms. Hennessy seconded the motion. The minutes also reflect that Board member Ms. Schultz raised questions regarding several of the resolution items. One of those items was Resolution "I," which was the resolution authorizing the issuance and sale of new bonds. The minutes state:

> Ms. Schultz also asked if the reason Commerce Bank was designated as the Paying Agent in the Resolution Authorizing the Issuance and Sale of the new bonds was because Commerce Bank currently holds the 1996 Temporary Notes?

Business Administrator/Board Secretary Bryan McGair answered, "that is correct that Commerce holds the Temporary Notes, but according to Bond Counsel, Philip Norcross, they were put out for competitive quotes and Commerce's rate was low." The minutes indicate, and Ms. Haines' answer to the Complaint confirms, that a roll call vote followed the discussion of Business and Finance items. The motion to approve all the resolutions passed by a unanimous vote.

At the next Board meeting on February 10, 2000, Mr. McGair recommended that the Board amend the approved bond resolution to change the paying agent from Commerce Bank to Summit Bank. Ms. Haines voted in favor of the amendment. The reason given for the change was that Mr. Norcross had not received competitive quotes from other financial institutions. When competitive quotes were received, Summit Bank was more competitive than Commerce Bank.

At the May 4, 2000 organization meeting of the Board, Ms. Haines was elected President. When the Board was asked to approve the depositories for school funds, Ms. Haines abstained on the vote since Commerce Bank is the Board's main depository holding all payroll and benefits monies. Ms. Haines also recused herself from voting on the appointment of Philip Norcross as bond counsel. Philip Norcross is brother to George Norcross, III, who is President and Chief Executive Officer of Commerce National Insurance Services, Ms. Haines' employer.

ANALYSIS

The Commission found probable cause that the above conduct violated N.J.S.A. 18A:12-24(c). N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Ms. Haines makes several arguments in opposition to the Commission's finding of probable cause. She first argues that the relationship between Commerce National Insurance Services and Commerce Bank, N.A. is so miniscule that her vote to have Commerce Bank serve as paying agent does not constitute a violation of N.J.S.A. 18A:12-24(c).

The Commission understands that Commerce National Insurance Services is only a subsidiary of a sister corporation to Commerce Bank, N.A. and therefore there is no parent/subsidiary relationship between Commerce National Insurance Services and Commerce Bank, N.A., which received the contract. Rather, there is more of a diagonal line linking the two. Nonetheless, the Commission believes that such a relationship is the type of indirect financial involvement that the Legislature contemplated in N.J.S.A. 18A:12-24(c). The Act does not require a direct involvement. The Act requires only a showing of an indirect involvement that might reasonably be expected to impair a school

official's objectivity or independence of judgment. In addition, the Legislature's purpose, set forth in N.J.S.A. 18A:12-22(a), makes it clear that the Legislature wanted the Commission to consider whether the conduct that took place violated the public trust or created an impression that the public trust was being violated. What "might reasonably be expected" is determined by what the reasonable member of the public would believe would impair a school official's independence of judgment. Where, as here, a board member's employer shares a parent company with the corporation that seeks to contract with the board, there exists a relationship that indirectly affects the board member. The Commission thus concludes that it creates an indirect financial involvement that might reasonably be expected to impair the board member's objectivity. Therefore, by voting for the resolution in question, Ms. Haines acted in her official capacity in a matter in which she had an indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment in violation of N.J.S.A. 18A:12-24(c).

Ms. Haines next argues that Commerce Bank, N.A., had been selected as the Board's primary depository prior to Mrs. Haines becoming a member of the Board. She also states that, prior to her membership on the Board, Commerce Bank, N.A., was the holder of the Board's temporary notes, which were to be permanently financed by the issuance of its general obligation school bonds pursuant to the January resolution. Thus, she states, the involvement of Commerce Bank, N.A., had nothing to do with her. She also argues that no member of the Board or in the public commented that her vote on the resolution in question was somehow improper.

The Commission did not find probable cause that Respondent used her official position to secure an unwarranted privilege or advantage for the bank as set forth in N.J.S.A. 18A:12-24(b). Rather, the Commission concluded that the vote in question was one from which she should have abstained because she had an indirect financial involvement. The Commission therefore finds that Respondent's point may mitigate the penalty, but is not persuasive on the question of whether she had an indirect financial involvement with Commerce Bank, N.A. that might reasonably be expected to impair her objectivity. The Commission similarly concludes that the fact that no one, including the Complainant, who was in the audience during the meeting, warned Respondent or stated after the fact, that her vote was improper, is a point to be considered in determining sanction, rather than whether a violation occurred.

CONCLUSION

For all the foregoing reasons, the Commission concludes that Respondent Patricia Haines violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted in favor of Commerce Bank being the paying agent for the bond issue on January 27, 2000.

Regarding the penalty, the Commission considered that the vote did not result in monetary gain to Mrs. Haines, but rather presented an indirect financial involvement that created the appearance that Ms. Haines could not be objective. The Commission also considered the arguments in her written statement: 1) that the nature of her work did not touch upon Commerce Bank, N.A. and the relationship of Commerce Bank to Commerce National Insurance Services was tenuous; 2) that Commerce Bank, N.A. had been the primary depository for Board funds prior to Ms. Haines becoming a board member; and 3) that no one, including the Complainant, ever said that her vote was in violation of the Act prior to the Complaint being filed. Based on the foregoing, the Commission concludes that a reprimand is the appropriate penalty to recommend to the Commissioner of Education.

This decision of the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C Garbarini/HB

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C07-00

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondent to file a written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and gave it due consideration in determining whether she violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Now Therefore Be It Resolved that the Commission concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of reprimand;

Be it Further Resolved that the Commission authorizes staff to disseminate the decision in this matter.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution was authorized by the School Ethics Commission at its public meeting on September 27, 2000. Commissioner Rosalind Frisch voted against this decision.

Lisa James-Beavers, Executive Director

IN THE MATTER OF PATRICIA HAINES,	:	
HADDONFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments were filed by respondent which reference her arguments and positions set forth in the letter brief she submitted on September 12, 2000 to the Commission and which comment on why she believes the Commission inappropriately found a violation of the law occurred or, in the alternative, why the reprimand recommended by the Commission should be rejected as unwarranted. Complainant submitted a reply to respondent's comments.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the recommended penalty and its implementation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that a reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision, wherein it was found that respondent violated *N.J.S.A.* 18A:12-24(c) on January 27, 2000 when she participated in a vote on a Board resolution authorizing the issuance and sale of new bonds with Commerce Bank designated as the paying agent because this vote presented an indirect financial involvement that created the appearance that respondent could not be objective. In so ruling, the Commissioner notes that the Commission considered and addressed the aggravating and mitigating factors raised by the parties in reaching its penalty determination and, having done so, imposed upon respondent the lowest penalty prescribed by statute. Additionally, the Commission was in the optimum position to make such determinations because it had the opportunity to fully investigate the facts presented. Therefore, its recommended penalty in this matter will not be disturbed absent a compelling basis to do so.

Accordingly, IT IS hereby ORDERED that Patricia Haines be reprimanded as a school official found to have violated the School Ethics Act .*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: NOV 27 2000

Date of Mailing: NOV 27 2000

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

390-00

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	:	DECISION
RESPONDENTS.	:	

November 27, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10766-96

AGENCY DKT. NO. 389-9/96

ARLENE MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH CO. OR CORP.,

Respondents.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella and Nowak, attorneys)

Denis C. Germano, Esq., for respondents (Hulse and Germano, attorneys)

Record Closed: October 6, 2000 Decided: October 11, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of a Petition of Appeal with the Commissioner of Education on September 6, 1996, by Arlene Miller ("petitioner") requesting reinstatement of her position as a school psychologist with the Board of Education of New Hanover Township, Burlington County, ("respondent board"), and compelling respondent board to terminate arrangements with child study team services from private contractors or vendors. The matter was

transmitted to the Office of Administrative Law on December 6, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy in this administrative forum and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 11, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

10-13-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 16 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, NJ 08608
(609) 392-8172
Attorneys for Petitioner

ARLENE MILLER, Petitioner, v BOARD OF EDUCATION OF NEW HANOVER TOWNSHIP IN BURLINGTON COUNTY, LISA Mulligan, and THERAPEUTIC OUTREACH COMPANY OR CORPORATION, Respondent.	: BEFORE THE OFFICE OF ADMINISTRATIVE LAW : : OAL DOCKET NO.: EDUOT 10766-96S : : : : : : : **SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT** : :	

The parties to the within matter hereby agree to settle and resolve the claims asserted by petitioner in the Petition of Appeal with the above docket number based upon the following terms:

1. The parties recognize that petitioner filed a Petition of Appeal with the Commissioner of Education which asserts that the termination of her employment at the end of the 1995-96 school year, and the retention, employment, or use of other persons or employees or of respondent Lisa Mulligan and/or of Therapeutic Outreach

Corporation to provide child study team services violated her tenure, seniority, and other legal rights.

2. The parties recognize that this agreement resolves petitioner's claim for a remedy for the alleged violation of her rights for the 1996-97school year, and that the acceptance and implementation of all of the terms of this agreement shall result in the resolution of petitioner's claims that respondent violated petitioner's tenure, seniority, or other legal rights for the 1996-97 school year.

3. The parties recognize that the implementation and validity of this agreement is contingent upon the approval of this agreement in its entirety by the Commissioner of Education, and upon the effectuation of all of its terms, and that if the Commissioner of Education rejects this agreement or any term thereof, the matter shall be returned to the Office of Administrative Law as a contested case for further proceedings.

4. The parties recognize that petitioner has alleged that respondent acted unlawfully and violated her legal rights when it contracted with a private vendor for the provision of child study team services for the 1996-97 school year. The parties further recognize that respondent asserts that it relied upon a waiver granted by the Commissioner of Education, that petitioner appealed the validity of said waiver to the State Board of Education, and that by decision dated May 3, 2000, the State Board held that the Commissioner of Education lacked the authority to grant such a waiver, that such waiver was invalid, and that the services previously provided by petitioner

could not be provided by subcontract with a private party or vendor.

5. As a result, the parties recognize that but for respondent board's contracting to provide such salary with Lisa Mulligan and/or Therapeutic Outreach Company or Corporation, petitioner would have been retained in her employment as a school psychologist by respondent for the 1996-97 school year.

6. The parties recognize that for said school year, if petitioner was retained by respondent, petitioner would have earned approximately $10,000.00 in salary from respondent.

7. Petitioner has provided respondent with tax returns covering the 1996-97 school year, together with pay records from her other employer, the Florence Township Board of Education, and the parties have reached agreement as to petitioner's mitigation efforts and the amount due petitioner as backpay for the 1996-97 school year.

8. Consequently, respondent agrees to pay petitioner the amount of $10,000.00 as constituting her backpay entitlement after consideration of mitigation evidence, and that from that $10,000.00 payment, respondent shall take all usual and customary deductions for taxes, Social Security, and pension, and shall remit the employee's share of pension contributions to the Division of Pensions and/or Teachers' Pension and Annuity Fund to cover the 1996-97 school year.

9. The parties agree that the payments required by this agreement shall be made within 30 days of the Commissioner of Education's approval of this agreement.

10. The parties agree that the sum to be paid petitioner for the 1996-97 school year constitutes backpay for the salary that petitioner would have received if employed by respondent for said school year, and that it covers the period of July 1, 1996 through June 30, 1997.

11(A). The parties agree that petitioner shall receive pension credit for the 1996-97 school year as if employed on a one-fifth (1/5) basis by respondent. The parties recognize that petitioner has already received partial pension credit as a result of employment with the Florence Township Board of Education (which employment petitioner also held before the termination of her employment by respondent), and that to provide the additional pension credit required by this agreement, respondent shall deduct from petitioner's backpay and transmit to the Division of Pensions the employee's share of pension contributions from her backpay payment as if petitioner had been employed by respondent on a one-fifth (1/5) basis, and shall remit those contributions to the Teachers' Pension and Annuity Fund.

11(B).Respondent shall inform the Division of Pensions of the basis for the deductions, that said deductions constitute additional deductions based on the salary petitioner would have earned if employed by respondent for the 1996-97 school year on the same basis as in prior school years, shall request that the Division of Pensions contribute the employer's share of pension contributions for said school year, but if required by the Division of Pensions, shall pay the employer's share of additional contributions for petitioner's pension credit for the 1996-97 school year.

12. The parties agree that if the Division of Pensions refuses to grant the pension credit required by this agreement, this settlement shall be null and void, that petitioner shall not be deemed to have waived, abandoned, or surrendered any tenure, seniority, or other legal rights against respondent, and that petitioner's case shall be returned to active status for determination by the Office of Administrative Law without the waiver or loss of either parties' legal rights or defenses.

13. Petitioner agrees that because respondent contracted with the Burlington County Educational Services Unit for child study team services for the school years following the 1996-97 school year, petitioner has asserted no claim to backpay or other benefits against respondent for any years subsequent to the 1996-97 school year, but that petitioner reserves and does not waive her claims against the Burlington County Educational Services Unit which are presently pending before the State Board of Education in the case of Arlene Miller v. Burlington County Educational Services Unit, Agency Docket No.: 9-99.

Arlene Miller
Petitioner

Dated: 1/6/00

ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____
Richard A. Friedman, Esq.

Dated: 9/9/00

Board of Education of
New Hanover Township

By:_____ Dated: 9-26-07
Wayne Wharton
Board President

HULSE AND GERMANO
Attorneys for Respondent

By:_____ Dated:_____
Denis C. Germano, Esq.

OAL DKT. NO. EDU 10766-96
AGENCY DKT. NO. 389-9/96

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	:	DECISION
RESPONDENTS.	:	

The record, Settlement Agreement and Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner is compelled to remand the settlement agreement to the OAL because the agreement is expressly contingent upon the Division of Pensions and Benefits' recognition of additional pension credit to be attributed to petitioner for the 1996-97 school year. The agreement provides that:

> The parties agree that if the Division of Pensions refuses to grant the pension credit required by this agreement, this settlement shall be null and void, that petitioner shall not be deemed to have waived, abandoned, or surrendered any tenure, seniority, or other legal rights against respondent, and that petitioner's case shall be returned to active status for determination by the Office of Administrative Law without the waiver or loss of either parties' legal rights or defenses. (Settlement Agreement and Stipulation of Settlement at paragraph 12, page 5)

The Commissioner recognizes that any settlement agreement effectuated by the parties to a dispute shall, upon his approval, be deemed a final decision. *N.J.A.C.* 1:1-19.1(d). Therefore, although he does not find objectionable the terms of the agreement which are within his jurisdiction, the Commissioner cannot sanction a settlement which is clearly contingent upon the satisfaction of conditions *by another agency*, namely the Department of Treasury, Division of Pensions and Benefits, and which further provides that if such conditions are not met, the agreement shall be deemed null and void, thereby reactivating the within matter.

Accordingly, the settlement in this matter is rejected. The Commissioner directs that this matter be remanded to the OAL and held in abeyance, pending review by the Division of Pensions and Benefits of the parties' proposal to credit petitioner with additional pension contributions. If the parties obtain the necessary endorsement from the Division of Pensions and Benefits, the within agreement may be modified to so reflect that approval, and may be resubmitted to the Commissioner for review. If, however, the parties cannot obtain from the Division of Pension and Benefits the cooperation they seek, and they are unable to agree on revised settlement terms, this matter shall proceed to a determination on petitioner's claims.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: NOV 27 2000

Date of Mailing: NOV 27 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

391-00

J.K.H., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENTS. :

SYNOPSIS

Petitioning parents and guardians appealed respondent local Boards' refusal to pay tuition and transportation costs for their children to attend the visual/performing arts program operated by Red Bank Regional High School District. Respondent Boards denied responsibility for the payments; Red Bank Regional cross-claimed against each local Board seeking payment for tuition and transportation costs, asserting that it was an approved vocational school pursuant to *N.J.S.A.* 18A:54-5 *et seq.*; that petitioners' children are entitled to enroll in Red Bank pursuant to *N.J.A.C.* 6:43-3.11(a); and that it was entitled to receive payment from the respondent Boards pursuant to *N.J.S.A.* 18A:54-7.

The ALJ concluded that any special status that Red Bank Regional enjoyed under *N.J.S.A.* 18A:54-7 because of its Area Vocational Technical School and Local Area Vocational School District designations terminated with the repeal of *N.J.A.C.* 6:46-2 in 1991. Moreover, the ALJ concluded that the intent of *N.J.S.A.* 18A:54-7 is to permit districts voluntarily to enter into sending-receiving type relationships and only where they have done so does it impose upon the sending district a responsibility to pay tuition. The ALJ determined that the provisions of *N.J.S.A.* 18A:38-15 make clear that the ultimate discretion concerning whether a student will attend a program in another district at public expense lies with the local board. The ALJ dismissed the petitions and cross-claims.

The Commissioner adopted findings and determination in the Initial Decision as his own.

D.M., on behalf of minor child, A.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

S.C.S. AND K.L.R., on behalf of minor child, M.R.S,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

E.M.W. AND L.F.W.,on behalf of minor child, M.W.

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

L.F., on behalf of minor child, J.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

M.G. AND A.G., on behalf of minor child, N.M.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

R.L.H. AND J.M.H., on behalf of minor child,

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

D.M. ON BEHALF OF MINOR CHILD, A.M.,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondents,

OAL DKT. NO. EDU 4737-99
AGENCY DKT. NO. 118-5/99

and

S.C.S. & K.L.R. ON BEHALF OF MINOR CHILD, M.R.S.,
Petitioners,
v.
BOARD OF EDUCATION OF TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondents,

OAL DKT. NO. EDU 6019-99
AGENCY DKT. NO. 130-5/99

and

E.M.W. & L.F.W. ON BEHALF OF MINOR CHILD, M.W.,

Petitioners,

v.

BOARD OF EDUCATION OF CITY OF LONG BRANCH, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents,

OAL DKT. NO. EDU 6125-99
AGENCY DKT. NO. 160-6/99

and

L. F. ON BEHALF OF MINOR CHILD, J.F.,

Petitioner,

v.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents,

OAL DKT. NO. 6126-99
AGENCY DKT. NO. 182-7/99

and

M.G. & A.G. ON BEHALF OF MINOR CHILD, N.M.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL

OAL DKT. NO. EDU 8009-99
AGENCY DKT. NO. 219-8/99

DISTRICT AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents,

and

R.L.H. AND J.M.H. ON BEHALF OF MINOR CHILD, J.K.H.,

Petitioners,

v.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents.

OAL DKT. NO. EDU 10943-99
AGENCY DKT. NO. 353-12/99

For appearances see attached service list

Record Closed: July 17, 2000

Decided: October 16, 2000*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

These matters commenced when each petitioner filed a petition of appeal with the Commissioner of Education seeking an order requiring the local board of education to pay tuition and transportation costs for petitioner to attend the visual/performing arts program operated by Red Bank Regional High School District. Each respondent board filed an answer denying responsibility for tuition and transportation, and the Board of Education of Red Bank Regional High School District filed a cross-claim against each local board seeking payment for tuition and

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* An extension of time for issuing the decision in this matter was requested and granted pursuant to N.J.S.A. 52:14B-10c.

transportation costs. The local boards filed answers to the cross-claims, and between June 29, 1999 and December 21, 1999, the Commissioner transmitted each of the matters to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13. A motion to consolidate the first five cases transmitted was denied by letter order dated September 10, 1999. Thereafter prehearing conferences were conducted in each of the cases. The following were the issues identified for determination at hearing in EDU 4737-99:

1. Is petitioner entitled to enroll in the Red Bank Regional (RBR) Dance Program, pursuant to *N.J.A.C.* 6:43-3.11(a)?

2. If the answer to the previous question is yes, is RBR entitled to receive payment from Long Branch (LB) Board of Education for petitioner's tuition, pursuant to *N.J.S.A.* 18A:54-7 or otherwise?

3. Is petitioner entitled to have transportation costs associated with the attendance at RBR paid for by LB?

4. Is the RBR an approved performing arts vocational program or an approved vocational school, pursuant to *N.J.S.A.* 18A:54-5 through 54-7?

5. Does the fact that Long Branch is an *Abbott v. Burke* district have any impact on the resolution of the foregoing issues?

The issues identified in the other five cases were identical to the foregoing issues with the following exceptions. The issue articulated as issue number five (5) above was unique to EDU 4737-99 and EDU 6125-99; the particular program identified in issue number one (1) for EDU 6019-99 was commercial art, for EDU 6125-99 was drama, for 6126-99 was drama, for 8009-99 was vocal music, and for EDU 10943-99 was vocal music. In addition, the prehearing order in EDU 6019-99 added the following two issues, "Is the commercial art program at RBR part of the RBR visual/performing arts program approved by the Department of Education? and Do either petitioners or RBR have an obligation to first seek enrollment for the student in the Monmouth County Vocational Technical School District program before applying for enrollment in the RBR

program." The prehearing order in EDU 8009-99, added the following issue, "Is a shared time program for petitioner between RBR and RFH a feasible and appropriate remedy?"

Hearing dates were scheduled in each case; however, prior to commencement of any hearing respondent cross-claimant Red Bank Regional High School District filed motions for summary decision. In each instance the motions were supported by petitioners and were opposed by the local boards which in each case, with the exceptions of EDU 6125-99 and EDU 8009-99, filed cross-motions for summary decision. Oral argument on the motions was conducted in EDU 4737-99 on February 3, 2000. Thereafter, oral argument was also conducted in EDU 6019-99 (February 15, 2000) and jointly in EDU 6126-99 and 10943-99, on April 10, 2000. No oral argument was conducted in EDU 6125-99 or EDU 8009-99.

On March 3, 2000, Deputy Attorney General Michael C. Walters filed a motion to quash a subpoena served by Shore Regional High School Board of Education in EDU 6126-99, which sought disclosure of a June 1994 Attorney General's opinion letter rendered to the Department of Education in the course of an attorney-client relationship. In response, the undersigned requested that Mr. Walters consult with Commissioner Hespe to determine whether, under the circumstances in the within matter where it appeared that the opinion bore directly on the issues in the within cases, he would consider waiving his attorney-client privilege and producing the opinion letter. By letter dated March 27, 2000, Mr. Walters forwarded a copy of the June 9, 1994 letter opinion written by DAG David Earle Powers and advised that Commissioner Hespe had agreed to waive his attorney-client privilege with respect to the requested opinion.

Because copies of several letters forwarded by several parties, all dated February 18, 2000, written by Thomas A. Henry, Ed. D., Director of Office of School-to-Career and College Initiatives, appeared to create certain factual issues requiring resolution, on April 11, 2000, the undersigned wrote to the parties advising of the intention to take limited testimony from Dr. Henry regarding those issues. DAG Walters advised that he would forward Dr. Henry's certification in lieu of testimony. Thereafter, he forwarded Dr. Henry's May 18, 2000 certification, and upon request from the undersigned, a supplemental certification was submitted,

dated June 9, 2000. By letter dated June 13, 2000 the undersigned wrote to the parties as follows:

> I have reviewed Dr. Henry's June 9, 2000 Supplemental Certification and attached documents. I have decided to adjourn the June 20, 2000 hearing date pending receipt of whatever comments or additional documentation each of you wishes to supply. Please file by July 10, 2000 whatever responding material you wish to have considered and forward a copy to each person on the attached service list. After I review your responses I may or may not reschedule a day for Dr. Henry's testimony.
>
> I am also considering the possibility of consolidating all of the cases for a decision on the motions; at the time I decided the original motion to consolidate, I contemplated a decision after a hearing. As the cases have developed, the motions, with minor exceptions, are remarkably similar and one decision might still accomplish some judicial and administrative economy for OAL and the Commissioner's office. Please let me know if you object to consolidation for a decision on the motions. (If hearing days subsequently become necessary, the cases could then be severed.)

Additional written submissions from each of the parties concerning Dr. Henry's certifications were received thereafter. The last submission was received on July 17, 2000, whereupon the record closed. On August 9, 2000, the undersigned issued an order consolidating these cases for a determination on the motions.

FINDINGS OF FACT

The following facts are not in dispute and accordingly, I **FIND** them as uncontested facts.

Any vocational and technical education program of less than college grade is required to be conducted within the framework of a State Plan for Vocational Education approved by the State Board of Education and accepted by the United States Department of Education. See *N.J.A.C.* 6:43-2.1. The current Plan for Vocational and Technical Education (FY2000-2004) confirms that all vocational educational programs and/or courses must be reviewed and approved

by the Department of Education as prescribed in *N.J.A.C.* 6:43-8 and continues, "Thus, the use of the Classification of Instructional Programs (CIP) coding system by local districts continues to be required. This system allows the local district boards of education to identify individual programs offered at each institution and allows the State to report them in the New Jersey Directory of Verified Occupational Programs." The Classification of Instructional Programs (CIP) was originally developed by the United States Department of Education's National Center for Education Statistics. Once a program application has been approved, the program is assigned a CIP code number. This number defines the specific nature of the program and serves to distinguish programs within the vocational discipline/field. The approved program is then listed in the New Jersey Directory of Verified Occupational Programs. Listing the program in the Directory reflects the program's status as an approved program. The New Jersey Directory of Verified Occupational Programs (revised for 1995) lists Red Bank Regional as approved, *inter alia*, in the program area "Trade and Industrial" for the program name "Visual & Performing Arts, CIP code 50.0101. The current CIP contains the following entry concerning that number:

> 50. **VISUAL AND PERFORMING ARTS.** A summary of groups of instructional programs that describe the creation and interpretation of works and performances that use auditory, kinesthetic, and visual phenomena to express ideas and emotions in various forms, subject to aesthetic criteria.
>
> 50.01 **Visual and Performing Arts.** (See 50.0101).
>
> 50.0101 **Visual and Performing Arts.** An instructional program that generally describes an undifferentiated program in the visual and performing arts, and that may prepare individuals in any of the visual artistic media or performing disciplines.

With respect to delivery of vocational technical programs, the current Plan for Vocational and Technical Education states the following:

> New Jersey provides secondary vocational and technical education programs mainly via two delivery systems, the comprehensive high

> schools and the county vocational-technical schools.* On a more limited basis, special services school districts also deliver vocational and technical education. The postsecondary vocational-technical system is delivered by the state's 19 county/community colleges and 21 county vocational schools. The total number of approved occupational programs offered to secondary, postsecondary, and special needs students is 1,584. Twenty-six approved occupational programs are offered at five different special services school districts throughout the state.

The plan defines comprehensive high schools as schools from grades 9 through 12 that provide all academic subject material required for a high school diploma; support services to all students, including special populations; and vocational (occupational) programs in selected areas. According to the current plan there are 227 comprehensive school districts which offer approximately 877 vocational/occupational programs throughout the State.

Prior to December 1981, the New Jersey Administrative Code contained rules adopted by the State Board of Education pursuant to which a local educational agency could obtain approval for establishing and operating an Area Vocational Technical Education School. *N.J.A.C.* 6:46-1.1 then provided:

> "Area vocational technical education school" means any public school or public institution which falls in any one of the following categories:
>
> 1. A specialized high school used exclusively or principally for the provision of vocational education to persons who are available for study in preparation for entering the labor market; or
>
> 2. The department of a high school exclusively or principally used for providing vocational education in no less than five different occupational fields to persons who are available for study in preparation for entering the labor market; or

---

* Dr. Henry's certification describes a three-tiered delivering system: 1) comprehensive high schools, including charter schools; 2) vocational high schools; and 3) county vocational schools. For the reasons articulated hereinafter, however, this is not a material fact precluding summary decision.

3. A technical or vocational school used exclusively or principally for the provision of vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market; or

4. The department or division of a junior college or community college or university which provides vocational education in no less than five different occupational fields, under the supervision of the State Board, leading to immediate employment but not leading to a baccalaureate degree.

5. An "area vocational education school" shall be available to all residents of the State or an area of the State designated and approved by the State Board.

At its meeting of July 11, 1979, the New Jersey State Board of Education adopted a resolution approving the applications of Matawan Regional and Red Bank Regional school districts to be designated as area vocational technical schools. The application which was submitted by Red Bank to the State Board has not been provided as part of the record herein, and apparently it cannot be located. However, part of the application submitted and approved was the following Statement of Agreement signed in September 1978 by Milton G. Hughes, then Monmouth County's Superintendent of Schools, Edward F. Davey, County Vocational Director, and the superintendents of the two districts:

> Representatives of the Monmouth County Office of the New Jersey Department of Education, the Monmouth County Vocation-Technical School System, the Red Bank Regional High School System and the Matawan Regional School System have discussed the delivery of vocational-technical education on the secondary and post-secondary level. As a result of various discussions, the above-mentioned districts agree on the following points:
>
> - Programs and services offered by the two local schools will be coordinated with the County System.
>
> - Programs and services offered by the County system will be supported by the two local schools.

- Matawan will continue to send students to the Vocational building adjacent to its high school.

- Red Bank will identify interested students and/or students in need who would attend the above building on a shared-time basis, thereby increasing its participation in the County System.

- Red Bank and Matawan will exchange students, based upon need and/or interest in those areas where such programs are not already available to them. At present, vocational program offerings new to Red Bank and now available at Matawan are Cosmetology and Health. The one program new to Matawan at Red Bank is Child Care. At present, all other programs are available at either school.

- Students will not be solicited from other school districts if the same program is available at a County Vocational building, unless it is filled. If this situation should occur, then a percentage of slots for out-of-district students will be held open.

- The two local districts will participate actively in a shared-time program with the County System in those areas where local programs are not available and/or where local programs are filled.

- The two local districts agree to cooperate with and support the expansion of the County Vocational System.

The explicit purpose of this statement is to ensure Federal, State, County and Local officials that this application for AVTS status by Matawan and Red Bank will in no way diminish participation in and support of the County System. In fact, participation will increase based upon an increased transportation network and resulting shared-time possibilities for Red Bank. A commitment to a comprehensive high school with vocational program offerings has already been made by Matawan and Red Bank. These programs would merely continue under AVTS designation; however, they would now be available to students at both schools.

In December 1981, the State Board of Education amended the rules concerning local vocational education. The summary published with the proposed changes in the New Jersey Register of October 8, 1981, provided as follows:

Summary

The purposes of the amendments are to update and clarify the general requirements for designation as a local area vocational school district. These changes are required by an Attorney General's opinion which advised the Department of Education to promulgate appropriate rules to establish requirements and criteria for the designation of a local area vocational school district eligible for categorical aid in a manner reasonably related to and consistent with the purposes of the Public School Education Act of 1975 (*N.J.S.A.* 18A:7A- *et seq.*).

Social Impact

Increased benefits for New Jersey pupils in schools designated as local area vocational schools include: (1) pupils would be given greater career options; (2) additional educational strategies could be utilized within a broad occupational area; (3) essential personnel and services would be provided; and (4) the needs of the handicapped and limited-English proficient persons would be addressed more effectively. Employers would directly benefit from improved vocational education programs by being able to secure more suitable employees.

Economic Impact

The proposed amendments will provide appropriate allocation of categorical aid for approved local vocational education authorized under *N.J.S.A.* 18A:7A-1 *et seq.* These rules were recast to give clear guidance to local school districts concerning criteria for designation by the State Board of Education of a local area vocational school district, in order that certain schools might qualify for such categorical aid.

School districts presently receiving aid because of area vocational school status will have to requalify for such aid in the future under the amended rules. The changes proposed would permit a more clearly defined and equitable disbursement of categorical aid. The provision of suitably trained employees for business and industry will have a positive impact on New Jersey's economy.

The 1981 amendments eliminated the phrase "area vocational technical education school" and instead replaced the term with "local area vocational school district" defined as a school district which has been so designated by the State Board of Education and which has at least one school

which offers approved local vocational education. Red Bank Regional applied for local area vocational school district (LAVSD) status and received State Board approval in January 1983.

The following historical summary of Red Bank Regional's commitment to vocational education appeared in a document dated May 5, 1982, entitled, "Pre-qualification Assessment for Designation as a Local Area Vocational School District to be Eligible for Categorical Vocational Aid under the Public School Education Act of 1975:"

> The Red Bank Regional High School District was created in November of 1969. Prior to that time the students of Little Silver and Shrewsbury attended the old Red Bank High School as tuition students. Red Bank High School was a comprehensive high school and had vocational education programs in place prior to regionalization and prior to the development of the new regional facility.
>
> As the plans for the new facility were being formulated a meeting was held with the Superintendent of the Monmouth County Vocational School District (Mr. Donald Hoagland) to discuss the possible location of a county vocational building on the new site. Since it was communicated that it would not be possible to have a county facility (other schools were on a priority waiting list) the Red Bank Regional High School Board of Education pursued other options.
>
> In July of 1971 an application for designation as an Area Vocational School was prepared. This was considerably before the formulation of Chapter 212 and categorical vocational funding. Unfortunately, the application was discouraged by a State Department of Education staff member before it reached the State Board of Education.
>
> The Red Bank Regional Board then decided to become a comprehensive high school and made a major commitment to the development of vocational education in a comprehensive high school setting. Local funds were used (Bond issue December 16, 1971) to construct a 250,000 sq. ft. facility. A layout of the facility is attached. The vocational areas are highlighted in yellow.
>
> The facility opened in September, 1975 and was designated an area vocational school by the State Board of Education on July 11, 1979.

> The facility is viewed by many as a model and visitors from all areas of the state, who are designing programs of facilities, are routinely hosted on tours during the school day. Students in the program have distinguished themselves and their school by winning state sponsored contests in areas including but not limited to, VICA, Plymouth Trouble-shooting, DECA and FHA/HERO.
>
> Student placement in jobs after graduation has also been very favorable. Many graduates are now in responsible positions in the community and some serve on our advisory committees.

In May 1985 the Department of Education, Division of Vocational Education, issued an official policy, circulated to county vocational schools and local area vocational school districts with respect to the funding of sub-baccalaureate programs in the performing arts. That official policy provided as follows:

> Performing Arts, as an occupational or vocational education program, is recognized at the national level and is listed in the federal Classification of Instructional Programs (CIP CODES). Performing arts programs are currently being offered at the Mercer County Vocational School, the Somerset County Vocational School and the Red Bank Regional Local Area Vocational School District (LAVSD). In these three schools, the local boards of education have determined that there is a need and a desire to offer a performing arts program. Based on local board action, the program has been added to the curriculum of each of the schools and subsequently has been recognized as an official course offering by the State Board of Education. Since Red Bank Regional is a LAVSD, and since Title 18A Chapter 212, Laws of 1975, now *N.J.S.A.* 18A:7A-1 *et seq.* authorizes categorical aid for vocational programs in LAVSDs, Red Bank Regional may receive state categorical aid for the performing arts program in the same way it receives state categorical aid for all of its other vocational programs. Similarly, performing arts programs in schools other than LAVSDs may generate equalization aid.
>
> The issue, here, is whether or not performing arts programs meet the criteria for the funding of programs with federal dollars under the provisions of the Carl D. Perkins Vocational Education Act (P.L. 98-534). Federal support for vocational education programs is, and has been, extremely limited. It is estimated that the federal share represents approximately 5 percent of the total expenditure for vocational education programs in New Jersey. Because of the

> limited investment of federal funds, criteria for the expenditure of those funds have been developed to ensure the use of the funds in a manner which maximizes cost-benefit.
>
> Under the Carl D. Perkins Act, federal funds are specifically targeted for unserved and underserved populations and the improvement and modernization of occupational programs which are supported by up-to-date demand (job availability) data. Therefore, it is quite possible that a vocational education program which has been approved by a local board of education, and subsequently by the State Board of Education as a course offering could be considered ineligible to receive program funds under the federal legislation. At present, while performing arts programs in New Jersey are approved as vocational education programs (including approval as a source of categorical or equalization aid), they are not approved for funding with federal or state program dollars because they fail to meet the job availability provisions of the Carl D. Perkins Act.
>
> In New Jersey, there has been insufficient documentation that there is an occupational demand for individuals trained in the performing arts at the sub-baccalaureate degree level. Labor market data in the area frequently includes occupational titles which go beyond the performing arts, per se. For instance, receptionists, writers, programmers, laborers, sales representatives, business managers and carpenters are employed by the performing arts industry. Educational programs for these titles are conducted under separate and distinct CIP Codes.
>
> In consideration of all of the above, it is the continuing policy of the Division of Vocational Education, New Jersey Department of Education, that performing arts programs may be approved for categorical and equalization aid purposes, but will not be supported by either federal or state vocational education program funds.

On July 18, 1985, Red Bank Regional sent the following letter to all chief school administrators in Monmouth County:

> Recently, the New Jersey Department of Education, Division of Vocational Education issued a major policy statement concerning performing arts programs as vocational education in the State of New Jersey. A copy of that policy statement is attached for your review. Since the Red Bank Regional High School is a designated

> Local Area Vocational School District, and since our performing arts program has been approved as a vocational program, the policy has particular application to our program.
>
> In essence, parents and students may now select performing arts much the same as they select the Marine Academy of Science Technology and other County Vocational School programs. In addition, it assures funding in the form of categorical aid to districts who send tuition students to the performing arts program. Categorical Aid is triggered by completing the "Application for State School Aid" form ASSA-1 usually submitted September 30.
>
> A number of prospective performing arts students did audition and were accepted for the 1985-86 school year and are awaiting final decisions by their local boards of education.
>
> Please be advised that the following courses are approved:
>
> Television Production
> Drama
> Dance
> Creative Writing
>
> So that we can finalize our sections and schedules for September, we would appreciate your review of the attached policy and the assurance of state categorical aid for performing arts students. It is my understanding that a copy of the attached policy statement will be included as an informational item in the County Superintendent's agenda for September 1985.
>
> Thank you for your continued support of public education in our county.

Red Bank Regional's action in this regard provoked a response from Walter J. McCarroll, the Assistant Commissioner of Education in charge of County and Regional Services, and Gordon Ascher, Assistant Commissioner for the Division of Vocational Education, which provided in pertinent part:

. . .

> The second paragraph of the July 18 letter states ". . . parents and students may now select performing arts much the same as they select the Marine Academy of Science Technology and other county vocational school programs." If by that you meant to infer any parent or student in any school district in Monmouth County has this option, then this statement is in error. The potential statewide attendance area for MAST was specifically delineated by special legislation. (*N.J.S.A.* 18A:54c-6). Similarly, the countywide attendance area for county vocational schools is set by statute (*N.J.S.A.* 18A:54-11 *et seq.*). There is no statute nor regulation which authorizes an AVTS/LAVSD to similarly expand its attendance area. It is, therefore, the position of this office that Red Bank Regional High School may solicit and accept students from only those districts denominated on its application to become an AVTS/LAVSD as approved by the State Board.
>
> The final paragraph of the first page of your letter of July 18, states ". . . the following courses are approved: television production, drama, dance, creative writing." Any inference that television production has been approved for ninth grade students is incorrect. Incoming ninth grade students in the performing arts program may not enroll in television production.

. . .

The resolution adopted by the Red Bank Regional High School Board of Education and submitted to the State Board of Education seeking continued designation as an LAVSD in March of 1987 indicated that the district would continue its sending/receiving relationship with Matawan Regional and would accept, as spaces permitted, students from other public and non-public schools so long as acceptances did not conflict with the County Vocational School and would continue to honor the September 25, 1978 agreement with Monmouth County Vocational School and the Monmouth County Superintendent of Schools. The resolution adopted by the State Board of Education, dated July 1, 1987 approved the Red Bank Regional High School district as a local area vocational school district for another five-year period. Prior to the expiration of that five-year period, however, on August 5, 1991, the State Board deleted all reference in the administrative code to "local area vocational school districts." The August 5, 1991 New Jersey Register (23 *N.J.R.* 2332) published the following comment from Robert M. Nogueira, Principal of the Red Bank Regional High School District, together with the State Board's response, as follows:

COMMENT: The commenter requested that the local area vocational school district (LAVSD) designation process be continued even though comprehensive high schools, under the Quality Education Act (P.L. 1990, c.52), will no longer receive State categorical aid for vocational education programs.

RESPONSE: The Department declines to continue the LAVSD designation process given the current State budget situation and staff reductions. The Department cannot afford the staff time needed to review courses of study, applications, prepare evaluations and other paperwork involved in redesignation of the 18 LAVSDs. If funding is not the issue, there is no reason why the comprehensive high schools cannot continue to offer vocational education programs to meet the needs of pupils in their districts.

In a letter dated October 4, 1990, Bruce M. Quinn, County School Business Administrator for Monmouth County, had advised the Belmar School district concerning the effect of the Quality Education Act of 1990 on local area vocational school districts as follows:

> You have requested a letter from this office relative to the current legal standing of a Local-Area Vocational School District since the adoption of the Quality Education Act of 1990.
>
> Please be advised that *N.J.S.A.* 18A:54-5 thru 7, was unchanged by this act. The State still recognizes the designation of a Local-Area Vocational School District as defined in *N.J.A.C.* 6:46. The only change regarding LAVSDs has to do with categorical funding and the definition of resident pupils.
>
> Therefore, the Belmar Board of Education will be able to continue to establish a sending/receiving relationship with the Red Bank Regional High School District Board of Education under 18A:54-7 for the 1991-92 school year for the purposes of vocational education.
>
> I hope this information meets your requirement. If I can be of further assistance, please do not hesitate to contact my office.

On February 4, 1991, Edwina Lee, Director of Governmental Relations for the New Jersey School Boards Association, wrote to Red Bank Regional in regard to a concern that elimination of all references to LAVSD in the administrative code would somehow affect the continuation of such programs. Ms. Lee advised that in her capacity she had sought a response to this concern from Dr. Sandra Streeter, Executive Assistant to the Assistant Commissioner of the Department of Education, Division of Vocational Education. Ms. Lee's letter further advised:

. . .

> Dr. Streeter assured us that, in no way, does the elimination of references to LAVSDs from administrative code render such programs non-existent or illegitimate. This specific issue was discussed previously with the individual members of the State Board of Education. They were informed that LAVSD programs would continue to function as they have in the past, and would be dealt with in the same manner as all other comprehensive high schools, in accordance with those relevant provisions in administrative code.

Another letter from Bruce M. Quinn, this one dated July 20, 1992 and addressed to the Superintendent of the Avon School District, provided:

> You have requested a letter from this office relative to the current legal standing of sending-receiving relationships with the Red Bank Regional High School District Board of Education as a vocational program provider.
>
> Please be advised that *N.J.S.A.* 18A:54-5 through 7, was unchanged by this act. The state still recognizes the vocational programs offered by the Red Bank Regional High School District Board of Education pursuant to *N.J.A.C.* 6:43-3.11. However, you should be aware that the area of mandatory and permissible enrollment is soon to be the subject of an attorney general's written legal opinion. This may change the present practice on this subject.
>
> In the meantime, within the present rules, the Avon Board of Education would be able to establish a sending/receiving relationship with the Red Bank Regional High School District

> Board of Education under 18A:54-7 for the 1992-93 school year for the purposes of vocational education.
>
> I hope this information meets your requirement. If I can be of further assistance, please do not hesitate to contact my office.

The Attorney General's written legal opinion, presumably the one referenced in the July 1992 letter from Mr. Quinn, was issued on June 9, 1994. The opinion began, "You have asked for our opinion whether the Red Bank Regional High School District (Red Bank) may accept students from other districts and whether the district of residence must pay the tuition for students attending the Performing Arts Program at Red Bank." The opinion concluded that Red Bank could accept non-resident students for its performing arts, but that the district of residence would not be required to pay the student's tuition unless it chose to approve the placement.

The several letters, all dated February 18, 2000, written by Thomas A. Henry, Ed.D., on Department of Education stationery referenced hereinabove at page 5 advised the recipients that Red Bank does not have approval to offer either a vocal music program or a photography program and continued in pertinent part as follows:

> As a comprehensive high school offering approved vocational programs, the Red Bank District may accept students from outside its sending district. However, the home district has no responsibility to pay for the tuition and transportation for those students. Only students attending county vocational schools or approved vocational schools in comprehensive high school districts are eligible to have their tuition and transportation costs paid by the home district (*N.J.S.A.* 18A:54-20.1 and *N.J.S.A.* 18A:54-70 (*sic* 18A:54-7)). Unfortunately, the Red Bank District does not meet either of these eligibility criteria.

As part of its review of Red Bank Regional's local area vocational school district materials for 1985-86, the Division of Vocational Education had approved the following courses: Drama I, Drama II, Dance I, Dance II, and Creative Writing I and Creative Writing II and had so advised the district by letter dated May 23, 1985. Not contained in this record is any proof of specific approval of commercial art courses or vocal music courses. In a letter dated December

30, 1996, addressed to the Honorable Bruce R. Campbell, ALJ, Michael Maddaluna, County Superintendent of Schools for Monmouth County, advised Judge Campbell that from 1982 to 1991 he was employed as the Monmouth County Educational Specialist for Vocational Education and that in that capacity he had worked closely with Red Bank Regional High School district as they applied for and received approval from the New Jersey Department of Education for their entire vocational educational program. He therefore advised Judge Campbell that the vocational courses offered by Red Bank were approved courses.

Red Bank Regional's curriculum guide currently lists the following courses under the performing arts program: Commercial art I, II, III, and IV; Drama I, II, III, and IV; Stagecraft I, II, III and IV; Dance I, II, III and IV; Creative Writing I, II, III and IV; Vocal Music I, II, III, and IV; Piano I, II, III and IV; and Commercial Photography I, II, III and IV. Each of the students in the within consolidated cases applied to the Visual Performing Arts Program. Each auditioned and was accepted into the program for enrollment in the course sequence identified hereinabove at page 4 for each case. None of the respondent districts in the within matter operate performing arts programs in the corresponding disciplines approved by the Department as vocational programs. Acceptance letters from RBR advised the parents of each student that acceptance was contingent upon local board of education approval. When each local board of education advised each petitioner that it would not pay tuition or transportation to the performing arts program, the within matters followed. Each of the students has enrolled pursuant to a contract signed by the parents to pay RBR $8,600 for a full year's tuition. The parents seek reimbursement from their local boards.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.* 4:40-2. Trial courts considering motions for summary judgment are now required to engage in

the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (Citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the material facts recited hereinabove, as opposed to the conclusions to be drawn from them, are not in dispute, and accordingly, these matters are ripe for summary decision.

The starting point for any analysis concerning who is required to pay the cost of a student's education in New Jersey is *N.J.S.A.* 18A:38-1. That statute, entitled "Attendance at school free of charge," provides in pertinent part as follows:

> Public schools shall be free to the following persons over five and under 20 years of age:

> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other persons gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitoulsy for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease; and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.
>
> . . .
>
> d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;
>
> e. Any person for whom the Division of Youth and Family Services in the Department of Human Services is acting as guardian and who is placed in the district by said bureau;
>
> f. Any person whose parent or guardian moves from one school district to another school district as a result of being homeless and whose district of residence is determined pursuant to section 19 of P.L. 1979, c.207 (C. 18A:7B-12).

The statutory scheme provides discretion to local boards of education to admit to their schools students who are not domiciled within the school district "with or without payment of tuition as the board may prescribe." *N.J.S.A.* 18A:38-3. Because the students in the within matter are not domiciled within the Red Bank Regional district and because Red Bank Regional has admitted them to the Red Bank Regional High School conditioned upon payment of tuition,

petitioners seek to place responsibility for payment of the tuition upon the local districts in which each is domiciled. Whether the local districts can be required to pay the students' tuition to attend the visual/performing arts program is exactly the question which was addressed by Deputy Attorney General David Powers in the written legal advice rendered to the Commissioner of Education in 1994 and referenced hereinabove at pages 5 and 19. In critiquing DAG Powers' opinion, the petitioners note the omission of any reference to *N.J.A.C.* 6:43-3.11. That regulation, entitled, "Access to vocational instruction offered" was adopted by the State Board of Education, effective September 1990 and provides:

> (a) Pupils shall be permitted to enroll in programs of vocational instruction offered by district boards of education other than their resident district so long as the resident district board of education does not offer a comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education.
>
> (b) To the extent that space is available, each type of program of vocational instruction offered by the State Board shall be made available to all pupils residing in the State, and each program of instruction offered by a district board of education shall be made available to all pupils residing in the district or community served by the district board of education offering such instruction.
>
> (c) Pupils shall be admitted for enrollment in classes and provided instruction on the basis of their potential for achieving the occupational or other objectives of such instruction.

Petitioners and Red Bank Regional acknowledge that the regulation makes no specific provision concerning payment of tuition either by the districts where the students are domiciled or by the students themselves, but suggest that when read in conjunction with the provisions of *N.J.S.A.* 18A:54-5 to 54-7, the regulation compels the conclusion that the students have a right to enroll at Red Bank Regional and have the right to have their tuition paid by their local districts. *N.J.S.A.* 18A:54-5 and 54-6 provide that a board of education of any school district or regional school district may establish and maintain vocational schools, subject to approval of location, management and courses of study by the Department of Education. Red Bank Regional asserts that its 1979 approval as an AVTS and its 1983 and 1987 approvals as an LAVSD were made

pursuant to the provisions of 18A:54-6 and therefore qualify it as a regional vocational school. With respect to such schools *N.J.S.A.* 18A:54-7 provides:

> All such boards of education shall receive pupils from other districts so far as their facilities will permit and shall be entitled to collect and receive from any sending district for the tuition of such pupils a sum not exceeding the actual cost per pupil, as determined according to rules prescribed by the commissioner and approved by the state board.

Red Bank asserts that its special status under *N.J.S.A.* 18A:54-6 continues because *N.J.S.A.* 18A:54-4 requires specific notice of discontinuance, something which Red Bank asserts it never received. Dr. Henry apparently agrees with Red Bank Regional's interpretation of the language in *N.J.S.A.* 18A:54-7, but denies that Red Bank's AVTS or LAVSD status was approved pursuant to the provisions of *N.J.S.A.* 18A:54-6 or that those approvals have any current meaning since they were related only to the provision of categorical aid which was abolished in 1990.

From a historical perspective it certainly appears that the Department of Education regarded AVTS and LAVSD status as approvals, at least in part, pursuant to *N.J.S.A.* 18A:54-6. That statute was listed specifically as authority for the 1981 regulatory amendments changing the term Area Vocational Technical Education School to Local Area Vocational School District (See *New Jersey Register*, October 8, 1981, 13 *N.J.R.* 635), and Bruce Quinn's 1990 and 1992 letters specifically refer to those statutory provisions in connection with Red Bank's LAVSD status. Since 1991, however, there have been no rules or regulations specifying any procedure for designation as a local area vocational technical school, and the Department of Education's response in the August 5, 1991 *New Jersey Register* to Red Bank Regional's request that the LAVSD designation process be continued, quoted hereinabove at page 17, provided clear notice to Red Bank that thereinafter its vocational programs could continue to operate, but in the same manner and under the same rules and regulations as approved vocational education programs offered in any comprehensive high school. Accordingly, I **CONCLUDE** that any special status Red Bank Regional enjoyed under *N.J.S.A.* 18A:54-7 because of its AVTS and LAVSD designations terminated with the repeal of *N.J.A.C.* 6:46-2 in 1991. The foregoing conclusion

notwithstanding, for the following reasons, I disagree with Dr. Henry's conclusion that the language in *N.J.S.A.* 18A:54-7 would require payment by the local districts to Red Bank Regional, in any event.

In 1967 the Legislature revised and reenacted the education laws as Title 18A. The provisions which they enacted as 18A:54-7, quoted hereinabove, have remained the same since their original effective date. With respect to costs for pupils attending county vocational schools, the 1967 legislation provided two separate statutory provisions depending upon the location of the district of residence. *N.J.S.A.* 18A:54-15 provided:

> **Tuition rates; maximum cost per pupil.** In the event of such establishment of any vocational school in such second-class county, the board of chosen freeholders of the county in which said school shall be established shall be entitled to collect and receive from the sending districts in which the pupils attending the vocational school reside, for the tuition of such pupils, a sum not exceeding the actual cost per pupil as determined according to rules prescribed by the commissioner and approved by the state board. Such tuition shall be established in advance of the school year by the board of chosen freeholders, and shall be at the same rate per pupil to each sending district, and shall be paid quarterly by the board of education of each sending district.

N.J.S.A. 18A:54-23 provided in pertinent part:

> **Receiving pupils from other districts.** The boards of education of schools established under the provisions of section 18A:54-12 in any county of the third class with a population not less than 60,000 nor more than 100,000, according to the 1960 federal census, and the boards of education of schools established under the provisions of section 18A:54-13, shall receive pupils from districts without the county so far as their facilities will permit, provided a rate of tuition not exceeding the cost of such education as prescribed by rule of the commissioner, approved by the state board, is paid by the sending districts.

Chapter 467 of the Laws of 1981 revised the language with respect to certain counties of the second class by adding 18A:54-11.14, which provided as follows:

County vocational school districts.

1. The board of education of each school district or regional school district in any county of the second class having a population of not less than 410,000 nor more than 470,000 according to the latest federal decennial census in which there is a county vocational school district referred to in section 18A:54-11.1 shall send to any of the schools of such county vocational school district all pupils residing in such school district or regional school district who have applied for admission to and have been accepted by any of the schools of such county vocational school district and each such board of education shall pay tuition for said pupils to such county vocational school district pursuant to *N.J.S.* 18A:54-23. The provisions of this section shall not apply to any board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

The language in 18A:54-23, which provided "shall receive pupils from districts without the county so far as their facilities will permit, provided a rate of tuition not exceeding the cost of such education as prescribed by rule of the Commissioner, approved by the State Board, is paid by the sending districts" remained the same. Finally, Chapter 52 of the Laws of 1990, known as the "Quality Education Act of 1990," repealed the language of 18A:54-11.4, *N.J.S.A.* 18A:54-15 and *N.J.S.A.* 18A:54-23 and replaced it with the following current provision relating to enrollment of pupils in county vocational schools:

Enrollment of pupils in county vocational schools, funding.

71.a. The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of

> this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.
>
> . . .

From the foregoing, I **CONCLUDE** that when the Legislature intended to impose upon a local board of education a mandatory burden to pay tuition for a student to attend a vocational school program it did so with very specific language, *i.e.*, "The board of education. . . shall send. . ." and "The board of education shall pay tuition..." In 1981 when it added the mandatory tuition provisions of 18A:54-11.4, it did not amend *N.J.S.A.* 18A:54-7, nor did it do so in 1990 when it amended the provisions with respect to county vocational schools. Accordingly, I **CONCLUDE** that the intent of 18A:54-7 is to permit districts voluntarily to enter into sending-receiving type relationships and only where they have done so does it impose upon the sending district a responsibility to pay tuition. This interpretation is consistent with historical treatment of the statutory provision by school districts and by the Department of Education. The July 18, 1985 letter which the Red Bank district sent out, in fact, recognizes the discretion of local boards where it says: "A number of prospective performing art students did audition and were accepted for the 1985-86 school year and are awaiting final decisions by their local boards of education." The 1990 and 1992 letters from Bruce Quinn also implicitly recognize the voluntary nature of the relationship pursuant to *N.J.S.A.* 18A:54-7 in that they advised the local boards that they could continue to enter into agreements with Red Bank Regional for the education of their students in the visual and performing arts program. The advice rendered by the Director of Governmental Relations for the New Jersey School Boards Association in 1991 also implies a voluntary relationship under the statutory provisions where it says "LAVSD programs would continue to function as they have in the past, and would be dealt with in the same manner as all other comprehensive high schools, in accordance with those relevant provisions in the administrative code." The 1994 opinion letter written by DAG Powers discusses the provisions of *N.J.S.A.* 18A:54-7, but makes no mention of any intent to impose a mandatory sending/receiving relationship with consequent mandatory financial burden. Even the acceptance letters sent to the students in the within cases recognized that the local boards had the discretion to approve the placements and thereby assume responsibility for tuition payments.

The Commissioner's decision in *Board of Education of the City of Asbury Park v. Board of Education of Red Bank Regional High School District, et al.*, OAL DKT. NO. EDU 6082-96; Agency Dkt. No. 146-4/96, cited by Red Bank and by petitioners, does not compel a different conclusion. In that case the Commissioner's decision, which was affirmed by the State Board of Education and the Appellate Division, concluded that a number of respondent school districts were authorized under *N.J.S.A.* 18A:38-15 and *N.J.S.A.* 18A:54-5, c and 7, to send students who had been assigned to Asbury Park High School, but desired such vocational or performing arts education, to the Red Bank Regional High School because comparable programs were not available at Asbury Park High School. Nothing in those opinions would compel the conclusion that had the "sending districts" not wished to send students to the Red Bank Regional High School program, they could have been required to do so. Although the administrative law judge's opinion, which was adopted by the Commissioner, spoke in terms of parental choice, in fact, the basis for the decision was *N.J.S.A.* 18A:38-15, which provides:

> **Attendance at special high school courses of study in another district**
>
> Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district.

The provisions of that statute make clear that the ultimate discretion concerning whether a student will attend a program in another district at public expense lies with the local board. Although neither the Commissioner's decision, adopting the administrative law judge's decision, nor the State Board decision in the *Asbury Park* case specifically discussed the provisions of *N.J.A.C.* 6:43-3.11(a), quoted hereinabove, that regulation was cited in the Appellate Division opinion affirming the State Board's decision. When read in the context of the statutory provisions concerning vocational education, the most reasonable interpretation of *N.J.A.C.* 6:43-3.11(a), and one consistent with historical perspective, is as a companion to the statutory

provisions at *N.J.S.A.* 18A:38-15, *i.e.*, that a local board of education may determine to allow a student to attend a vocational program offered by another district, and it may pay the tuition for the pupil so long as the local board of education does not furnish a comparable type of program. *N.J.A.C.* 6:43-3.11 may not be read to create a right for students to have their tuition paid by a local district where there is no clear language indicating a State Board intent to do so. Accordingly, I **CONCLUDE** that the provisions of *N.J.A.C.* 6:43-3.11 are relevant only in situations where a local board of education has determined to pay tuition for a student to another district, clearly not the situation in the within cases, and therefore the "comparability" of the programs need not be addressed.*

Given the foregoing conclusions, it is also unnecessary to address the additional issues which were set forth in the prehearing orders in EDU 4737-99, 6019-99, 6125-99 and 8009-99. If the Commissioner should determine that legal authority exists to compel the local districts to pay tuition to the Red Bank Regional Performing Arts program, these matters can be remanded for determination of the other issues.

For all of the foregoing reasons, it is hereby **ORDERED** that the petitions of appeal and the cross-claims of Red Bank Regional High School district are hereby **DISMISSED WITH PREJUDICE** and these proceedings are concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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* Since vocational programs are required to be approved by the Department of Education and once approved are listed in the New Jersey Directory of Verified Occupational Programs, and since none of the districts herein have any approved vocational programs in the visual or performing arts or any of the course sequences listed, if I were to address this issue I would conclude that no hearing is required to determine that none of the local districts offers a comparable type of program.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 16, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10-16-00
DATE

Deborah A. Gattinelli/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

SERVICE LIST

Name	Attorney for Petitioners	Dkt. No.
Robert P. Martinez, Esq. 65 South Main Street Building D Pennington, N.J. 08534 (609) 818-0068	S.C.S. & K.L.R. o/b/o M.R.S. E.M.W. & L.F.W. o/b/o M.W. M.G. & A.G. o/b/o N.M.G. D.M. o/b/o A.M.	EDU 6019-99 EDU 6125-99 EDU 8009-99 EDU 4737-99
R. Armen McOmber, Esq. McOmber & McOmber 54 Shrewsbury Avenue Red Bank, New Jersey 07701 (732) 842-6500	Attorney for Long Branch BOE	EDU 4737-99and EDU 6125-99
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James P. Granello, Esq. 530 Prospect Avenue Little Silver, N.J. 07739 (732) 842-4114	Attorney for Red Bank Reg. Hg. Sch. BOE	EDU 4737-99 EDU 6019-99 EDU 6125-99 EDU 6126-99 EDU 8009-99 EDU 10943-99
Martin M. Barger, Esq. Reussille, Mausner, Carotenuto, Barger & Steel 365 Broad Street Red Bank, N.J. 07701 (732) 741-1800	Attorney for Rumson-Fair Haven Regional High School BOE	EDU 8009-99
Robert L. Hayden, *Pro Se* 34 Riverside Avenue Oceanport, N.J. 07757 (732) 544-1594		EDU 10943-99
Louis Fellman, *Pro Se* 12 Burnt Mill Circle Oceanport, N.J. 07757 (732) 389-3754		EDU 6126-99

D.M., on behalf of minor child, A.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

S.C.S. AND K.L.R., on behalf of minor child, M.R.S,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

E.M.W. AND L.F.W.,on behalf of minor child, M.W.

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

L.F., on behalf of minor child, J.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

M.G. AND A.G., on behalf of minor child, N.M.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS,

AND

R.L.H. AND J.M.H., on behalf of minor child,

J.K.H., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENTS. :

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, exceptions were submitted by respondent Board of Education of Red Bank Regional High School District (hereinafter, "Red Bank Regional") and on behalf of Petitioners D.M. (EDU 4737-99), E.M.W. and L.F.W. (EDU 6125-99), and S.C.S. and K.L.R. (EDU 6019-99), identified hereinafter as "petitioners."

In its exceptions, Red Bank Regional sets forth a number of facts which were not included in the summary provided by the Administrative Law Judge (ALJ), and argues, *inter alia*, that it never received *actual notice* of discontinuance as "a vocational school" pursuant to *N.J.S.A.* 18A:54-4. (Red Bank Regional's Exceptions at 4) Relying on Dr. Nogueira's certification that the District never received such written notice, Red Bank Regional reasons that the issue of "actual notice of discontinuance," therefore, remains in dispute.

Further, for the reasons set forth in its submissions before the ALJ, Red Bank Regional maintains that *N.J.S.A.* 18A:54-7 is applicable herein, and requires that the local

districts pay tuition for their students' attendance in its vocational programs. In this regard, Red Bank Regional avers:

> The absence of litigation by a parent challenging the refusal of a local district to pay tuition up until now should have no bearing in the correct interpretation of this section of the law. Red Bank Regional has run a successful vocational program in the visual performing arts based in large measure upon the willingness of local school districts to fund their resident student's education at Red Bank Regional. *** The administrative law judge's inference that because primarily Red Bank Regional looked to local districts to voluntarily agree to make payment somehow should be construed as [a] benchmark for what the legislature intended the language contained in *N.J.S.A.* 18A:54-7 to mean is specious.*** (*Id.* at 6)

Red Bank Regional further contends that *N.J.A.C.* 6:43-3.11 must be read in conjunction with *N.J.S.A.* 18A:54-7, thereby compelling it to accept qualified nonresident students whose tuition and transportation costs would be borne by their local districts. (*Id.*)

Finally, even assuming *N.J.S.A.* 18A:38-15 controls in this matter, Red Bank Regional asserts that "a local district acts arbitrarily and capriciously in denying a qualified resident female student the tuition and transportation costs necessary to permit such student the opportunity to attend an approved vocational education not offered by the local school district. *** Local districts cannot arbitrarily and capriciously refuse to provide the funds necessary to allow female students the opportunity to attend approved vocational education programs." (*Id.* at 7)

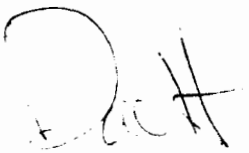
Petitioners join in selected exceptions submitted by Red Bank Regional, and add that the interpretation and legal weight accorded to *N.J.S.A.* 18A:38-15 by the ALJ is erroneous, in that it deprives them of their right to the review of local district discretionary decisions and "vitiates a singular element of a plan for the delivery of vocational education services that is more consistent with the language of the statutes and the code promulgated by the State Board of

Education" in favor of "unfettered and unregulated local discretion." (Petitioners' Exceptions at 3, 5) Petitioners reason that "*N.J.S.A.* 18A:54-2 through 54-7, read in conjunction with *N.J.A.C.* 6:43-3.11, have a certain plain English meaning that the [Initial Decision] simply ignores ***." (*Id.* at 6) Moreover, petitioners argue that the Initial Decision "obliterates" the notice requirement found in *N.J.S.A.* 18A:54-4 "by positing an implied administrative repeal of it ***." (*Id.* at 7) Petitioners dispute the conclusions drawn by the ALJ from the legislative history of the vocational education enactments and maintain that *N.J.A.C.* 6:43-3.11 is written as a student entitlement, rather than a provision applicable only to voluntary placements by resident school districts. (*Id.* at 8) For these reasons, petitioners urge the Commissioner to reject the Initial Decision, acknowledge their entitlements, and remand this matter for further proceedings.

Upon careful and independent review of the record in this matter, which included a transcript of the oral arguments heard at the OAL on February 3, 2000, the Commissioner finds no cause to disturb the Initial Decision. Additionally, the Commissioner concurs with the ALJ that "*any special status Red Bank Regional enjoyed under N.J.S.A. 18A:54-7 because of its [Area Voocational Technical School] AVTS and [Local Area Vocational School District] LAVSD designations terminated with the repeal of N.J.A.C. 6:46-2 in 1991,*" (emphasis added) (Initial Decision at 24) and *N.J.S.A.* 18A:38-15, therefore, controls the outcome in this matter. In so doing, the Commissioner finds nothing in the record to substantiate Red Bank Regional's claim that the respondent districts abused their discretionary authority by arbitrarily and capriciously refusing to pay tuition and transportation costs for their students to attend Red Bank Regional's vocational programs.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Petitions of Appeal and cross-claims of Red Bank Regional High School District are dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: NOV 2 8 2000

Date of Mailing: NOV 2 8 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

391-00

EDU #4737-99, 6019-99, 6125-99, 6126-99, 8009-99 and 10943-99 (consolidated)
C # 391-00
SB # 72-00

D.M., on behalf of minor child, A.M.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

S.C.S. AND K.L.R., on behalf of minor child, M.R.S.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

STATE BOARD OF EDUCATION

DECISION ON MOTION

3/7/01

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

E.M.W. AND L.F.W., on behalf of minor child, M.W.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT/CROSS-CLAIMANT–APPELLANT,

AND

L.F., on behalf of minor child, J.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT MONMOUTH COUNTY,

RESPONDENT,

AND

M.G. AND A.G., on behalf of minor child, N.M.G.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS/CROSS-CLAIMANT–APPELLANT,

AND

R.L.H. AND J.M.H., on behalf of minor child, J.K.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT,

AND :

BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :

RESPONDENT.[1] :

Decided by the Commissioner of Education, November 28, 2000

For the Petitioners-Appellants D.M., S.C.S. and E.M.W., Robert P. Martinez, Esq.

For the Petitioners-Appellants M.G. and A.G., pro se

For the Respondent/Cross-Claimant–Appellant Board of Education of Red Bank Regional High School District, James P. Granello, Esq.

For the Respondent-Respondent Board of Education of the City of Long Branch, McOmber & McOmber (R. Armen McOmber, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Middletown, Kenney, Gross & Kovats (Malachi J. Kenney, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Rumson-Fair Haven Regional High School District, Reusille, Mausner, Carotenuto, Barger & Steel (Martin W. Barger, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Shore Regional High School District, Tucci & Collins (Gregory W. Vella, Esq., of Counsel)

Upon review of the papers filed, including the affidavit submitted by M.G., the State Board of Education grants the motion filed by M.G. and A.G. to file an appeal in this matter nunc pro tunc. Accordingly, the briefing schedule is reestablished. The letter brief submitted by M.G. and A.G. in support of their appeal on February 22, 2001

[1] Petitioners L.F. and R.L.H. did not file a notice of appeal to the State Board from the Commissioner's decision. Hence, they are not parties to the instant appeal.

is deemed filed as of the date of this decision. Respondents' answer briefs will be due by March 30, 2001.

Roberta Van Anda abstained.

March 7, 2001

Date of mailing MAR 09 2001

392-00

K.E. AND C.E., on behalf of minor children, J.E. AND M.E.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

December 01, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER ON APPLICATION FOR EMERGENCY RELIEF
OAL DKT. NO. EDU 9514-00
AGENCY REF. NO. 382-10/00

J.E. & M.E., BY K.E. AND C.E.,

THEIR PARENTS,

Petitioners,

v.

NEW MILFORD BOARD OF EDUCATION,

Respondent.

This matter having been brought before the Office of Administrative Law on motion of Loughlin & Latimer, Stephen M. Latimer and Sherry Chachkin appearing on behalf of the Petitioners, M.E. and J.E., for an order staying disciplinary action; and Fogarty & Hara, Esqs., Stephen R. Fogarty appearing on behalf of the respondent New Milford Board of Education; and the undersigned Administrative Law Judge having heard the testimony of witnesses, reviewed the evidence, and heard the argument of counsel on November 1, 2000,

Based on the Findings of Fact and Conclusions of law rendered orally at said hearing, as well as for the specific reasons stated on the record at that time, it is hereby **ORDERED** that:

(1) The application to stay J.E.'s and M.E.'s school suspensions for the period of time extending from October 3, 2000 through November 10, 2000 **BE** (and is hereby) **DENIED**;[1]

(2) The application to restore J.E.'s and M.E.'s school attendance prior to November 13, 2000 **BE** (and is hereby) **DENIED**;[1]

(3) J.E. and M.E. **BE READMITTED** to school on November 13, 2000 without having submitted to any psychiatric evaluations and without being required to furnish any reports whatsoever in this regard beforehand;[2]

(4) J.E. and M.E. **RESUME** their school attendance on 11-13-00 without having submitted to any psychiatric evaluations and without being required to furnish any reports whatsoever in this regard beforehand;[2]

(5) Petitioners' request for permission **NOT** to be psychiatrically evaluated and **NOT** to submit any reports in this regard prior to their readmission **BE** (and is hereby) **GRANTED**;[2] and,

---

[1] because the petitioners failed to demonstrate they will suffer irreparable harm if the remainders of the suspensions are carried out.

[2] because such matters are within the exclusive purview of the Child Study Team for special education students and because no probative evidence was presented from which it could be inferred that J.E. and M.E. are a danger to themselves or others.

(6) Petitioner's request not to perform any community service **BE** (and is hereby) **GRANTED**.[3]

11-2-00
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

\mvh

[3] since the Board of Education's disciplinary policy does not expressly provide for community service as a form of discipline, the action taken by the Board in this regard was *ultra vires*.

OAL DKT. NO. EDU 9514-00
AGENCY DKT. NO. 382-10/00

K.E. AND C.E., on behalf of minor children, J.E. AND M.E.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on November 1, 2000,[1] and the recommended Interlocutory Order on Application for Emergent Relief of the Administrative Law Judge (ALJ) have been reviewed. Respondent's exceptions, petitioners' reply exceptions and respondent's reply thereto were timely filed and were duly considered by the Commissioner in rendering his determination herein.

In this matter, petitioners have requested emergent relief staying the disciplinary actions imposed on them for violating respondent's policy and regulations when they failed to report an act of vandalism to the school which they observed in progress, and for their conduct in the ensuing police investigation thereof.

Respondent's exceptions solely address the issue of the grant of petitioners' request to restrain the imposition of further discipline on J.E. and M.E. by requiring them to perform community service. Respondent contests the ALJ's reasoning that, since community

[1] The audiocasette tape of the OAL hearing was delivered to the Commissioner on November 27, 2000.

service was not expressly provided for in respondent's disciplinary policy, respondent's action in this regard was *ultra vires*. Thus, in respondent's view, the ALJ erred in his grant of a stay of the community service component of the discipline imposed, because a stay may not be issued absent a finding that petitioners' legal right is well-settled or a finding of irreparable harm. See *N.J.A.C.* 6A:3-1.6(a). (Respondent's Exceptions at 2) Respondent asserts that petitioners do not have an established legal right to relief from the community service requirement because its policy and regulations provide for discipline, such as community service, and that it has the discretion to impose such discipline independent of the express terms of its policy. (*Id.* at 3)

Respondent points to its Regulation No. 5600, which provides that "[t]he following disciplinary measures *may* be applied *as appropriate* to the pupil's violation of the rules," and permits respondent to require the pupil to "make restitution, in cost *or labor,* for any loss he or she has caused," as authorizing respondent to impose community service as a disciplinary measure. (emphasis in text) (*Ibid.*)

Citing *Rizzo v. Baton*, Union City, *Super. Ct.*, Chanc. Div., January 8, 1999, Docket No. UNN-C-122-98, respondent further argues that community service as a form of discipline is consistent with the legislative intent regarding the discretion afforded boards of education to address student misconduct. (*Id.* at 4) Additionally, respondent maintains that boards of education have broad discretion to manage their schools through disciplinary action they deem appropriate, so that even if a community service requirement were not provided for in its policy or regulations, in the interest of fairness, it could deviate from policy or regulation with respect to student discipline. *See Matawan Reg. Teachers' Ass'n v. Matawan-Aberdeen Reg. H.S. Dist. Bd. of Ed.*, 87 *S.L.D.* 1826 (July 13, 1987), *aff'd S.L.D.* 1834 (Comm. Ed., August 12, 1987) and *K.O.H. v. Edison Twp. Bd. of Ed.*, 95 *N.J.A.R.*2d (EDU) 275, 276

(Comm. Ed. June 14, 1995), *aff'd* 96 *N.J.A.R.*2d (EDU) 445 (St. Bd. February 7, 1996, citing *Goss v. Lopez*, 419 *U.S.* 565 (1975)). Respondent contends that the imposition of community service in this matter was in the interest of fairness, because had it been deprived of the opportunity to impose community service, it might have felt compelled to impose a longer suspension. (*Id.* at 5-6)

Finally, respondent argues that there is no evidence that community service will cause the students irreparable harm and there was no finding of irreparable harm by the ALJ. Accordingly, respondent concludes, the record reflects a lack of the requisite factors to support a stay of the community service discipline imposed on petitioners. (Id. at 7)

Citing *E.R. v. Board of Educ. of the Lower Camden County Reg. H.S. Dist.*, OAL Dkt. No. EDU 6661-98, 1998 N.J. *AGEN LEXIS* 548 (October 15, 1998) at *5 (Board must follow its stated policy of imposing punishment on the basis of individual circumstances) and *Weidemann v. State University of New York College at Cortland*, 188 A.D.2d 974, 592 *N.Y.S.*2d (App. Div. 1992) in their reply, petitioners advance the argument that respondent may not impose community service because respondent's regulations do not provide for community service as a disciplinary measure. (Petitioners' Reply Exceptions at 2) Petitioners also assert that due process requires that only punishments expressly identified can be imposed, citing:

> *In re De Marco*, 83 N.J. 25, 36 (1980) ("[n]o one shall be punished for a crime unless both the crime and its punishment are clearly set forth in positive law."); criminal prosecutions, *State v. Valentin*, 105 N.J. 14, 18 (1987) ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." citing *De Marco*); and juvenile proceedings, *State v. J.L.A.* 262 N.J. Super. 78, 91 (App. Div. 1993) rev'd in part 136 N.J. 370 (1994) ("[n]o one shall be punished for a crime unless both the crime and its punishment are clearly set forth in positive law." citing *De Marco*) (footnote omitted) *(Id.* at 3)

Petitioners point out that respondent's Regulation No. 5600 does not provide for community service, but rather provides for eight disciplinary measures ranging from admonishment to expulsion, and that nowhere in the regulations is it indicated that respondent may impose other, unexpressed disciplinary measures. Likewise, petitioners submit, the four remedial measures listed, *i.e.*, (1) restitution and restoration, (2) counseling, (3) parent conferences, and (4) alternate educational programs, do not include community service. Petitioners also take issue with respondent's interpretation that the word "labor," as used to describe restitution, is an express indication that community service, as a type of "labor," provides authority for the imposition of community service. Petitioners argue that restoration is the act of restoring to its former condition. J.E. and M.E., however, cannot perform "labor" to restore the damaged property, in this instance petitioners submit, because the defaced property has already been restored to its former condition by school personnel. Petitioners further argue that it is unclear what loss petitioners have caused respondent by failing to report the conduct they witnessed. (*Id.* at 4-5)

Additionally, petitioners assert that respondent's argument, citing *Matawan, supra*, that it could impose community service as a disciplinary measure in the interest of fairness is misplaced, because all the fact finders in *Matawan* agreed that "strict adherence to the policy in light of the particular factual circumstances 'would compel an unfair result.'" (*Id.* at 6) In this instance, petitioners proffer, respondent had at its disposal several disciplinary measures from which to choose to discipline J.E. and M.E. (*Id.* at 7)

Finally, petitioners argue that respondent did not specify exactly what community service activities it would require, and that the imposition of a disciplinary requirement that J.E.

and M.E. must perform community service could cause irreparable harm because in a small community, such as this, community service could further stigmatize the students. (*Id.* at 8)

In its reply exceptions, respondent asserts, *inter alia*, that petitioners' use of citations to out-of-state cases have no precedential value in these proceedings. Further, respondent points out that *Weidemann, supra,* does not contain language to support the theory that a public agency has no discretion to impose a disciplinary measure that is not expressly delineated as an option in its policies or regulations, as petitioners suggest. Respondent also proffers that the authorities cited in petitioners' exceptions with respect to irreparable harm do not support the propositions for which they are presented. Therefore, in the absence of legal authority to support petitioners' position, respondent concludes, petitioners are not entitled to emergent relief from the community service aspect of the imposed discipline. (Respondent's Reply Exceptions at 1-3)

Initially, the Commissioner emphasizes that review of a motion for emergent relief occurs under the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

Upon a thorough review, the Commissioner has determined to affirm the ALJ's Order denying petitioners' application to stay J.E. and M.E.'s suspensions for the time period from October 3, 2000 through November 10, 2000. The ALJ determined that petitioners failed to demonstrate that they would suffer irreparable harm if the four remaining school days of their

suspensions were carried out.[2] The Commissioner agrees. Further, petitioners' application to resume school attendance on November 13, 2000 without having to submit the psychiatric evaluations required by respondent is granted. Like the ALJ, the Commissioner finds no probative evidence from which it could be inferred that the students are a danger to themselves or others.

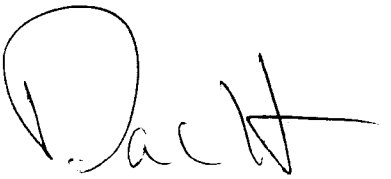
With respect to the requirement that petitioners perform community service, however, the Commissioner does not concur with the ALJ's determination granting emergent relief. While "community service" may not be listed as a specific penalty within the scope of the district's discipline policy, it is clear from the audiotape of the hearing, and from petitioners' exceptions at 5-6, that the type of "community service" envisioned as the penalty for petitioners' infraction (tasks such as scrubbing defaced desks, cleaning the school grounds, or collecting leaves, all at the now-restored building where the defacement at issue herein occurred) might very reasonably be viewed as falling within the ambit of the policy's "restitution and restoration" provision. Thus, the Commissioner cannot conclude, based upon the hyper-technical reading of the Board's policy proposed by petitioners, that petitioners have demonstrated a likelihood of success on the merits of their claim that the Board's actions were *ultra vires*, so as to warrant extraordinary restraint.

Accordingly, in all respects except its recommendation to stay petitioners' performance of community service, the recommended Order of the ALJ is affirmed for the reasons expressed therein. With regard to community service, the Order granting emergent relief is set aside, and petitioners are directed to perform such service as is assigned by the Board;

[2] The parties stipulated that J.E. and M.E. were receiving two hours of home instruction per school day during the suspensions. The record reflects that November 7, 9 and 10 were school holidays.

provided, however, that such service is of the extent and nature indicated on the record before the ALJ. The matter on its merits shall continue at the OAL for hearing on an expedited basis.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: DEC 01 2000

Date of Mailing: DEC 01 2000

[3] This decision, as the Commissioner's final determination on motion, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

393-00

IN THE MATTER OF THE TENURE HEARING	:	
OF JAMES WIDMANN, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF TRENTON, MERCER	:	DECISION
COUNTY.	:	

December 01, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8696-99

AGENCY DKT. NO. 293-9/99

JAMES WIDMANN,

Petitioner,

v.

SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: September 25, 2000 Decided: October 16, 2000

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 20, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10/16/00
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

10-17-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

SUMNERS GEORGE & DORTCH
A Professional Corporation
849 West State Street
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for Petitioner, Board of Education of the City of Trenton, Mercer County

IN THE MATTER OF THE TENURE CHARGES AGAINST JAMES WIDMANN, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : AGENCY DOCKET NO. 293-9/99 : OAL DOCKET NO. EDUTH 08696-99S : ***SETTLEMENT AGREEMENT***

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, James Widmann.

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 293-9/99, OAL Docket No. EDUTH 08696-999S; and

WHEREAS, the charges allege that on April 24, 1997, Respondent was arrested by the City of Trenton Police Department based upon an investigation from which it was alleged that he stole and/or unlawfully possessed stolen Trenton School District tools, equipment, and machines from the Trenton Central High School Vocational Department and used them for his personal use in Widmann's Garage, a body shop which he owned and operated; and

WHEREAS, as a result of budgetary constraints, Respondent's position as a Vocational Teacher-Auto Mechanics was abolished and he was terminated from employment from the Trenton Board of Education effective June 30, 1997; and

WHEREAS, on or about June 5, 1997, Respondent was admitted into the Pre-Tr Intervention Program as a result of the charges of official misconduct, ***N.J.S.A.*** 2C:30-2(a), and theft by unlawful taking, ***N.J.S.A.*** 2C:20-3(a); and

WHEREAS, on March 11, 1998, the charges of official misconduct and theft by unlawful taking against Respondent were dismissed as a result of his completion of the Pre-Trial Intervention Program; and

WHEREAS, on September 21, 1999, the Board certified tenure charges arising out of aforesaid allegations of official misconduct and theft; and determined that since Respondent has been terminated due to the abolishment of his position, there was no need to suspend him with or without pay based upon the tenure charges; and

WHEREAS, Respondent has not been returned to employment with the Trenton Board of Education or received any salary from the Board since the abolishment of his positi termination effective June 30, 1997; and

WHEREAS, in his answer to the tenure charges, Respondent filed a counterclaim alleging that subsequent to the abolishment of his position, the Board should have recalled him to employment because it had recalled other Vocational Education teachers in the School District who were terminated due to the same reduction in force that abolished/terminated Respondent's position and had less seniority rights and should not have been recalled instead of Respondent; and

WHEREAS, the parties acknowledge there is substantial evidence which is relevant to warrant this settlement agreement, in particular that:

1. Either party may be successful in pursuing their particular claims -- the Board in sustaining tenure charges and Respondent in sustaining his counterclaim that he is entitled to salary for employment for the 1998-1999 and 1999-2000 school year due to the failure to recognize his tenure/seniority rights by recalling him to employment;

2. Respondent has never been disciplined during his employment with the Board since it commenced October 19, 1987;

3. Respondent understands that the Commissioner of Education has a duty, pursuant to ***N.J.A.C.*** 6:11-3.6, to refer tenure decisions to the State Board of Examiners for possible suspension or revocation of his teaching certificate;

4. The expeditious resolution of this matter will save both parties the cost and uncertainty of continued litigation.

THEREFORE, in consideration of the foregoing, the parties agree that the matter should be resolved based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against the Respondent;

2. Respondent shall be paid $10,000 in lost wages subject to the appropriate employment employee deduction, thereby waiving his right to any salary covering his counterclaim that he should have been returned to employment for the 1998-1999 and 1999-2000 school years, as well as accumulated leave days;

3. Respondent agrees to submit a letter of resignation effective August 31, 2000.

4. The parties agree and covenant that neither party, nor any person, organization, or other entity on their behalfs will file any charge, claim, lawsuit against either party based upon the fact that the Board filed tenure charges or that Respondent defended against those charges.

5. The parties recognize that each of them had input into drafting this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafter(s).

6. The parties understand that this Agreement is contingent upon the approval of Administrative Law Judge Steven C. Reback and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal or administrative proceedings of any nature, and will be without prejudice to their positions in such proceedings, and that in such event, the parties may again attempt to settle the matter i manner which is satisfactory to the Commissioner of Education.

7. Respondent requests that the tenure hearing be held in abeyance in order to obtain approval of this Settlement Agreement by Administrative Law Judge Steven C. Reback and the Commissioner of Education, and he agrees that in accordance with ***N.J.S.A.*** 18A:6-14, he is not entitled to salary payments during the pendency of obtaining approval of this Agreement by the Administrative Law Judge and the Commissioner of Education, and if the Administrative Law Judge and/or Commissioner of Education reject this Agreement, he is not entitled to salary payments from the date of this Agreement until the time it takes for the Commissioner to render a decision on the merits of the tenure charges and the counterclaim regarding his employment rights and back pay.

8. The parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreement not expressed herein, and with the understanding that neither party is compelled to do so, and that by entering into this Agreement each party waives their right to a hearing and disposition on the merits of the charges.

Date

Abdul-Malik R. Ali, President
Trenton Board of Education, Petitioner

Date

Thomas W. Sumners, Jr., Esq.
Attorney for Trenton Board of Education

9/7/00
Date

Arnold M.Mellk, Esq.
Attorney for Respondent

9-7-00
Date

James Widmann
Respondent

OAL DKT. NO. EDU 8696-99
AGENCY DKT. NO. 293-9/99

IN THE MATTER OF THE TENURE HEARING	:	
OF JAMES WIDMANN, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF TRENTON, MERCER	:	DECISION
COUNTY.	:	

The record, Settlement Agreement and Initial Decision* issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: DEC 01 2000

Date of Mailing: DEC 01 2000

* The Commissioner notes that the Initial Decision has an inaccurate caption, which has been corrected herein.

394-00

DAVID SCHLESINGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the District's decision to withhold his salary increment for the 1998-99 school year was arbitrary, capricious and unreasonable.

In light of the testimony of witnesses, evaluations submitted and the record of the matter, the ALJ concluded that the Board's discretionary exercise of its statutory authority to withhold petitioner's salary increment for unsatisfactory performance should not be overturned. The ALJ concluded that petitioner did not prove that the withholding was improper. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3811-99
AGENCY DKT. NO. 399-9/98

DAVID SCHLESINGER,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: September 5, 2000 Decided: October 13, 2000

BEFORE **ELINOR R. REINER**, ALJ:

Statement of the Case

This is an appeal by a teacher from the decision of the State-Operated School District of Jersey City ("District") to withhold his salary increment for the 1998-99 school academic year pursuant to *N.J.S.A.* 18A:29-14.

Procedural History

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education on August 31, 1998. Count 19 of the multi-count petition alleged the wrongful withholding of the increment of petitioner, David Schlesinger. On September 21, 1998, the District filed its answer. On October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98. A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing. A hearing was held in the Schlesinger case, designated OAL Dkt. No. EDU 3811-99, on April 10 and 11, 2000. Witnesses and exhibits are listed in the attached appendix.

Findings of Fact

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the District submitted a detailed review of the testimony and proposed findings of fact, which I largely have adopted herein.

1. Petitioner has taught in the Jersey City School District for thirty-one years. Petitioner has a master's degree in supervision and administration, secondary.

2. During the 1997-98 school year, petitioner was assigned to teach first grade at Public School No. 15 in Jersey City. Prior to that, petitioner had taught all grades except grades one and two.

3. Petitioner was given a choice of teaching grade one or grade seven math for the 1997-98 school year and chose to teach grade one. Petitioner was

assigned to teach grade one when he returned to teaching at the beginning of the 1997-98 school year, after being on a medical leave of absence for the prior school year. He did not receive in-service training for this assignment prior to assuming it.

4. Petitioner's teaching performance at P.S. 15 was formally evaluated on two different occasions during the 1997-98 school year by Annie Graham, then principal of P.S. 15. Ms. Graham found petitioner's performance to be less than satisfactory on both occasions.

5. Ms. Graham has been employed by the District for twenty-one years and is presently principal of P.S. 12.

6. Ms. Graham held a staff meeting in September 1997, before school opened for the students, where she distributed a handbook and went over the rules and procedures. Ms. Graham also spoke to petitioner informally when she walked though the school about what she expected from a teacher.

7. On September 30, 1997, Ms. Graham observed petitioner's class from 9:05 a.m. until 10:00 a.m. When Ms. Graham entered the classroom, petitioner was reprimanding the students about germ prevention. Petitioner proceeded to have the students write down the date and then copy three sentences which she had written on the board. The writing activity lasted for most of the hour, except for about ten minutes, which petitioner spent discussing the "n" and "y" sounds and animal sounds with the students.

8. Petitioner's performance was evaluated in relation to five performance factors, which are listed on the observation report. The factors are: (1) Demonstrates proficiency in the subject matter; (2) Assesses needs and evaluates progress of the pupils; (3) Employs effective organization

and planning; (4) Utilizes effective instructional techniques; and (5) Addresses affective domain. Ms. Graham rated the petitioner's teaching performance on September 30, 1997, as less than satisfactory in all five factors.

9. Ms. Graham found that petitioner needed to improve his proficiency in the subject matter because he was not following his written lesson plan. Petitioner's plan indicated that he would be teaching vocabulary by use of sentence strips, but he did not do that. Instead, he had the students engaged in writing the date and then writing three sentences for a long period of time. The students wrote the date as "9/30/97" rather than properly writing it out as September 30, 1997. (The date "9/30/97" was written on the board.) The month should be written out for primary grade students because they need to learn how to spell the word for penmanship and writing skills. The students copied three sentences that petitioner had written on the board onto pieces of paper. This was a "Do Now" activity that should have taken no more than fifteen minutes, yet the students spent more than an hour on it.

10. Petitioner's performance was unsatisfactory in the area of assessing pupil needs and evaluating their progress during the lesson observed by Ms. Graham on September 30, 1997. Petitioner gave all the students the same writing activity. Some of the students finished their writing before the rest of the students, but petitioner did not give these students any follow-up activities, and the students began to engage in off-task behavior. The students in petitioner's class were not all on the same level, yet they had not been grouped. Petitioner had no grades in his roll book for any students. He had some papers in the students' folders, but these papers related to the daily activities and most of these papers were not graded.

11. Ms. Graham gave petitioner an unsatisfactory rating for organization and planning. Petitioner was not following his written lesson plan. Although

what was written in his plan book looked good, on this occasion he deviated from his plan and had the students engage in a lengthy writing activity. Further, he had no activities in his plan book for science or social studies.

12. Ms. Graham rated petitioner's instructional techniques as unsatisfactory during the class she observed on September 30, 1997. Petitioner not only deviated from his written lesson plan and never taught the vocabulary and sentence strips in his plan book, but also spent an hour on a writing activity that should have taken fifteen minutes. Although the students in the class were on different levels, petitioner had not grouped them, but had them all engage in the same activity.

13. Ms. Graham found that petitioner needed improvement in the area of affective domain because his interactions with his pupils were not conducive to learning. He even had masking tape around his desk, identifying his space. Petitioner had experienced discipline problems with the students and was wasting instructional time trying to discipline them. A main cause of the problem was petitioner's lack of organization. He was not following his plan and schedule, he had not tested and grouped students according to their varying levels, and he was not giving challenging work to the brighter students in his class.

14. Graham held a post-observation conference with petitioner on October 7, 1997, during which she reviewed her written evaluation report. She and petitioner talked about keeping roll books and plans up to date, about assessing students to identify their needs and grouping them and about the time it should take for various activities. Petitioner said that she was asking too much of him, to have grades recorded in his roll book and to keep his lesson plans up to date.

15. Ms. Graham conducted a second formal evaluation on November 19, 1997, from 9:45 a.m. to 10:45 a.m. Petitioner began with the story of the day, conducted a discussion, and then had the students write about the topic of being thankful. Petitioner had written on the board, "I'm thankful to God for . . . ."

16. Ms. Graham found that petitioner still needed improvement in the area of assessing the needs and evaluating the progress of his pupils. There were very few papers in the students' folders in the subjects of mathematics and reading. Folders should have had materials on all subjects because those papers would be used to assess the students and to plan lessons for them. Petitioner had administered very few tests to the students and had not given any major tests in reading or math.

17. Ms. Graham also found that petitioner needed improvement in organization and planning. He had not included his quiz on consonants in his lesson plan and had not written any objective for his lesson on the board so that his students would know what was to be taught.

18. Ms. Graham rated petitioner as needing improvement in the area of instructional techniques. Petitioner had the students spend over an hour discussing and writing about being thankful, an activity that should have taken no more than fifteen to twenty minutes. His quiz on consonants was good, yet he spent only ten minutes on it. Petitioner should not have referred to God in any part of his lesson, yet he had expressly written "thankful to God" on the board.

19. Ms. Graham conducted a post-observation conference with petitioner on December 1, 1997. She told petitioner that it was not appropriate to emphasize God in his teaching. They discussed the need to follow a schedule and the written lesson plans, the proper pacing of activities, and the ways that activities could be broken up and timed.

20. Ms. Graham also visited petitioner's classroom a number of times on an informal basis. Petitioner was having problems with his students' behavior and his approach to his students. He had placed masking tape around his desk and on the floor, to mark off his space and to keep the students away from his desk. Ms. Graham heard petitioner yelling at his students when she visited the petitioner's class informally, and even heard his yelling and screaming when she was in the area surrounding his classroom, in other teachers' rooms.

21. Dawn Reynolds has served as assistant principal of P.S. 15 since February 1993. She served approximately twenty-three years with the District, as a teacher of basic skills, an elementary school teacher, head teacher with the Adult Learning Center and assistant principal.

22. Ms. Reynolds conducted a formal observation and evaluation of petitioner on February 3, 1998, from 1:00 p.m. until 2:15 p.m.

23. Ms. Reynolds observed approximately twenty-one or twenty-two students in the class. Petitioner introduced a math lesson on subtraction and then proceeded to ask questions. Students in the front of the classroom were calling out answers, but other students were not participating and were off task, getting up to sharpen pencils, going into their desks and talking with one another. At the same time that the question-and-answer activity was being conducted by petitioner, a teacher assistant was in the room, checking homework, correcting papers and talking to the students. Ms. Reynolds found the activities of the teacher assistant added to the confusion by distracting the students, when not all of the students were being drawn into the lesson by petitioner.

24. On her formal observation report, Ms. Reynolds noted that petitioner's performance in the area of assessing student needs and evaluating their

progress was less than satisfactory and needed improvement. Petitioner was teaching a subtraction lesson to a small segment of students who were in the front of his class by asking them questions and allowing the students to call out answers. There was no structure to the activity, and it was difficult to tell whether any student had mastered the concept. Aside from this questioning, there was no other form of student assessment. Petitioner had work folders for students, but there was very little student work in them to show the progress of the students in the subject areas. Petitioner had no folders for any student for the required Basic Skills/Enrichment.

25. Ms. Reynolds gave petitioner an unsatisfactory rating for organization and planning. An objective was on the board, but the objective was from the previous day's lesson and not for the current math lesson. Petitioner was trying to teach the whole group and did not involve his teacher assistant in the lesson. Petitioner gave no direction at all to the teacher assistant. Instead, the assistant walked around aimlessly for a while and then started to correct homework while petitioner was teaching.

26. Ms. Reynolds determined that petitioner needed to improve his instructional techniques. Petitioner could have used his teacher assistant for small group instruction, but he did not involve his assistant. It was difficult to tell if the students who participated in the lesson truly understood it. Only six to eight students in the class were totally engaged in the lesson; the rest of the students were off task and received no value from the lesson.

27. Ms. Reynolds found that petitioner needed improvement in the area of affective domain because he had not met the needs of all the students by drawing all of them into the lesson and he had not properly addressed class rules. Written class rules were posted in the classroom but no consequences for breaking the rules were posted. Further, during Ms.

Reynolds' visit on February 3, 1998, petitioner took a math book away from one student for allegedly copying from another student, and thus made it difficult for the student to participate in the lesson.

28. Ms. Reynolds held a post-observation conference with petitioner on February 17, 1998, where she reviewed her observation report. Petitioner was not in agreement with the evaluation and refused to sign the report.

29. Ms. Graham recommended the withholding of petitioner's increment because of the problems with his performance. He had not kept his plan book up to date, he did not follow his written lessons and schedule, and did not treat his students with respect.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Schlesinger's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for

that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 50 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

Petitioner alleged that there was a serious question as to the motives and credibility of Ms. Graham, who had a personal predilection against him. Petitioner contends that any alleged deficiency in his teaching skill was the result of having students who were not on the same level and/or behaviorally challenged. He contends that the District has penalized him for the incorrigible behavior of the students and failed to properly prepare him to teach the first grade. Petitioner argues that the criteria and requirements were not made clear to him, nor were they clear to his only negative evaluator, Ms. Graham. He contends that Ms. Graham critiqued him not based upon objective district-wide criteria, but according to her own personal views of what a teacher should do. He further alleges that if the District had a fashion in which it wished roll books or plan books to be maintained, he should have been trained in that method. He further alleges that the District failed to establish the guidelines it uses to grant or deny increments. He argues that he should have been able to place on the record all the positive things he has done while a teacher in the District.

I have considered petitioner's arguments and conclude that the evidence simply does not substantiate his contentions. I cannot agree that the motives and credibility of Ms. Graham were insincere or that she had a personal predilection against him. Rather, I found Ms. Graham's testimony to be credible and worthy of belief. Additionally, I must point out that petitioner was also observed by Dawn Reynolds,

whose testimony was in concert with Ms. Graham's and was also credible and worthy of belief. In sum, there were three evaluations that supported the findings of fact here and they were of sufficient duration for the evaluators to make informed and reasonable decisions. Moreover, petitioner failed to demonstrate that the evaluators negatively critiqued him based upon their own personal views of what a first-grade teacher should do. In fact, the evaluations were based on effective district-wide requirements and petitioner failed to demonstrate that he was not properly advised of these requirements. He was so advised by Ms. Reynolds and also by Ms. Graham on two occasions. He was advised prior to the observations and after each evaluation. Petitioner's argument that the problems he encountered were the result of having students who were not on the same level and/or behaviorally challenged did not serve him well. There is no evidence to support this conclusion and it is clear that the discipline problems he experienced with his students were essentially of his own making. Moreover, for petitioner to argue that he was not properly prepared to teach the first grade is of no help. Not only did he request to teach the first grade, but having been a teacher for thirty years he should have possessed the requisite expertise to prepare to teach the first grade.

In sum, petitioner's effort to blame his failure to comply with the requirements of his job either on the evaluators who conducted the evaluations or other factors was unsuccessful. Petitioner failed to prove that it was unreasonable for Ms. Graham and Ms. Reynolds, who observed and evaluated his teaching performance a total of three times, to conclude that his performance was less than satisfactory.

Of import, his assertions were contrary to the testimony and evidence adduced by respondent's witnesses. Petitioner was evaluated on two occasions by Ms. Graham. Ms. Graham's testimony, as substantiated by her reports, was clear, specific, credible and worthy of belief. It demonstrated that petitioner properly received unsatisfactory ratings in assessing needs and evaluating progress of pupils, employing effective organization and planning and utilizing effective instructional techniques, and that he needed improvement in demonstrating proficiency in subject matter and addressing affective domain on the first observation. He continued to need improvement in

assessing needs and evaluating progress of pupils, employing effective organization and planning and utilizing effective instructional techniques when evaluated on the second occasion. Clearly, the evidence demonstrated that petitioner's teaching performance on the two occasions on which he was observed by Ms. Graham was less than satisfactory, as set forth above. Moreover, Ms. Graham attempted to advise petitioner of what was expected of him and make suggestions for his improvement. Petitioner failed to improve significantly, so that when he was evaluated by Dawn Reynolds some months later he continued to need improvement in assessing needs and evaluating progress of pupils, utilizing effective instructional techniques and addressing affective domain and was still unsatisfactory in employing effective organization and planning. The evaluation of Dawn Reynolds, as substantiated by her report, proved that petitioner continued to have the same problems that he had demonstrated when first observed by Ms. Graham in September.

Under the circumstances, I **CONCLUDE** that petitioner has not proven that the Board's decision to withhold his salary increment was arbitrary, capricious or unreasonable.

Order

It is hereby **ORDERED** that the relief requested by petitioner is denied and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 13, 2000
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

10-17-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

David Schlesinger

For Respondent:

Dawn Victoria Reynolds
Annie Graham

List of Exhibits

For Petitioner:

P-1 Memo to all instructional staff from Mrs. Graham, dated September 25, 1997 (five pages)

For Respondent:

R-1 Instructional Staff Observation Report for David Schlesinger, dated September 30, 1997 (four pages)

R-2 Instructional Staff Observation Report for David Schlesinger, dated November 19, 1997 (four pages)

R-3 Letter to Human Resources from David Schlesinger, dated December 8, 1997

R-4 Instructional Staff Observation Report for David Schlesinger, dated February 3, 1998 (three pages)

R-5 Letter to Mr. Donahue from David Schlesinger, dated March 1, 1998 (two pages)

R-6 Memo to David Schlesinger from Mrs. A. Graham, dated March 6, 1998

R-7 Instructional Annual Written Performance Report for David Schlesinger, dated May 11, 1998 (three pages)

R-8 Letter to David Schlesinger from Judi Granick, dated June 1, 1998

OAL DKT. NO. EDU 3811-99
AGENCY DKT. NO. 399-9/98

DAVID SCHLESINGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, which included a transcript of the hearing conducted at the OAL on April 10 and April 11, 2000, the Commissioner determines to affirm the Initial Decision. As noted therein, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. *See Kopera, supra.* Finding no cause to disturb the findings of fact, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet his burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: DEC 01 2000

Date of Mailing: DEC 11 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

395-00

JOHN TILI I,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

December 4, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7136-98

AGENCY DKT. NO. 155-5/98

JOHN TILLI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN,

Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Paul H. Green, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: October 16, 2000 Decided: October 18, 2000

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on July 27, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Settlement discussions were held and a settlement has been reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE — **MARGARET M. HAYDEN**, ALJ

Receipt Acknowledged:

DATE — DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE — ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
OCT 16 11 33 AM '00

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
TEN JAMES STREET
FLORHAM PARK, NEW JERSEY 07932
(973) 301-0001
ATTORNEYS FOR RESPONDENT

JOHN J. TILLI,

Petitioner,

-v.-

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY/ OFFICE OF ADMINISTRATIVE LAW

Agency Docket No. 155-5/98
OAL Docket No.

STIPULATION OF SETTLEMENT

The parties in the above-captioned matter hereby agree to settle same upon the following terms and conditions:

1. For the 2000-2001 and 2001-2002 school years, respondent Board of Education will continue to maintain petitioner at a salary level $3,154.00 below the maximum MA+30 step of the applicable teachers salary guide as negotiated between the Board and the Fair Lawn Education Association for each school year. The sum of $3,154 equals the amount of petitioner's salary increment withheld by the respondent for the 1993-94 school year.

2. If petitioner receives satisfactory or better annual performance evaluations from his supervisor(s) for the 2000-2001 and 2001-2002 school years, then respondent shall restore

petitioner to the full maximum MA+30 step of the then applicable teachers' salary guide on a prospective basis only, effective with the commencement of the 2002-2003 school year.

3. If petitioner does not receive satisfactory or better annual performance evaluations for both the 2000-2001 and 2001-2002 school years, then respondent will continue to maintain petitioner's salary at an amount $3,154.00 below the maximum MA+30 guide step until such time as petitioner has received two consecutive annual performance evaluations assessing his overall teaching performance as satisfactory or better, at which time petitioner will be prospectively restored to the full guide salary as set forth hereinabove.

4. Nothing herein shall be construed to limit respondent's right to withhold petitioner's salary and/or employment increments, if any, in future school years for any legitimate reason.

5. Petitioner, for and in consideration of the undertakings of the Board set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members (in their official and individual capacities), employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had or now has, or which his heirs, executors or administrators hereafter may have by reasons of any matter, cause or thing whatsoever, from the beginning of his employment with Respondent to the date of these presents, and particularly, but without limitation of the foregoing general items, any claims arising from or relating in any way to his employment relationship and/or affiliation with Respondent, including but not limited to, any claims which have been asserted or could have been asserted under any and all federal, state or

local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment with Respondent, with the following exceptions: claims arising under the Worker's Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1 *et seq.* and pension claims arising out of any §403(b) or other pension, retirement or annuity plan. Petitioner represents that as of the date of the execution of this Stipulation there are no such claims pending or presently contemplated.

6. The Board, for and in consideration of the undertakings of Petitioner set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Petitioner and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had or now has, or which its officers, members, employees and/or agents, its and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with the Board to the date of these presents, and particularly, but without limitation of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or affiliation with the Board, including but not limited to, any claims which have been asserted or could have been asserted under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of his employment in the Fair Lawn School District up to the present time

7. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would

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have any impact upon the present action. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

8. The Parties agree that this Stipulation may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by their representatives on the dates set forth below:

Schwartz Simon Edelstein Celso & Kessler
Attorneys for Respondent

By: _____
PAUL H. GREEN

DATED: ~~June 30, 2000~~ October 10, 2000

Springstead & Maurice
Attorneys for Petitioner

By: _____
ALFRED F. MAURICE

DATED: June 30, 2000

By: John J. Tilli
John J. Tilli
Dated: Wed., July 19, 2000

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OAL DKT. NO. EDU 7136-98
AGENCY DKT. NO. 155-5/98

JOHN TILLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: DEC 04 2000

Date of Mailing: DEC 04 2000

396-00

R. S., on behalf of minor child, M. S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE RAMAPO : DECISION
INDIAN HILLS REGIONAL HIGH SCHOOL
DISTRICT, BERGEN COUNTY, :

RESPONDENT. :

_____ :

September 28, 2000

OAL DKT. NO. EDU 1809-00
AGENCY DKT. NO. 66-2/00

R. S., on behalf of minor child, M. S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: DEC 05 2000

397-00

CYNTHIA MARSHALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 11828-99
AGENCY DKT. NO. 318-10/99

CYNTHIA MARSHALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 12/05/00

398-00

LEARLINE BEATY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

September 28, 2000

OAL DKT. NO. EDU 03823-99
AGENCY DKT. NO. 399-9/98

LEARLINE BEATY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 12/05/00

399-00

IN THE MATTER OF THE TENURE :
HEARING OF DR. ROBERT H. MANN, :
ASBURY PARK SCHOOL DISTRICT, :
MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

December 07, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6843-00

(On Remand EDU 10864-99)

AGENCY DKT. NO. 331-11/99

IN THE MATTER OF THE TENURE HEARING OF DR. ROBERT H. MANN, ASBURY PARK SCHOOL DISTRICT, MONMOUTH COUNTY

Kathleen Smallwood-Johnson, Esq., for petitioner

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: October 13, 2000 Decided: October 18, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Asbury Park Board of Education sought to remove Dr. Robert H. Mann, serving under contract pursuant to *N.J.S.A.* 18A:17-15 as superintendent of schools, prior to the end of the contract period. The matter was opened before the Commissioner of Education, *N.J.S.A.* 18A:6-9, and answered by the respondent.

The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case on December 10, 1999, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After a motion to dismiss three of the counts in the petition of appeal was denied and after four days of hearing and one day of settlement conferences, the parties reached an amicable resolution of the matter. On May 18, 2000, the terms of the settlement were read into the record. After being placed under oath, the respondent stated he fully understood and consented to all of the terms and conditions of the settlement. The Board's counsel represented that the Board had authorized her to enter into the settlement on its behalf and that the Board would meet that night to ratify the agreement.

On May 22, 2000, I received a certified copy of the Board's resolution of May 18, 2000 approving the settlement and typed and handwritten copies of the agreement. The latter had been signed in my presence, on May 18, 2000.

The agreement was reviewed, approved and forwarded to the Commissioner of Education, who remanded on July 7, 2000. I received the file on September 22, 2000. I held a meeting with counsel and they undertook to reform the agreement in accordance with the order of July 7 and the principles laid down in *In re Cardonick*, 1990 *S.L.D.* 842.

Aware that the Commissioner will carefully examine the factual circumstances surrounding each proposed settlement, the parties meticulously recite the operative circumstances, including that Asbury Park is a designated "Abbott" district, Dr. Mann's background and experience, the nature of the tenure charges and that there was reasonable cause to bring the tenure charges, but at the same time proving the tenure charges by a preponderance of the evidence was highly unlikely. The parties recognize that it would be in the best interests of all involved, including the pupils and citizens of Asbury Park to sever the employment relationship. From the record educed and the parties' recitation, I am convinced that Dr. Mann could not effectively perform his duties in the atmosphere that surely would prevail were he to return to the superintendency. This, combined with the fact that none of the charges involve moral turpitude, leads me to conclude that this agreement should be submitted to the

Commissioner of Education with the recommendation that it be approved. The parties cognize that the agreement cannot be effectuated prior to the Commissioner's approval.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

OCT 18 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10-23-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 24 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

STIPULATION OF SETTLEMENT AND AGREEMENT

THIS STIPULATION OF SETTLEMENT AND AGREEMENT, made this day of , 2000, by and between Asbury Park Board of Education, whose principle place of business is 407 Lake Avenue, Asbury Park, New Jersey 07712 and Dr. Robert Mann (hereinafter "Dr. Mann"), whose address is 110 Tanya Circle, Ocean, New Jersey 07712 if as follows:

RECITALS

WHEREAS, Asbury Park Board of Education is a public school district, which school district has been designated as an "ABBOTT" district and is required to comply with the rules and regulations as codified in NJSA 18A et seq and NJAC 16:9A entitled "ABBOTT Regulations" as well as all laws governing public schools as delineated in the State and Federal Codes; and

WHEREAS, Asbury Park Board of Education has a staff of approximately 600 and a student body of approximately 3700; and

WHEREAS, the district has three elementary schools (Bangs Avenue, Thurgood Marshall and Bradley), one middle school and one high school as well as the Goody School, the Pre-School Center, the Adult Learning Center and the Computer Center; and

WHEREAS, Dr. Robert Mann had been an educator and/or Administrator employed by the Asbury Park Board of Education since July 1, 1970; and

WHEREAS, Dr. Mann obtained tenure as the Assistant Superintendent of Asbury Park Board of Education in or around July 2, 1996; and

WHEREAS, On October 19, 1997 Dr. Mann was named Superintendent of Asbury Park School District; and

WHEREAS, on or about June 25, 1998 Dr. Mann entered into a contract with the Asbury Park Board of Education wherein Dr. Mann would be employed as Superintendent for a period of five years; and

WHEREAS, on or about November 2, 1999 the Asbury Park Board of Education authorized the Board Attorney to certify tenure charges against Dr. Mann; and

WHEREAS, the said tenure charges were filed with the Commissioner of Education on November 3, 1999; and

WHEREAS, the said tenure charges alleged that Dr. Mann failed to faithfully perform his duties and obligations as Superintendent, that he failed to keep the Board fully informed of all Administrative actions, that he failed to appropriately address issues surrounding student athletic eligibility, that he failed to address the State's Corrective Action Plan, that failed to advise the Board of the need to update the policy manual, that he failed to address state requirements for special education, that he failed to assign staff so as to achieve maximum effectiveness, and that he failed to ascertain that all teachers were properly certified; and

WHEREAS, the attorney for the Petitioner Asbury Park Board of Education forwarded all discovery requests to Respondent's attorney; and

WHEREAS, trial commenced in front of the Honorable Bruce R. Campbell, Administrative Law Judge, in May 2000; and

WHEREAS, the trial continued for four days during which time Petitioner called the Board President, the Board Vice President, and numerous Board Members to testify; and

WHEREAS, the Petitioner also called Dr. Vito Gagliatti, Mr. Gerald O'Malley, Mr. Francis McGorty, Mr. Angelo Rizzo and Dr. Guy Barabto who were special monitors from the Office of Commissioner of Education; and

WHEREAS, Petitioner and Respondent submitted over one hundred evidentiary exhibits; and

WHEREAS, after four days of trial that included testimony from state monitors and Board Members as well as cross examination of the aforesaid witnesses, it was acknowledged by the Petitioner and Respondent the following:

1. Petitioner had reasonable and probable cause to bring the tenure charges.

2. The testimony and evidence exhibits indicated that facts set forth in the tenure charges could not be provable.

3. All parties thereafter agreed that even though the charges could not be provable and the fact that the Respondent was a competent and capable Superintendent, it would be in the best interest of the students and citizens of Asbury Park as well as the Superintendent to allow the said Superintendent to resign from his position in consideration of the Asbury Park Board of Education making the payment of certain monies subsequent to the approval of the Court and Commissioner of Education and as set forth in detail hereinbelow.

NOW, THEREFORE, based upon the representations and covenants contained herein, the parties agree as follows:

a. Dr. Mann shall resign from his position as Superintendent effective June 30, 2000.

b. The Asbury Park Board of Education agrees to pay to Dr. Mann the sum of $310,000.00 distributed as follows:

$50,000.00, paid on or about June 1, 2000 for services previously rendered by Dr. Mann during the September 1999-June 2000 school year.

The sum of $260,000.00 to be paid in annual installments of $130,000.00. The first installment to be made within 30 days of approval by the Court and the Commissioner of Education of the within settlement and the remaining $130,000.00 to be paid on or before August 15, 2000.

c. The Asbury Park Board of Education and Dr. Mann acknowledge that the sum of $310,000.00 represents a compromise settlement of the contractual obligation existing between the parties and is further acceptable to both parties under the terms and conditions of the Superintendent's contract, past practice and policies of the District with regard to the severance of employment relationships with employees, including sick and vacation days; and the annuity provision of his contract.

d. The parties voluntarily entered into this agreement in good faith to resolve this matter and have been continuously represented by counsel.

e. The Asbury Park Board of Education additionally agrees to pay counsel fees of $40,000.00 to James E. Collins. This payment having been made pursuant to the receipt of an invoice for services by Asbury Park Board of Education.

f. The terms and conditions set forth immediately hereinabove had been approved by the Asbury Park Board of Education on Thursday May 18, 2000.

James E. Collins, Esquire
Attorney for Dr. Mann

Kathleen Smallwood-Johnson
Attorney for Asbury Park Board of Education

IN THE MATTER OF THE TENURE HEARING OF DR. ROBERT H. MANN, ASBURY PARK SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record of this remanded matter and the Initial Decision of the Office of Administrative Law (OAL) in the form of a Stipulation of Settlement and Agreement have been reviewed.

Upon careful and independent review of the terms of the settlement, together with the full record of this matter, the Commissioner is, once again, compelled to reject the agreement as it is currently structured, since it does not comport with the standards established by the State Board of Education for settlement of tenure matters. *In re Cardonick*, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). Specifically, although the Commissioner has no basis on which to reject the substantive terms of the Agreement, there is no indication, notwithstanding his prior direction, that respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. Such referral, the Commissioner notes, is not limited to instances where charges "involve moral turpitude" (Initial Decision at 2), but, rather, whenever a contested case before the Commissioner of Education results "in loss of tenure or dismissal of a teacher or teaching

staff member for inefficiency, incapacity, conduct unbecoming a teacher or other just cause ***." *N.J.A.C.* 6:11-3.6.

Moreover, in reviewing the within agreement, the Commissioner is compelled to remind this and other boards that, although a superintendent and local board may, at any time, *mutually agree* to terminate an employment contract entered into pursuant to *N.J.S.A.* 18A:17-15, *Harrington v. Board of Education of the Township of Clinton*, 95 *N.J.A.R.*2d (EDU) 535, 541 (1995), a board's decision to certify tenure charges to the Commissioner not only results in the dedication of significant administrative resources required to adjudicate such a matter, but necessarily brings any and all agreements originating therefrom within the scrutiny of the Commissioner in accordance with his exclusive jurisdiction to determine what constitutes grounds for a tenure dismissal, and whether tenure settlements are in the public's interest. (*Cardonick* at 849) Thus, where a board elects to certify tenure charges to the Commissioner, the Commissioner anticipates that such charges are fully investigated and evaluated, vis-a-vis the evidence thereto, *prior* to a board bringing the weight of the legal process down on the teaching staff member, since the "[c]ertification of tenure charges by a board of education is predicated on the board's belief that the charges *** and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. *N.J.S.A.* 18A:6-11." (*Cardonick* at 850) In the instant matter, notwithstanding that the Board saw fit to bring tenure charges against respondent seeking his removal, and to certify these charges to the Commissioner, based, *inter alia*, on numerous instances of his failing to perform duties, it now affirms that respondent "was a competent and capable Superintendent***." (Stipulation of Settlement at 3)

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected and the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement or expansion of the record to indicate respondent's understanding that this matter must be referred to the State Board of Examiners for possible revocation of certificate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: DEC 07 2009

Date of Mailing: DEC 07 2009

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

400-00

JULIE GRELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

December 7, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12131-99
AGENCY DKT. NO. 338-11/99

JULIE GRELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent

Alfred F. Maurice, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: October 11, 2000 Decided: October 19, 2000

BEFORE **MARGARET M. MONACO**, ALJ:

Petitioner filed an Verified Petition of Appeal alleging that she was improperly terminated by Respondent in violation of her tenure and seniority rights. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on December 30, 1999. A hearing was scheduled for July 25, 26 and August 7, 2000. Prior to the scheduled hearing, counsel advised the undersigned that a settlement had

been reached and the parties thereafter submitted the attached Negotiated Settlement Agreement and General Release setting forth the terms of the agreement.

I have reviewed the record and the terms of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 19, 2000
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

10-24-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADM. LAW
OCT 11 1 22 PM '00

NEGOTIATED SETTLEMENT AGREEMENT AND GENERAL RELEASE

WHEREAS Julie Greller (hereinafter "Petitioner") sued the Northern Valley Regional High School District Board of Education ("Respondent") in an action before the Commissioner of Education of New Jersey, Agency Docket Number 338-11/99, Office of Administrative Law Docket Number 12131-99N (the "Action"), and

WHEREAS Petitioner and Respondent seek to settle all disputes between them, and

WHEREAS, Respondent believes that it acted lawfully and properly in all respects, but wishes to avoid the legal fees and expenses that necessarily will result from further litigating this action. and

WHEREAS, Respondent expressly denies each and every allegation contained in the Action and further expressly denies that it has any liability for the claims alleged therein; and

WHEREAS, Respondent expressly denies any wrongdoing whatsoever including any conduct with respect to Petitioner and any violation of any statute, ordinance or law; and

WHEREAS, Petitioner and Respondent desire to reach an amicable and final resolution of all claims of Petitioner against Respondent, its officers, agents, representatives and employees, divisions, affiliated entities and its present and former officers, agents, representatives, employees and the agents, successors, assigns, trustees, heirs, administrators, executors, representatives and principals thereof (hereinafter referred to as "Releasees");

NOW THEREFORE, in consideration of the obligations set forth in this Negotiated Settlement Agreement and General Release (hereinafter the "Agreement and Release"), and in full settlement of all claims, Petitioner and Respondent agree as follows:

1. Without admitting any liability or wrongdoing whatsoever, Respondent agrees to pay Petitioner the sum of Twenty Thousand Dollars ($20,000.00) (hereinafter "The Sum") in the following manner: by check for $20,000.00 payable to "Julie Greller." This sum shall not be subject to any withholdings; petitioner shall be provided a 1099 Form by Respondent covering said amount.

2. Respondent further agrees to provide Petitioner with a letter of recommendation to be used to secure future employment. Respondent agrees that in responding to employment inquiries, it will limit its response to a discussion of Petitioner's performance of her job duties or to those topics discussed in the letter of recommendation.

3. Petitioner agrees and does indemnify and hold Respondent and Releasees harmless from and against any and all tax liabilities, interest and penalties that may be assessed or applicable deductions on the monies paid pursuant to the Agreement and

Release referred to in Paragraph 1 or satisfying any liens or judgments against Petitioner.

4. In exchange for the promises made by Respondent and outlined in Paragraphs 1 and 2 above, Petitioner further agrees as follows:

a. Petitioner shall dismiss with prejudice the Action. Petitioner hereby warrants, represents and certifies she has not filed or instituted (and no person or agency has filed or instituted on his behalf) any other complaints, petitions, suits, actions, charges, claims and/or proceedings against Respondent and Releasees (as defined herein) in any forum, which are currently active, other than the Action; and

b. Petitioner shall withdraw her demand for arbitration through the Northern Valley Education Association with respect to her employment and the termination of said employment.

c. Petitioner releases and forever discharges Respondent and Releasees from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, bonuses, controversies, agreements, promises, claims, charges, and complaints and demands whatsoever, whether in law or equity, which against the Respondent and Releasees, Petitioner and Petitioner's heirs, executors, administrators, successors, and assigns, may now have or hereafter can have, shall have, may have or may have had for, upon or by reason of any cause of thing whatsoever and shall not institute or be represented or participate in, nor submit or file, or permit to be submitted or filed on their behalf against Respondent and Releasees, any complaint, petition, suit, action, charge, claim or proceeding with any administrative agency, or court or other forum, under any federal, state or local laws or regulations, any claim arising under the Americans with Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 ("ERISA"), Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Acts of 1866, 1871 and 1991, including Section 1981 of the Civil Rights Act, the Family Medical Leave Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, the New Jersey State Labor Laws, the New Jersey Wage-Hour and Wage-Payment laws, the New Jersey Education statutes and regulations, and/or any other federal, state or local human rights, civil rights, wage-hour, pension or labor law, rule, statue, regulations, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation under such laws, or any claim of breach of any contract (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference

with contractual relations, wrongful or abusive discharge, assault, battery, defamation, prima facie tort, fraud, negligence, loss of consortium, or any action similar thereto against Respondent and Releasees, including any claim for attorneys' fees, based upon any conduct from the beginning of the world up to and including the date of this General Release, provided, however, that Petitioner does not release any claim of breach of the terms of the Agreement and Release between Petitioner and Respondent and Releasees. Thus, for the purpose of implementing a full and complete release and discharge of Respondent and Releasees, Petitioner expressly acknowledges that the Agreement and Release is intended to include in its effect, without limitation, all claims which Petitioner does not know or suspect to exist in Petitioner's favor at the time of execution hereof, and that the Agreement and Release contemplates the extinguishment of any such claim or claims; and

d. In the event that, for any reason, any complaint, petition, suit, action, charge, claim or proceeding covered by Paragraph 3c is pending or is instituted on her behalf, Petitioner shall immediately seek and obtain dismissal with prejudice of said complaint, petition, suit, action, charge, claim or proceeding. Should Petitioner fail to seek and obtain such dismissal, she will, at the option of Respondent and Releasees, be considered in breach of the Agreement and Release and shall be required to immediately return any and all funds and benefits received pursuant to the Agreement and Release; and

e. Petitioner acknowledges and agrees that in the event any charge, complaint, petition, action or proceeding was or is filed on behalf of Petitioner in any agency, court or other forum against Respondent and Releasees based on any conduct from the beginning of the world up to and including the date of the Agreement and Release, other than the instant action, Petitioner will not accept any award, recovery, settlement or relief therefrom; and

f. Petitioner shall comply with all other obligations provided for by the Agreement and Release.

5. Petitioner and Respondent agree that they will not at any time disparage each other or impugn the other party's reputation.

6. Petitioner shall not in any manner disclose, discuss, make any statements with regard to, or publicize (1) the fact that she pursued legal claims; (2) the fact that she retained an attorney to pursue such claims; and (3) the fact of or the terms of the Agreement and Release or other allegations of the Action or Counterclaims to any third party or the public at large, including, but not limited to any present or former employee(s) of Respondent and Releasees, except to state as follows: "the matter has been resolved to the satisfaction of the parties." As an exception to this provision, it is understood that Petitioner may provide information concerning this Agreement and Release or the allegations of the Action to her counsel; tax advisors or preparers, financial advisors (any) and as required by legal process such as subpoena; and Respondent and Releasees may

disclose information to its/their officers, directors, auditors and governing authorities for approval purposes and otherwise only on a need to know basis, or where it/they are otherwise legally obligated to do so. Additionally, if Petitioner is either required by law, legal process or subpoena to provide information related to the above-captioned matter or this Agreement and Release, she shall immediately notify counsel for Respondent by hand delivering or faxing notification or such legal process or subpoena to Cherie L. Maxwell of Sills Cummis Radin Tischman Epstein & Gross, and shall do so before responding to said legal process or subpoena in order to give Respondent and Releasees adequate opportunity to assert any interests it/they might have with respect to any production in response to said subpoena. Petitioner understands and agrees that should she violate the confidentiality agreement set out above, Respondent and Releasees shall be entitled to pursue any remedies for such violation, and any monetary relief shall not release Petitioner of any of her other obligations under this Agreement and Release; moreover, neither Respondent and Releasees' violation of this paragraph, nor Petitioner's pursuit of any remedies for such violation shall release Respondent and Releasees of any of its/their other obligations under this Agreement and Release.

7. Neither Petitioner's breach of any of the Paragraphs of the Agreement and Release nor Respondent's and/or Releasees' pursuit of the remedies of such breach shall release Petitioner from any of her other obligations under the Agreement and Release.

8. Upon receipt of the Agreement and Release executed by Petitioner, and the Stipulation and Order of Dismissal with Prejudice (attached hereto as Exhibit "A") executed by Petitioner and Respondent, by and through their attorneys, Respondent shall deliver the check with the sum referred to above as well as a finalized letter of recommendation provided that approval of this Agreement and Release is obtained from the Administrative Law Judge and the Commissioner of Education as set forth in paragraph 14 of this Agreement and Release.

9. The parties further agree that the Agreement and Release will be governed by the laws of the State of New Jersey and the parties will submit to the jurisdiction of the state and or federal courts or administrative agencies located within the State of New Jersey for the resolution of any dispute which may arise hereunder.

10. The parties further agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in the Agreement and Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims and rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties, and, if necessary, such provisions, terms, clauses, waivers and releases of claims and rights shall be deemed severable, such that all other provisions, terms, clauses, waivers and releases of claims and rights contained in the Agreement and Release shall remain valid and binding upon all parties, provided, however, that notwithstanding any other provision of the Agreement and Release, if any portion of the waiver or release of claims and rights is held to be unenforceable, Respondent and Releasees, at their option, may seek modification or severance of such portion or consider the Agreement and Release null and void.

11. The Agreement and Release sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between them, if any, pertaining to the subject matter thereof.

12. The parties further agree that the Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all the parties or their attorneys on their behalf, which agreement makes specific reference to the Agreement and Release.

13. Petitioner by signing the Agreement and Release acknowledges that she has had a full and fair opportunity to review, consider and negotiate the terms of the Agreement and Release, that she has been advised to seek and has sought the advice of an attorney in connection with her decision whether to accept the benefits that have been offered to her under the Agreement and Release, and has reviewed the Agreement and Release, and that she has signed the Agreement and Release freely and voluntarily, without duress, coercion or undue influence and with full and free understanding of its terms.

14. The effectiveness of this Agreement is contingent upon approval by the Administrative Law Judge and the Commissioner of Education.

15. Petitioner has 21 days to review this Agreement from the time of receipt and has reviewed it with an attorney of her choice. Petitioner has 7 days after she signs this Agreement to revoke it by notifying Cherie L. Maxwell, Esq., Sills Cummis Radin Tischman Epstein & Gross, P.A. in writing. This Agreement is not effective or enforceable until that 7-day revocation period has expired.

To signify their agreement to the terms of the Agreement and Release, the parties have executed the Agreement and Release on the date notarized below their signatures, which appear below.

Julie Greller

JULIE GRELLER, Petitioner

Dated: 9/12, 2000

SPRINGSTEAD & MAURICE
Attorneys for Petitioner

ALFRED F. MAURICE, Esq.

NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

By: _____

Dated: 10/6, 2000

SILLS CUMMIS RADIN TISCHMAN EPSTEIN & GROSS, P.A.
Attorneys for Respondent

Cherie L Maxwell

CHERIE L. MAXWELL, ESQ.

OAL DKT. NO. EDU 12131-99
AGENCY DKT. NO. 338-11/99

JULIE GRELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record, Negotiated Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: DEC 07 2000

Date of Mailing: [illegible]00

401-00

M.L., on behalf of minor child, S.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning grandparent challenged the Board's residency determination that her granddaughter was not entitled to a free public education in the District.

The ALJ dismissed the petition because of failure to prosecute by petitioner. The ALJ ordered petitioner to reimburse the Board a total of $7,264.95 for payment of the period of ineligible attendance in the District.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner directed petitioner to remit to the Board the sum of $7,264.95.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11822-99
AGENCY DKT. NO. 306-10/99

M.L., ON BEHALF OF MINOR CHILD, S.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

M.L., on behalf of minor child, **S.C.**, petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: September 28, 2000 Decided: October 19, 2000

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

On October 13, 1999, M.L. (petitioner) filed a letter petition with the State Department of Education (DOE) contesting a decision by the Township of West Orange Board of Education (respondent) that S.C. was not entitled to a free public education in West Orange.[1] On or about October 25, 1999, respondent filed an answer with the DOE, incorporating a claim for tuition reimbursement. The DOE transmitted the matter to the Office of Administrative Law (OAL) on November 18, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

[1] The pertinent transmittal sheet inaccurately references the minor child as M.L.

By letter dated January 14, 2000, this judge advised petitioner and counsel for respondent that a hearing was scheduled for September 28, 2000 and requested that the parties advise, as soon as possible, if they were not available for that date. No communications were received from petitioner regarding that letter, specifically, and no communications were ever received from petitioner, generally.

The OAL subsequently sent a Notice of Plenary Hearing (Notice), dated February 3, 2000, to the parties, advising that a hearing in the matter had been scheduled for 9:00 a.m. on September 28, 2000. The Notice stated, in part: "if you do not attend the hearing, the judge may dismiss your case or order that the action requested by the other party be granted." (Exh. C-2.)

Neither petitioner nor a representative on her behalf appeared at the hearing, and no communications were received by this judge from petitioner, nor on her behalf, regarding her non-appearance at the hearing. Petitioner was therefore deemed to have abandoned her case, *N.J.A.C.* 1:1-14.4(a), and her petition should be dismissed, *N.J.A.C.* 1:1-14.14. At respondent's request, an *ex parte* hearing was conducted regarding its requested relief. *N.J.A.C.* 1:1-14.4(c). The record was closed on September 28, 2000. In light of petitioner's abandonment of her case, the only question presented is whether respondent's requested relief should be granted.

FINDINGS OF FACT

Based upon a review of the entire record, I **FIND** the following to be facts.

L.C. and M.L. are S.C.'s mother and grandmother, respectively. L.C. has two children in addition to S.C. As of September 1999, M.L. resided in West Orange, New Jersey, and L.C., in East Orange, New Jersey.

On September 22, 1999, M.L. executed an Affidavit for Non-Resident Pupil Enrollment in support of an application to enroll S.C. in the public schools of West Orange pursuant to *N.J.S.A.* 18A:38-1. The affidavit stated, in part, that S.C., who was then seven years old, was residing with M.L., that M.L. would assume all personal obligations for S.C. relative to school requirements, and that S.C. was residing with M.L. because:

> Parent unable to care for her financially. Providing Mother has (2) other children to care for.
>
> [Exh. R-1 at 1.]

On September 22, 1999, L.C. executed an Affidavit of Parent, stating, in part, that she was not capable of supporting or providing care for S.C. because:

> No financial assistance a [*sic*] present time.
>
> [Exh. R-2 at 1.]

At the time, L.C.'s two other children resided with her and attended school in East Orange.

Sometime in September 1999, M.L. went to respondent's offices to enroll S.C. as a student in respondent's district. Respondent denied enrollment on the basis that petitioner did not present an economic family hardship. Petitioner appealed that determination to the DOE, and, as a result, S.C. was enrolled in respondent's district, pending resolution of the appeal. S.C. attended the Hazel Avenue School, a public elementary school in West Orange, from October 16, 1999, through the balance of the 1999-2000 school year, until June 21, 2000, a total of 165 school days.

S.C. is not enrolled in respondent's schools for the 2000-2001 school year. Transfer papers effectuating a transfer of S.C. to the East Orange school district were processed.

The total fee charged by respondent for out-of-district elementary students for the 1999-2000 school year was $7,925, which amount was based upon respondent's per elementary pupil spending. The applicable *per diem* rate was $44.03. Based on that rate, M.L. is liable to respondent for a total of $7,264.95 for the period from October 16, 1999, through June 21, 2000.

DISCUSSION

The Commissioner of the DOE generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Pertinent statutory provisions address residence requirements relative to attendance at local district schools.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including to individuals who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a).

Local school districts must also provide a free education to any person who is kept in the home of another person domiciled within the district and supported by such other person gratis, as if he/she were such other person's own child, upon the filing by that person with the board of education of a sworn statement. Such statement shall, if so required by the board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously through the school term. A copy of certain documents regarding residency shall also be filed. The parent/guardian shall file with the board of education a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely to receive a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. *N.J.S.A.* 18A:38-1(b)(1).

If in a board's judgment the evidence does not support the validity of a resident's claim, the board may deny admission to the child. The resident may contest such a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. The resident shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the statutory criteria. No child shall be denied admission during the pendency of such proceedings. If the child in question is then currently enrolled in the district, he/she shall not be removed during the period in which the resident may contest the board's decision nor during the pendency of the proceedings before the Commissioner. If in the judgment of the

Commissioner the evidence does not support the resident's claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. *Ibid.*

In light of petitioner's failure to prosecute her case, I am persuaded that respondent is entitled to reimbursement for the cost of the education provided to S.C. pursuant to the applicable statutory provision. In response to queries from this judge, respondent's counsel advised that respondent usually expects payment of such funds in one payment but will consider other alternatives if requested by the individual in question. In the absence of evidence regarding payment periods, I am persuaded that 60 days is a reasonable deadline for the payment of the amount in question.

CONCLUSIONS

It is hereby **CONCLUDED** that the petition filed by M.L. with the DOE on October 13, 1999 should be dismissed because of a failure to prosecute by petitioner; that respondent is entitled to reimbursement from M.L. in the amount of $7,264.95 for the cost of providing a public education to S.C. at the Hazel Avenue School for the period from October 16, 1999, through June 21, 2000; and that such amount should be paid to respondent within 60 days from the effective date of this decision.

ORDERS

It is hereby **ORDERED** that the petition filed by M.L. with the DOE on October 13, 1999 be and is hereby **DISMISSED** and that petitioner reimburse respondent a total of $7,264.95 within 60 days of the effective date of this decision, unless an alternative payment schedule is agreed to by the parties.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10-24-00

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2000

DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Witnesses

For Respondent:

Josefa Lopez

Exhibits in Evidence

C-1 Letter dated January 14, 2000

C-2 Notice of Plenary Hearing

R-1 Affidavit for Non-Resident Pupil Enrollment

R-2 Affidavit of Parent

R-3 Tuition Calculation

OAL DKT. NO. EDU 11822-99
AGENCY DKT. NO. 306-10/99

M.L., on behalf of minor child, S.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with and adopts the Initial Decision as the final decision in this matter for the reasons expressed therein by the Administrative Law Judge.

Accordingly, the Petition of Appeal is hereby dismissed and petitioner is ordered to remit to respondent the sum of $7,264.95 for the period of S.C.'s ineligible attendance in the West Orange School District.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: DEC 07 200

Date of Mailing: [illegible]00

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

403-00

LINDA PETERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

This matter originated in a State Board appeal of two letter decisions of the Commissioner which dismissed a two-count petition by a tenured speech correctionist who challenged the Board's action reducing her full-time position to part-time, twenty hours per week.

Citing N.J.S.A. 18A:28-5 and 28-9, the ALJ determined that the Board engaged in an illegal RIF by reducing petitioner's position from a full-time position to a part-time position without reducing the amount of work she was required to do. Because of this illegal RIF, the ALJ granted petitioner's Motion for Summary Judgment and ordered the Board to award petitioner back pay and other emoluments related to her position.

The Commissioner concurred with the ALJ and granted summary decision to petitioner insofar as she alleged violation of her tenure and seniority rights. The Commissioner directed respondent to pay petitioner all salary and emoluments owing and due her for the 1996-97 school year.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING PETITIONER'S MOTION

FOR SUMMARY DECISION

OAL DKT. NO. EDU 2990-98

AGENCY DKT. NO. 280-7/96

LINDA PETERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY AND LEO F. KLAGHOLTZ, COMMISSIONER OF EDUCATION, [1]

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Paul J. Carr, Esq., for respondent, Pinelands Regional School District

Jack S. Senechal, Deputy Attorney General, for the Commissioner of Education (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: October 11, 2000 Decided: October 24, 2000

BEFORE **STEVEN C. REBACK**, ALJ:

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[1] By letter of August 28, 2000, which was received by my office on August 31, 2000, Deputy Attorney General Jack S. Senechal advised me on behalf of the Commissioner of Education that "the Commissioner takes no position with regard to [issue] on motion". He then goes on to note, however, that insofar as the petitioner raises the question of whether the equivalency and waiver were properly granted the Commission reserves the right to brief this issue as necessary.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This motion was brought on behalf of the petitioner, Linda Peters, seeking summary decision and a declaration that the respondent Board's actions in reducing her position from a full-time to a part-time one violated her tenure rights. As a consequence she also seeks back pay, pension credit and all other emoluments of her position to which she would have otherwise been entitled for the period September 1, 1996 through June 30, 1997. For the following reasons the motion be and is hereby **GRANTED**.

This question arises out of a dispute between the Board of Education of the Pinelands Regional School District [Pinelands] and one of its middle/high schoolteachers, Linda Peters [Peters]. While the Commissioner of Education [Commissioner] was named as a party in Peters' Petition of Appeal, the Commissioner takes no position with regard to the question presented above. *See Letter from Jack S. Senechal, D.A.G., to the Honorable Steven C. Reback, A.L.J.*, dated Aug. 28, 2000, at 1. The following facts are adopted exclusively from Peters' Brief in Support of Summary Judgment.

Peters, who holds an educational services certificate with a speech language correctionist endorsement, has been employed by Pinelands since September of 1986 and is a tenured teacher. During the 1995-96 school year, Peters worked thirty-six hours and fifteen minutes a week, and her job duties included, but were not limited to: (1) scheduling and implementing speech/language therapy sessions for classified students; (2) evaluating and re-evaluating those students to determine both their eligibility to receive speech/language therapy and whether each student's Individual Education Plan [IEP] was adequate as per State and Federal law; (3) classroom observations and screenings of students as per State mandate; (4) formulating students' speech IEPs; (5) drafting evaluation reports; (6) attending annual IEP meetings to determine students' current educational programs and address their program needs for the following school year; and (7) attending transitional conferences with each of Pinelands four kindergarten through sixth grade sending districts to formulate IEPs for incoming seventh graders.

On or about February 1, 1996, Pinelands applied to the Commissioner for a waiver that would allow it to deviate from the special education program criteria established in N.J.A.C. 6:28-4.3(a)(1),[2] which required that speech language services be provided either individually or in groups of not more than three students. The Commissioner granted this waiver, and it authorized Pinelands to increase the size of speech language services groups to no more than five students, but neither the Commissioner's waiver nor Pinelands' waiver request made reference to a reduction in Peters' employment.

Based on this waiver, Pinelands reduced Peters' position for the 1996-97 school year to twenty hours per week, with a commensurate reduction in her annual salary. There was, however, no comparable reduction in Peters' assigned caseload and job responsibilities for the 1996-97 school year. Peters expressed her concern about the significant time reduction in which she would have to complete her job, and she suggested to Pinelands that it should notify the parents of special education students about how the waiver would impact the students' IEPs. Pinelands responded that Peters should revise the IEPs to reflect whether the student would receive individual or group instruction, rather than the size of each group.

Peters filed a Petition of Appeal with the Commissioner in July of 1996, alleging that Pinelands had inappropriately used the special education waiver to effectuate an improper reduction in force [RIF] in violation of her tenure rights under *N.J.S.A.* 18A:28-5. In that petition, Peters seeks reinstatement to a full-time position with all back pay and other emoluments of that position. Peters also alleges that the Commissioner did not grant Pinelands' waiver for the purposes authorized by *N.J.A.C.* 6:3A-1.1,[3] and she seeks an order declaring the waiver null and void.

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[2] Now codified at *N.J.A.C.* 6A:14-1(h)(1).

[3] Now codified at *N.J.A.C.* 6A:5-1.1 to –1.5, eff. June 8, 2000. While Peters bring forth this argument in support of her overall position, it need not be addressed for several reasons. First, a disposition of this case can be effectuated without discussing whether or not Pinelands illegally used the waiver. As discussed *infra*, the penultimate issue is whether Peters was the subject of an illegal RIF when her position was reduced from full-time to part-time status, and the use of the waiver is in no way determinative of that outcome. Second, the Commissioner has stated that "insofar as [Peters] raises the question of whether the . . . . waiver was properly granted, the Commissioner reserves the right to brief the issue if necessary." *Letter from Jack S. Senechal, D.A.G., to the Honorable Steven C. Reback, A.L.J., supra,* at 1. If this case can be determined without discussing the waiver, there will be no need for the Commissioner to brief this issue. Third, the waiver expired at the end of the 1996-1997 school year, so the issue is most probably moot. Finally, the waiver provision is a regulation that affects the rights of not only the litigants, but also the authority of the Commissioner and the State Board of Education as well. Thus, the matter is adequately

In September of 1996, Peters began the 1996-97 school year working twenty hours a week, in four day a week increments. While her work hours and salary were half as much as they were during the 1995-96 school year, neither her student caseload nor her job responsibilities decreased, and she met with more students during each class period than she had the previous school year. One month into the school year, Pinelands adjusted Peters' work hours from twenty to twenty-three hours a week with an accompanying salary modification in an attempt to address lunch, travel, and other time issues. Peters contends that this adjustment was insufficient to enable her to perform all of her job responsibilities in a complete and proper manner.

On or about December 5, 1996, a request was accepted by the Office of Special Education of the New Jersey Department of Education [OSE] to conduct an investigation into whether the Commissioner's waiver was being utilized to alter the speech services required by students' IEPs, and if so, was that permissible under the law. The OSE investigation, issued on March 18, 1997, revealed that two students were not receiving instruction in accordance with their IEPs, which specified that they receive their instruction in smaller groups than their current instruction groups. The OSE investigation also revealed that the change to student services had not been made by the IEP team, but was instead a unilateral decision made by either Pinelands' director of special services or the speech-language therapist. Because of these violations, OSE ordered Pinelands to develop a Corrective Action Plan to immediately correct the problem with the two affected students and ensure that parents were notified of any other proposed IEP changes by Pinelands.

In response to the report, Peters' workweek increased on April 24, 1997 from twenty-three to thirty-two hours until June 30, 1997, with a corresponding increase in her salary. Even so, her workload did not change throughout the entire 1996-97 school year. In April of 1997, Pinelands informed Peters that she would be reappointed to her full-time position for the 1997-98 school year, where she has been employed ever since. The Commissioner's waiver expired at the end of the 1996-97 school year.

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resolved under the statutes and regulations governing tenure without even reaching the issue of the validity of the waiver.

The submissions of the motion *sub judice* was completed on October 11, 2000 when my office received Ms. Naprstek's response to the August 3, 2000 letter submitted by Mr. Carr.

LITIGANTS' ARGUMENTS:

Peters' argues that Pinelands violated her tenure rights by conducting an illegal RIF during the 1996-97 school year. She seeks an award of back pay, pension credit, and all other such emoluments of her position to which she was entitled for the period of September 1, 1996 through June 30, 1997. Moreover, Peters argues that summary decision is proper in this case because the parties do not disagree about any salient, material facts.

Peters' argues that because she is tenured, her position is covered by *N.J.S.A.* 18A:28-5, which protects tenured staff from dismissal or a reduction in compensation except for inefficiency, incapacity, conduct unbecoming or other just cause. Peters also argues that this statute protects teachers when school districts abolish teaching positions for reasons of economy under *N.J.S.A.* 18A:28-9. Peters alleges that while Pinelands could have either abolished her position and reassigned her duties among remaining staff, provided that the remaining staff is properly certified, or reduced her full-time position to part-time, which would be an abolishment of a full-time position and the creation of a part-time one pursuant to a RIF, what Pinelands actually did was reduce the amount of time she was allowed to work without reducing the amount of work that she was required to do.

Peters acknowledges that Pinelands believed its actions were legally permissible in light of the Commissioner's waiver. Peters argues, however, that Pinelands misused the waiver, and when that misuse was discovered and corrected, she received an additional nine hours a week to complete her tasks. Pinelands also failed to reduce her duties to correspond with the reduction in her workweek. Peters argues that this action alone evidences the fact that the duties she was carrying out during the 1996-97 school year required much more time than Pinelands allotted.

While Pinelands admits that Peters' hours and compensation were reduced, it opposes Peters' motion for summary decision. First, Pinelands argues that the Commissioner's waiver was intended to provide local school districts with immediate relief from the rules and

regulations promulgated by the State Board of Education. The Commissioner granted this waiver to no less than eight school districts pursuant to the authority invested in the Commissioner under N.J.S.A. 18A:28-9. Pinelands explains that it requested the waiver in an attempt to provide economic relief within the district, which allowed it to increase the number of students per class and reduced the need for full time instruction from Peters.

Second, Pinelands argues that Peters took it upon herself as a child study team participant to unilaterally impose her own recommendations in developing IEPs to meet the needs of individual students. As a result of this, Pinelands argues that Peters created more work for herself than Pinelands had assigned, which was contrary to the decision by the Commissioner granting the waiver for the purpose of economically relieving Pinelands. Because of this, Pinelands argues that Peters comes before the OAL with unclean hands because she hindered its legal rights and established her own cause of action. In response, Peters contends that in her position she was required, pursuant to *N.J.A.C.* 6A:14-3.7, to evaluate students and make recommendations as to their speech language needs, although she has no unilateral authority to make any decisions. Because of this State mandate, Peters argues that Pinelands cannot support its claim that she comes before the OAL with unclean hands.

ANALYSIS

When deciding a motion for summary decision, the following regulation applies:

> At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein. . . . The decision sought may be rendered if the papers and discovery, . . . together with [any] affidavits, . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue, which can only be determined in an evidentiary proceeding. . . .
>
> [*N.J.A.C.* 1:1-12.5(a), (b).]

Under this regulation, which is akin to the judiciary's motion for summary judgment, *see R.* 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented,

when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533-34. Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" *Id.* at 529.

As a preliminary matter, Pinelands' argues that summary decision is not proper at this time because the issue of whether Peters hindered its legal rights and established her own cause of action remains in dispute. Because Pinelands offers no specific facts to support its claim that Peters implemented her own recommendations unilaterally, it has not demonstrated that the evidence presents a sufficient disagreement on the issue. As the Supreme Court in *Brill* explained, merely providing a blanket statement that a fact is disputed is not enough for a party to avoid summary decision on this issue.

Moreover, Peters was required by State regulation to complete the very tasks that Pinelands claims she used to establish her own cause of action. The regulation that Peters relies on is a multi-faceted, highly detailed scheme that mandates both how a student's IEP is to be created, the staff required to be on the IEP team, and what the IEP team must consider when creating an IEP. *See N.J.A.C.* 6A:14-3.7. Peters is a member of the IEP team when a student has speech language needs. When developing an IEP, the regulation states that the IEP team "shall" consider a myriad of factors including: The strengths of the student and the concerns of the parents; the results of an initial or most recent student evaluation; positive behavioral interventions to suppress behavior impeding a student's education; the student's language needs; the needs of a blind or visually impaired student; the student's communication needs; the needs of a deaf or hearing impaired student; whether the student requires additional technology devices to help further their education; and the student's need for technical consultation from State agencies providing transitional services. *N.J.A.C.* 6A:14-3.7(c)1-9; *see also N.J.A.C.* 6A:14-3.7(e) (requiring that a student's IEP for speech language services shall consider the factors set forth in *N.J.A.C.* 6A:14-3.7(c), as well as the factors set forth in *N.J.A.C.* 6A:14-3.7(d)).

It is undisputed that Peters worked with the same amount of students during the 1996-1997 school year, and that she worked to satisfy the regulatory requirements outlined above. Peters is also under a mandate to be involved in the annual IEP evaluation of students in pre-school and elementary school, and she fulfilled this task as well. *See N.J.A.C.* 6A:14-3.7(h) (mandating that pre and elementary school IEP review "shall include input from the staff of the secondary school). Thus, the regulation supports Peters' position that she was required to do the very tasks that Pinelands has characterized as extra work. That conclusion, coupled with the fact that Peters could not complete her work within the time given by Pinelands, which Pinelands recognized when it increased the amount of time in which she could work in the middle of the school year, is overwhelming evidence that that Peters was at the very least doing the same amount of work as a part-time teacher that she had done while working full-time. Thus, Peters has demonstrated that the evidence is so one-sided that she must prevail as a matter of law.

The only question that remains in this case is whether Peters is the victim of an illegal RIF, and if so, is she eligible for back pay and other emoluments related to her position. In determining this, an analysis of two competing statutory provisions is required; the tenure protections afforded school employees and the RIF interest of school districts. *Di Maggio v. Board of Educ. of Trenton,* EDU 6389-97, Initial Decision (May 24, 1999), *rev'd,* Comm'r (July 8, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>.

The relevant tenure statute mandates that:

> [t]he services of all teaching staff members employed in [a variety of positions including] such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, [with certain exceptions], shall be under Tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for [a statutorily prescribed period].
>
> [*N.J.S.A.* 18A:28-5.]

See also Spiewak v. Board of Educ. of Rutherford, 90 *N.J.* 63, 67 (1982) (holding that both remedial and supplemental instructors can acquire tenure). As for the school district's RIF interest, State statute mandates that:

> [n]othing in this title or any other law relating to Tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> *[N.J.S.A.* 18A:28-9.]

While it is "simply impossible to reconcile all of the many inconsistent decisions" interpreting these two statutes, the conflict that is created can seriously impact issues such as the length of the work year and salary entitlements of school employees. *See Di Maggio v. Board of Educ. of Trenton,* EDU 6389-97, Comm'r (July 8, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. For example, if an employee can prove that he/she was the victim of an illegal RIF, that employee may be eligible for: (1) an increase in his/her current salary; (2) an entitlement to back pay based on the amount of money he/she should have been paid as a full-time employee minus what he/she was actually paid as a part-time employee; and (3) post-judgment interest as an equitable matter. See Bassett v. Board of Educ. of Oakland, 223 *N.J.Super.* 136, 142-44 (App. Div. 1988); see also Popovich v. Wharton Bd. of Educ., 1975 *S.L.D.* 737, 745 (holding that a district, which engaged in an illegal RIF of a senior music teacher when it reduced her employment from full to part-time status while retaining a junior music teacher at full-time status, was required to pay the senior music teacher her salary and other emoluments equal to the difference of pay she actually received versus what she would have been provided).

In determining whether a RIF violates an instructor's tenure rights, the New Jersey Supreme Court has "recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely 'for reasons of economy.'" *Impey v. Board of Educ. of Shrewsbury,* 142 *N.J.* 388, 399 (1995). "Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a

position genuinely advances the goals of economy and efficiency and was undertaken in good faith." *Id.* at 399-40. Substance, rather than the form of a change in employment, is the controlling factor in making this determination, and if a position is replaced with an identical position but a different title, that action does not constitute a valid RIF. *See Viemeister v. Prospect Park Bd. of Educ,* 5 *N.J.Super.* 215, 218 (App. Div. 1949); *see also Bassett, supra*, 223 *N.J.Super.* at 143 (explaining that *N.J.S.A.* 18A:28-5, because of its remedial purpose and beneficent ends, must be liberally construed").

In the present case, Pinelands tried to effectuate a RIF in which Peters' full-time position was reduced to a part-time position. A District may reduce an instructor's position to part-time status "only if it seeks also to diminish the substantive duties" of that instructor. *Cochran v. Watchung Hills Reg'l Bd. of Educ.*, 4 *N.J.A.R.* (EDU) 163, 175, 177 (1983), *adopted,* State Bd. of Educ., 1985 *S.L.D.* 1878, 1880; *see also Wexler v. Hawthorne Bd. of Educ.,* 1976 *S.L.D.* 309, 313 (holding that a RIF of a French teacher to part-time status was proper due to the fact that enrollment in the district's French program had declined to the point where it was no longer economically feasible to maintain a full-time French position). Districts may not, however, engage in a "sham RIF" by abolishing an instructor's full-time position and then offering that employee a part-time position that requires the employee to work the same or more hours. See Markowski v. Board of Educ. of Cape May County, Special Serv. Dist., EDU 00309-99, Initial Decision (Feb. 4, 2000), <http://lawlibrary.rutgers.edu/oal/search.html> (explaining that a district "may not legitimately require an employee to work for the same or more duty periods which it previously recognized to be a full-time load for less pay simply by calling the full-time employment "part time"); see also Diglio v. Board of Educ. of the River Dell Reg'l Sch. Dist., 1980 *S.L.D.* 547, 551-52 (holding that a teacher who, after working in a district full-time for several years and who then was reassigned to part-time status, was subjected to an illegal RIF because he worked the same amount of duty periods as a part-time teacher that he had when he was a full-time teacher).

Clearly, Pinelands has violated Peters' tenure rights by engaging in a "sham RIF." While Pinelands did in fact reduce the amount of hours that Peters was to complete her work, it made no move to reduce her workload. Pinelands used the Commissioner's waiver to enlarge the size of speech language therapy classes from two or three students to five students in an attempt to

reduce the amount of classes that Peters would teach each day, but it did not reduce the actual amount of students that Peters taught. This fact is penultimate because Peters is mandated by State regulation to complete a complex series of evaluations for each student she is working with, not for each class she teaches. The form of the change in Peters' working condition may have been a reduction in hours, but the substance of the change is that Pinelands is asking Peters to do the same amount of work as a part-time employee that she did as a full-time employee. Just as the districts in *Markowski* and *Diglio* engaged in illegal RIF's when they required teachers reduced to part-time status to work the same amount of duty periods as they had when they were full-time employees, Pinelands has engaged in an illegal RIF because it required Peters to do the same amount of work that she had done as a full-time employee, but only paid her as a part-time employee.

Pinelands' economic justification is lacking as well. While there may be an issue as to whether Pinelands correctly used the Commissioner's class size waiver properly, the disposition of that issue does not affect the outcome of the present case. Even if that wavier is valid, Pinelands must still demonstrate that Peters' RIF genuinely advances the goals of economy and efficiency and was undertaken in good faith. Instead, Pinelands argues that because it was suffering from economic hardships, the Commissioner's waiver gave it *carte blanche* to violate Peters' tenure rights as it saw fit. That argument should not be adopted because it is inconsistent with the tenure protections afforded to employees under *N.J.S.A.* 18A:28-5, the appropriate reasons for initiating a RIF under *N.J.S.A.* 18A:28-9, case law, and administrative decisions.

CONCLUSION

While it would have been proper for Pinelands to either reduce Peters' position from full-time to part-time based on a corresponding reduction of students requiring speech therapy, Pinelands engaged in an illegal RIF by reducing her position from full-time to part-time without reducing the amount of work she was required to do. Because of this illegal RIF, Peter's motion for summary judgment should be granted, and she should be awarded back pay and other emoluments related to her position.

Accordingly it is **ORDERED** that the petitioner's motion for summary decision be and is hereby **GRANTED**. It is therefore further **ORDERED** that respondent, Board of Education of the Pinelands Regional School District is **ORDERED** to award petitioner back pay, pension credit and all other emoluments of her position to which she would otherwise have been entitled had she been employed full-time for the period September 1, 1996 through and inclusive of June 30, 1997.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/24/00
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

10-26-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

APPENDIX

No witnesses

No exhibits

OAL DKT. NO. EDU 02990-98
AGENCY DKT. NO. 280-7/96

LINDA PETERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon full review of the record and, having carefully and thoroughly considered the factual circumstances unique to this matter, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge that respondent award to petitioner back pay and emoluments, essentially for the reasons set forth in the Initial Decision.

Accordingly, summary judgment is granted to petitioner insofar as she alleges violation of her tenure and seniority rights. Respondent is, therefore, ordered to pay to petitioner all salary and emoluments owing and due her for the 1996-1997 school year.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: DEC 11 2000
Date of Mailing: DEC 11 2000

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

404-00

HIWATHA GREEN-JANVIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, JAMES HERZOG, DANIEL GALLAGHER AND WILLIAM STEELE, PRINCIPAL, individually and jointly,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged the Board's action to eliminate her nontenured position as Chief of Center for Safety and Security.

The ALJ found that the Board was in a financial crisis in the 1997-98 school year and opted for a reduction in force. Thus, the ALJ determined that the Board's action to terminate petitioner's employment was not arbitrary and unreasonable and did not violate the New Jersey Law Against Discrimination. Moreover, the ALJ concluded that the Board properly terminated petitioner's employment by the terms and conditions of the contract entered into by the parties. Petitioner had 30 days notice, ample time to exhaust her vacation days before the effective date of her termination. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own with modification. The Commissioner concurred with the ALJ that petitioner failed to show by a preponderance of credible evidence that the Board's action to abolish her position was arbitrary and capricious, that there was discriminatory activity and that the Board failed to provide 30 days notice. The Commissioner, however, noted that by acknowledging that it awarded vacation days to petitioner as a 12-month employee, the Board conceded that it provided benefits to petitioner which were not specified in her contractual agreement. The Commissioner directed the Board to compensate petitioner for any unused vacation, sick or personal days, if so provided for in the policy or agreement applied to her.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8904-98

AGENCY DKT. NO. 430-9/98

HIWATHA GREEN-JANVIER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY; BERT LOPEZ, PRESIDENT, JAMES HERZOG; DANIEL GALLAGHER AND WILLIAM STEELE, PRINCIPAL, INDIVIDUALLY AND JOINTLY,

Respondents.

Gregory C. Johnson, Esq., for petitioner

Michael C. Epps, Esq., General Counsel, for respondents

Record Closed: August 14, 2000 Decided: October 24, 2000

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination by the Board of Education of Atlantic City (Board), specific members of the Board and the Board's High School Principal, to cause her non-tenured position as Chief for the Center for Safety and Security to be eliminated.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15; *N.J.S.A.* 52;14F-1 to -13, and under the jurisdiction of the Commissioner of Education (Commissioner), pursuant to *N.J.S.A.* 18A:6-9 and 18A:6-19 to-25. The hearing was held on May 10, 13, 1999, September 7, 1999, and May 1, 2000. The parties requested, and were granted leave to submit post-hearing briefs and memoranda. The hearing record closed on August 14, 2000. Extensions to render this initial decision were approved.

ISSUES

The issues to be determined by this administrative tribunal, as agreed upon by the parties, are these:

1. Whether the Board's action to terminate petitioner's employment position was arbitrary and capricious?

2. Whether, subsequent to her termination, the Board properly compensated petitioner for her vacation time and compensatory time to which she is entitled?

3. Whether the Board's decision to eliminate petitioner's employment position was discriminatory and in violation of her New Jersey law Against Discrimination (LAD)?

4. Whether the Board retaliated against petitioner for her association with the Board's former Superintendent of Schools, in violation of petitioner's constitutional right of freedom of association?

STIPULATION OF FACTS

The parties stipulated to the following facts, which were spread on the hearing record, as follows:

Petitioner, Hiwatha Green, and respondent Atlantic City Public Schools, et al., stipulate to the following facts in the above matter as undisputed:

1. The petitioner, Hiwatha Green-Janvier, was hired by the respondent, Atlantic City Public Schools, on October 27, 1997, in the position of Chief of the Center for Safety and Security.

2. Petitioner Green-Janvier was in charge of all district security staff, including staff assigned at the Atlantic City High School ("ACHS").

3. Petitioner Green-Janvier's annual salary was $63,000 for the 1997-98 school year.

4. On or about May 21, 1998, the Board approved a final budget that funded the petitioner's salary and benefits. The respondent's budget was approved by the County Superintendent.

5. Petitioner Green-Janvier received an employment contract for the 1998-99 school year. The petitioner signed the contract on May 15, 1998, and returned it to the District's Human Resources Office.

6. At the Board meeting on June 23, 1998, Acting Superintendent Campbell recommended that the Board not layoff the petitioner because her position was necessary for district security operations.

7. At the Board meeting on June 23, 1998, Acting Superintendent Campbell spoke in public. Ms. Campbell stated to the Board that there were two positions she was not recommending be cut, Chief of Security and the Organizational Specialist.

Delois Campbell stated:

> The Chief of Security, that is the position that I'm recommending we keep. This particular person plans, coordinates, monitors and supervise(sic) the security operation, she provides training for the security guards. She schedules regular meetings with safety and personnel. She works with community based agencies to deal with safety related issues. She works and coordinates the entire safety security staff that we have here in Atlantic City.

8. Respondent Kelly made a motion, and seconded by Board member Gallagher, to adopt a Resolution No. 98 6B 57, to abolish several positions, including petitioner Green. The resolution was approved by a seven to three margin.

9. Petitioner Green received a letter notifying her of the layoff, as a "reduction in force," on or about June 24, 1998, terminating her employment with 30 days notice.

10. On April 21, 1998, the voters defeated the school budget. On May 19, 1998, the Board voted to approve the cuts to the budget approved by City Council, and to submit it to the County Superintendent.

The parties subsequently stipulated to the following:

11. Petitioner started work for the district in October 1997. As a 12-month employee, the petitioner was entitled to the accrual of vacation time at 1.6 per month (from November 1997 to June 1998) or 13.33 vacation days for the 1997-98 school year.

12. The respondent did not pay petitioner for her accumulated vacation days.

I hereby adopt, by reference, the above-stipulated facts as **FINDINGS OF FACT**.

SUMMARY OF THE RELEVANT TESTIMONY

Petitioner testified on her own behalf asserting, among other things, that she was employed by the former Superintendent of Schools, H. Benjamin Williams, with whom she had worked when Dr. Williams was employed by the Board of Education of the City of Paterson, Passaic County, as its Assistant Superintendent of Schools.

Petitioner's employment experience prior to her employment with the Board included, among other things, United States Department of Justice, Immigration and Naturalization Service; United States Department of Justice, Community Relations Service; City of Flint Michigan, Human Relations Commission and the Paterson Board of Education.

Petitioner does not possess any formal higher education degrees. However, she had attended Tennessee State University, Fisk University, The New School of Social Research and Wayne State University.

Petitioner described her duties and responsibilities in the position of Chief of the Center for Safety and Security with the Board which included, among other things, the training of security officers; plan, deploy and monitor the security officers; keep accurate time of work and attendance of the security officers and, supervise the 30 security officers at the Board's Albany

School (the former high school which was converted to a middle school) and the Atlantic City High School. There were no security officers assigned to the Board's elementary schools.

Petitioner testified that for the 1997-98 school year, she was assigned as a Control Office Administrator and reported directly to the Superintendent of Schools. She asserted that she was in daily contact with the Superintendent, Dr. Williams. Petitioner also worked with Assistant Superintendent Melvin Clarke.

Petitioner asserted that she visited the high school at least every other day. Petitioner testified that there was a conflict between petitioner and the high school principal, William Steele, with regard to the security of the Atlantic City High School. Petitioner characterized the conflict as a "very bad relationship." Petitioner asserted she could not work with Mr. Steele because he was an "obstructionist." There was acrimonious correspondence between Mr. Steele and petitioner concerning her position as Chief of Security and Mr. Steele's asserted position as the high school principal. Mr. Steele advised petitioner that she had "no right to set up a work schedule for an activity in this building or an activity scheduled for this building without running it pass (sic) me or one of my administrators." (P-13) In this instance, petitioner had assigned a member of the high school staff to set up for a school district-wide workshop and for the staff member to begin arrangements for the high school graduation without first consulting Mr. Steele.

Petitioner testified, among other things, that Mr. Steele, addressed the Board at a public meeting where the Board's 1998-99 annual school budget was under consideration and made negative comments about petitioner. The Board was considering proposals to be placed on the budget cap waiver and Mr. Steele asserted he was disappointed that The Board did not place petitioner's position on cap waiver. Petitioner asserted that Mr. Steele became angry and threw a chair and walked out of the Board meeting. Petitioner stated that Mr. Steele's conduct was intimidating.

Petitioner testified that following the Board's election held in April 1998, Mr. Steele is purported to have said that he, Steele, supported the new Board's position that the three people

the Superintendent brought with him to the school district should be removed. Petitioner was one of the three people to which Mr. Steele is purported to have mentioned or removed.

Petitioner asserted that Mr. Steele is a very tall African-American with a deep voice. He intimidated petitioner and always talked down to her. She contended that Mr. Steele did not act like a professional.

On cross-examination, petitioner admitted that Mr. Steele was not a member of the Board and was not petitioner's employer. Nor did Mr. Steele evaluate petitioner's performance. Petitioner also admitted that Mr. Steele spoke at the public Board meeting as an individual and stated his opinion concerning petitioner's position in public.

Petitioner testified extensively concerning the difficulties with the student body at the Albany Avenue School and the security personnel. She also testified about her role in developing training programs for the security officers and the use and misuse by the security officers.

Subsequent to the 1998 Board election and a change in the composition of the Board membership, the Board took action to certify tenure charges against Superintendent Williams with the Commissioner. The Board then removed Dr. Williams from his position, pending the outcome of the tenure charges.

Following the action by the Board to bring tenure charges against Superintendent Williams, the Board advised petitioner by way of letter dated June 19, 1998, that it intended to discuss personnel/staffing matters in closed session on June 23, 1998, which might adversely affect the terms, conditions, and termination of her employment, commonly referred to as a "Rice" letter[1].

[1] *Rice and Union County Regional High School Teachers Association v. Union County Regional Board of Education*, 155 *N.J Super.* 64 (App. Div. 1977).

Petitioner challenges her termination asserting that the Board's reasons for her termination, i.e., for reasons of economy, are false. Petitioner concedes that the Board was in financial difficulty prior to her employment. However, at the time of her termination her position was in the Board's budget for the 1998-99 school year and the Board had unexpended funds in its current expense account which was ample to pay her salary.

In addition to petitioner's claim for reinstatement, petitioner asserts that she is entitled to $13,000 for vacation days, sick days, compensatory days, and personal days for which the Board did not pay her upon her termination.

Assistant Superintendent Clarke testified, at length, on petitioner's behalf. He was aware of the contract into which petitioner entered with the Board, effective September 2, 1997. Clarke asserted that petitioner did not begin her employment on September 2, 1997, but rather, sometime later. He also asserted that petitioner's position as Chief of Security was non-tenured.

Assistant Superintendent Clarke testified as to his understanding of the reappointment or non-reappointment of non-tenured personnel and asserted that the Board must give the non-tenured employee notice of his/her non-reappointment prior to April of each year. Clarke stated that he had no information in April or May 1997 that petitioner would not be re-appointed for the 1998-99 school year. He asserted that no Board members had contacted him to advise that petitioner would not be reemployed.

Assistant Superintendent Clarke testified that subsequent to May 1998, the Board took official action on June 3, 1998 to place Superintendent Williams on leave, pending the hearing of tenure charges before the Commissioner. Clarke was not advised that the Board would take such action.

At this time, Clarke asserted, there were a lot of rumors about a "hit list" and that petitioner was one of several employees who would not be reemployed for the 1998-99 school year. He asserted that petitioner's position was in the Board's budget. He had several meetings with petitioner concerning her position. Some of these meetings involved High School Principal

Steele, with whom, petitioner reported to Clarke, she had difficulties. Clarke asserted that most of the difficulties between petitioner and Steele involved overtime of security officers and security officers issuing student identification cards (I.D.). Clarke asserted there was constant tension between petitioner and Steele.

Assistant Superintendent Clarke admitted that he wrote the "Rice" letter to petitioner, dated June 19, 1998. At that time, Clarke was aware of the possibility of the elimination of petitioner's position, among others. He asserted that the Superintendent had not indicated to Clarke that petitioner's position would be eliminated.

Subsequent to Superintendent Williams having been placed on leave, Delois Campbell was appointed Acting Superintendent by the Board. Clarke testified that Ms. Campbell argued before the Board not to eliminate petitioner's position. Clarke asserted that Board member James Herzog had prepared a resolution for the Board's approval to eliminate the positions of several positions, of which petitioner's position was one. The resolution did not specifically name individuals who held the positions to be eliminated.

Assistant Superintendent Clarke opined that the position of Chief of Security was necessary for the 1998-99 school year. He also opined that petitioner was entitled to *pro rata* pay for vacation days she did not take during the 1997-98 school year as a 12-month employee. Clarke admitted, however, the amount of vacation time to which he alleged she was entitled was not in the employment contract petitioner entered into with the Board.

On cross-examination, Clarke testified, among other things, that Superintendent Williams did show Clarke the alleged "hit list" of employees to be eliminated by the newly-elected Board. Clarke admitted, moreover, he never saw the "hit list" prepared by any Board member.

Herbert Benjamin Williams, former Superintendent of Schools, testified via telephone concerning his appointment of petitioner as Chief of Security, and her duties and responsibilities in the position. He stated that after petitioner began her duties in or about October 1997, she concentrated her efforts at the Albany Avenue School, the former Atlantic City High School.

Williams and the Board decided to open the Albany Avenue School for pupils in grades six, seven and eight, due to overcrowded conditions in its other schools. Williams admitted that there were severe behavioral problems with the pupils which caused petitioner to devote a great deal of time with security at the school.

Mr. Williams asserted that during the 1997-78 school budget discussions, there were some Board members interested in eliminating its security system with consideration for privatization. Williams asserted that the Atlantic County Superintendent of Schools would not support a change in the Board's budget to eliminate security for the schools. Williams advised the Board of the County Superintendent's position.

Mr. Williams testified that no Board member advised him of its intention to eliminate the position of Chief of Security. He asserted that it was not until after he was placed on administrative leave that he learned of the Board's action to eliminate petitioner's position.

Mr. Williams asserted that after the school election in April 1998, with the change of Board membership and leadership, he learned that there was a "hit list" to eliminate employment positions. He asserted that Board member Daniel Gallagher recommended methods by which the Board could save money in the 1998-99 school budget. Mr. Gallagher put together a list of positions to be reduced, however, this was not a recommendation of the Board's Finance Committee. During those discussions, the Board directed Williams to reduce the budget by $500,000. The positions to be eliminated by the Board included positions and individuals brought into the school district by Williams.

Mr. Williams admitted that there were no specifics concerning petitioner's contractual benefits. He asserted, however, that petitioner was entitled to the same benefits as other employees with regard to sick days, vacation days, and health benefits. He asserted that petitioner's position was similar to the Board's Director of Transportation.

Martin Ney, Atlantic County Superintendent of Schools, was called upon by petitioner to testify. Superintendent Ney testified that prior to the 1997-98 school year, the Atlantic City

Public Schools were classified at Level II by the Department of Education (DOE) and was under the strict scrutiny of a monitor assigned by the Commissioner who were paid a *per diem* rate by the Board. James Fiebig was the Level II Monitor who monitored the Board's deficiencies in pupil achievement, attendance, drop out standards, all of which did not meet the DOE's minimum standards for grades four, eight and eleven. Mr. Fiebig reviewed the Board's monetary decisions and pupil achievement, among other things. Mr. Ney testified that the Board's schools were in the some position as the schools in Paterson, Jersey City, and Newark with respect to Level II monitoring.

During the 1997-98 school year, Mr. Ney asserted he visited the Board's schools on a weekly basis. He met and discussed with petitioner her duties and responsibilities with the security of the schools. The major concerns centered on the chaotic conditions at the Albany Avenue School after it was opened by the Board in September 1997. Mr. Ney asserted that it was petitioner's goal to stabilize security at the Albany School, however, it did not happen.

County Superintendent Ney testified that the Board's 1998-99 school budget was presented to him for his review. He did not recall whether the budget called for the security position to be placed on a separate ballot. However, he asserted that security was a very important item and he would not approve a separate ballot.

During the 1997-98 school year, Superintendent Ney was concerned when petitioner took the school's security personnel out of uniform. He disagreed with petitioner's approach and believed that uniforms were important in the Albany Avenue School setting.

County Superintendent Ney testified that he was not familiar with the specifics of the Board's budget. He asserted, moreover, that the provision of security for its schools is a judgment call by the Board. He asserted, further, that he was not aware that Acting Superintendent Campbell recommended that petitioner be retained and not removed from her position. Mr. Ney asserted that the fact remained that petitioner's position was abolished by the Board and Ney believed the decision to abolish the position was the result of budget problems. He asserted that the Board had not consulted with him concerning the abolition of petitioner's

position. However, subsequent to the abolition of petitioner's position, County Superintendent Ney was satisfied that the Board had reasonable grounds for the abolition of the position after he had the opportunity to question both staff development and security personnel.

Elisha Thompkins, the Board's Business Manager, was called to testify on petitioner's behalf. Mr. Thompkins testified that he worked with Superintendent Williams on the Board's 1998-99 annual budget prior to the Board having placed Williams on administrative leave. Mr. Thompkins asserted that he relied upon the DOE to allow the Board to use bonding funds to balance the Board's current expense budget. He advised the Board that it would end the budget year with a balance of $65,000. The $65,000 balance was based upon the conclusion that the Board was permitted to move funds out of its capital fund into its general fund.

There was much testimony concerning the Board enacting an Academic Achievement Academy (Academy) as proposed by Board member James Herzog at the same Board meeting where it took action to abolish petitioner's position. It is not disputed that money to fund the Academy was not in the 1998-99 annual budget. Mr. Thompson testified that the Board spent $22,000 on the Academy during the 1998-99 budget year.

Marvin F. Hill, former member and former president of the Board, testified on behalf of petitioner and asserted, among other things, that he was not aware that petitioner's position was to be abolished. Nor was he aware that the action was on the Board's agenda for its meeting held on June 23, 1998. He asserted that the abolition of petitioner's position was an act by the Board and not recommended by the Superintendent. He opined that petitioner's position was necessary.

Mr. Hill asserted that it was his opinion that the Board had a "hit list" of people to be terminated. Those on the "hit list" were people brought into the school district by Superintendent Williams. He asserted that there were approximately ten names on the "hit list." Mr. Hill admitted that he had not seen the alleged "hit list."

Mr. Hill testified that the motion by Mr. Herzog to create and fund the Academy was not discussed by the full Board prior to its adoption and approval. He asserted that the costs to fund

the Academy would come out of the Board's general fund. He stated that petitioner's salary was included in the general fund and those funds could have been used to pay for the Academy.

Mr. Hill testified that he was not comfortable with the 1998-99 budget as it was presented. He asserted that the 1998-99 budget was insufficient and not properly funded. The Board was told that it would end the budget year with a deficit. Therefore, the Board proposed a special election for a supplemental tax levy for $6,000,000. He stated that it was believed the $6,000,000 would cover the projected deficit. The supplemental tax levy failed at the polls. Subsequently, the Board transferred bond money to its general fund to cover the deficit.

Mr. Jeffree Fauntleroy, a former member of the Board, also testified on behalf of petitioner who asserted that he was an Atlantic City police officer and discussed security in the schools with petitioner. He asserted that he was familiar with school security with respect to guns and drugs in the schools. He also discussed with petitioner her plans to organize and train the school security officers. He stated that he did not recall seeing a security plan proposed by petitioner. He stated that the Board had discussed the proposition that the schools security could be performed in a better way.

Mr. Fauntleroy discussed with petitioner the lack of organization with the school security program. He arranged a meeting and advised petitioner that free training was available and all petitioner had to do was to set a date and schedule the training program for the security officers. Petitioner cancelled the training program. However, she did not advise Fauntleroy of her cancellation. Mr. Fauntelroy did not know the reason petitioner cancelled the arranged training program for the security officers.

Mr. Fauntleroy testified that the Board's 1998-99 budget was not sufficient to fund all of the Board's programs even after the Atlantic City Council had approved the budget. He asserted that there were certain items in the 1998-99 budget that needed to be addressed further. He opined that there were items in the budget the Board could do without. He was not satisfied that the picture of the budget surplus as set forth by the school's administrator was accurate. He

contended that there was no line-by-line analysis, therefore, it was uncertain where the money was to come from to balance the budget.

Theresa Kelly, a present member of the Board, testified on behalf of the Board asserting, among other things, that during the 1997-98 school year she was a member of the Board's Finance Committee and its Curriculum Committee. Ms. Kelly recalled petitioner's employment and her duties as Chief of Security. She also stated that the opening of the Albany Avenue School it was an educational and financial disaster.

Ms. Kelly testified that the Board, acting as a committee of the whole, approved the 1998-99 school budget and submitted it to the Atlantic County Superintendent of Schools for his approval. Ms. Kelly asserted that she was uncertain of the line items in the current expenses. She was also uncertain that there were sufficient funds set aside for emergencies. She stated that the 1998-99 budget failed at the polls. However, the Atlantic City Council restored the defeated budget and some items of the budget cap waiver, which was also defeated by the voters. She was not satisfied that the restored budget would carry through the entire budget year.

Ms. Kelly testified, among other things, that she proposed the RIF of petitioner's position and other positions as well. The Board's Finance Committee understood the need of the RIF's for reasons of economy. Therefore, she moved before the Board the RIF's. She asserted that her only reason for the RIF's were for reasons of economy. She testified that after the Board's action on June 23, 1998, to abolish petitioner's position, the Board took further reductions in force and kept a tight reign on the budget expenditures. She asserted that even in June 1998, the Board did not believe it had a secure budget to carry it through the 1998-99 school year.

Ms. Kelly testified that funding for the Academy was not included in the 1998-99 budget. She was under the impression that the Academy was to be funded by existing Board personnel who would perform the duties for the Gifted and Talented students. She was not advised that the Academy would be a major cost to the Board.

Daniel Gallagher, a member of the Board beginning in April 1998, testified on behalf of the Board. During 1998-99, he was a member of the Board's Finance Committee (Goods and Services Committee) and found serious shortfalls with the 1998-99 budget, even after its approval by the Atlantic City Council. He never met petitioner, however, he knew of her position with the Board. He supported the resolution to abolish petitioner's position as one of several positions recommend for RIF.

On cross-examination, Mr. Gallagher testified, among other things, that in May 1998, Superintendent Williams recommended several ways in which the Board could save money for the 1998-99 budget. Reference was made to the Board minutes of its special session held on May 13, 1998 (P-34), to discuss the 1998-99 budget. Mr. Gallagher asserted that the special session of the Board was called for two reasons; i.e., to make reductions in the proposed defeated budget to present to the Atlantic City Council in order to save the CAP question and, to attempt to increase the Buildings and Grounds Account. Monitor Fiebig was present at the meeting and advised the Board not to bring personalities into the discussion when considering a reduction in force, but, rather, the positions and functions of the job performed.

Mr. Gallagher asserted that the Goods and Services Committee did, in fact, consider the positions for elimination in its deliberations. Superintendent Williams did not recommend the abolition of petitioner's position. The Committee received several accounts which it found to be under funded. It was for reasons of economy that it eliminated the positions, including petitioner's position.

Alma Dobson, a member of the Board until May 2, 2000, testified in rebuttal for petitioner asserting, among other things, that she attended the regular meeting of the Board on June 23, 1998, at which Acting Superintendent Campbell did not recommend the abolition of petitioner's position. Ms. Dobson asserted she did not vote to abolish petitioner's position on June 23, 1998, because Ms. Dobson understood there was money in the Board's budget to fund petitioner's position.

Ms. Dobson stated that prior to its action to abolish petitioner's position, the Board was quite concerned as to whether or not there would be sufficient funds available to carry it through the school year. She was present at the Board meeting when the Board placed Superintendent Williams on administrative leave. She believed that Superintendent Williams, who relied upon advice of the Board's Business Manager concerning the Board's finances, stated that the Board was "alright" for the rest of the year.

Ms. Dobson testified concerning the Board's budget deficit, the Commissioner's action to allow the Board to transfer funds from its bonds to current expenses, the voters rejection of the proposed 1998-99 school budget, the restoration of the rejected budget by Atlantic City Council, the sale of the Albany Avenue School to the City of Atlantic City for an amount in excess of one million dollars and, the resulting surplus funds, among other things.

Ms. Dobon admitted that the Commissioner's approval of the transfer of four million dollars from the Board's capital expenses to its current expenses provided the Board with the operating money it needed to finish the fiscal year in the black. She admitted that at the end of the 1997-98 budget year, the Board was in deficit and without the four million dollars, the Board would have remained in deficit.

ARGUMENTS OF THE PARTIES

Petitioner's Position:

POINT I

THE BOARD'S ACTION TO ELIMINATE THE CHIEF OF SECURITY WAS ARBITRARY AND MOTIVATED BY BAD FAITH

Count One of the Petition alleges that the petitioner's termination was arbitrary and capricious. *N.J.S.A.* 18A:28-9 grants boards of education the authority to abolish positions of employment for reasons of economy. In exercising its discretion to abolish positions for economic good cause, a board is not legally bound to follow a superintendent's recommendation,

provided the board is acting reasonably in good faith. *Stahnten v. Board of Education of Township of Hillside,* 1987 *S.L.D.* 1096, 1099 (Comm'r. Decision 1987) aff'd 987 *S.L.D.* 1104 (State Board 1987). It is well established that actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. *Kopera v. West Orange Board of Education*, 60 *N.J.* 288 (1960). The petitioner acknowledges that she has the burden of proof, based upon a preponderance of evidence standard, on all her claims.

The respondents contend that the Board action on June 23, 1998 to abolish the petitioner's position, as well as others, was done to prevent a budget deficit for the 1998-99 school year. The petitioner asserts that the respondents' actions, under the circumstances of this case, were arbitrary and should be set aside.

Was there a rational basis for the Board to abolish the petitioner's position? Absolutely not. The petitioner produced substantial evidence that the Board's action was improper. There are several compelling reasons for this conclusion. First, the petitioner was evaluated satisfactory by Superintendent Williams and recommended to continue in her position for 1998-99 (P-5). She signed her contract and returned it to the personnel office (P-2). On May 3, 1998, the Board considered a staff reduction as proposed by the respondent Gallagher and the Goods and Services Committee. The Superintendent disagreed, and the Board voted to adopt the cuts suggested by the City Council (P-34)[2]. Therefore, the budget became final.

By statute, *N.J.S.A.* 18A:27-10, school districts may non-renew an employee by written notice before May 15th of the year. In this case, the respondent Board renewed petitioner's contract.

> Second, "[a]t the Board meeting on June 23, 1998, Acting Superintendent Campbell did not recommended (sic) that the Board abolish the Petitioner's position because her position was necessary." (Stipulation¶6-7).

[2] There is no question that if the Board voted to eliminate the Chief of Security position at the May 13, 1998 meeting it had solid grounds to act under *N.J.S.A.* 18A:28-9.

Several witnesses testified in support of Ms. Green's case. Testimony by Board member Ms. Alma Dobson showed that Board members complained about security throughout the year and expressed the need for more security officers. Ms. Dobson voted no to the termination of Ms. Green because she thought the chief of security position was necessary and the position was funded in the budget (see P-8 and P-23). Similarly, Assistant Superintendent Melvin A. Clarke testified that Ms. Green was continued for the 1998-99 school year by recommendation by the Superintendent. No one in administration nor board member advised Mr. Clarke that Green would not be continued. Therefore, Mr. Clarke prepared and sent Ms. Green a contract for the 1998-99 school year (P-3).

Superintendent Williams testified about Ms. Green's evaluation of May 11, 1998 (P-5) and described her performance as "commendable." Dr. Williams emphatically stated that Ms. Green's position stayed in the budget despite discussions about its elimination during budget deliberations.

Third, on June 3, 1998, Superintendent Williams affirmed the District's budget was "all right" for the coming year. Dr. Williams relied upon the Business Manager as a source of his knowledge. Ms. Dobson testified that the Board's audit report for 1998-99 (P-36) showed budget surplus. As indicated in the respondent's Audit Report (P-36), the Board ended the 1998-99 year with a final balance of $6,629,014 and $269,203 for the 1997-98 year (P-36, p. 40). In fact, for 1998-99, the Board had $1,091,590 in excess surplus and $1,875,931 in undesignated funds.

In addition, the Board's subsequent decision to create and fund an academic academy, unbudgeted, at a cost of approximately $35,000 squarely contradicts its position that it had an uncertain budget situation (P-33). The decision to terminate the petitioner was clearly arbitrary and capricious.

POINT II

THE DISTRICT FAILED TO PAY PETITIONER HER SALARY AND BENEFITS SHE WAS ENTITLED

Count Two of the Petitioner alleges that the petitioner received less than 30 days notice of termination contrary to her contract. Assuming for the sake of argument that the petitioner fails to prove any other claim in the petition, she maintains that the respondent owes her pay for the full 30-day period. Basic contract law applies to this matter.

As a 12-month employee, the petitioner was entitled to a salary of $63,000 and benefits inclusive of sick, vacation, personal days and compensatory time. Superintendent Williams testified that the district should have treated Ms. Green just like any other administrator when it came to benefits.

The petitioner's contract requires 30 days notice in writing of a party's election to terminate the contract (P-2 and P-3). The petitioner's termination letter, dated June 24, 1998, states that it "serves as the required thirty-day notice..." (P-7). The petitioner testified without contradiction that she received her letter on June 29, 1998. This would entitle the petitioner to be compensated up to July 29, 1998 for a complete 30 days. Therefore, the petitioner contends she is owed compensation for at least 13 more work days, July 10 through July 29, 1998.

The petitioner will stipulate that the respondent paid her salary up to July 9, 1998. The period from July 10 to July 29 contains 13 work days. The petitioner believes she is owed for 13 days @ $262.50 per day or $3,412.50 in gross salary.

Ms. Green had accumulated 13.33 vacation days which she was entitled to compensation at the time of her termination (Supplemental Stipulation of Facts, ¶1 and 2). The respondent did not pay Ms. Green for her vacation days at her per diem rate of pay of $262.50 [$63,000/240 days=$262.50 per diem rate], or a gross amount of $3,499.12.

The petitioner was also entitled to three personal days which she was not paid for, and 12 sick days. In addition, Ms. Green was entitled to payment for 72 compensatory hours of work (80-8 hours) (P-4). This translates into nine days pay at her rate of salary. The petitioner asks that the court award her payment for 13.33 vacation days, 3 personal days, 12 sick days, and 72 compensatory hours or nine days. Overall, Ms. Green claims she is entitled to payment for 50.33 days totaling $13,211.62.

POINT III

PETITIONER'S REMOVAL WAS A VIOLATION OF HER CONSTITUTIONAL RIGHTS OF ASSOCIATION AND DISCRIMINATORY

Count Three of the petition alleges two claims, that is a violation of petitioner's Free Speech rights for her association with Superintendent Williams, and her termination violated the New Jersey Law Against Discrimination under *N.J.S.A.* 10:5-1 *et seq.* Assuming that the court finds that the petitioner's removal was in bad faith, then the next step would be an analysis of the applicable claims here.

On June 23, 1998, the petitioner was confronted with a fait accompli. Mr. Gallagher and Ms. Kelly had already decided to vote to terminate. The petitioner's termination was predicated upon her exercise of constitutional protected freedom of association.

A school district cannot terminate an employee for exercising his/her First Amendment free speech rights. *Parente v. Metuchen Board of Education*, 94 *N.J.A.R.* 2*d* (EDU) 352 (Comm'r March 17, 1994). In order to maintain a claim for termination based upon constitutional rights, the petitioner must prove that her discharge was predicated at least in part on her exercise of First Amendment rights. *Endress v. Brookdale Community College*, 144 *N.J. Super.* 126 (App. Div 1976).

Pickering v. Board of Education, 391 *U.S.* 563 (1968) held that statements by public officials on matters of public concern must be accorded First Amendment protection despite the

fact that the statements are directed at their nominal superiors, citing *Garrison v. Louisiana,* 379 *U.S.* 64 (1964). In *Wood v. Georgia*, *supra*, the Supreme Court further said:

> The burden is upon the governing body to show that there is a compelling public interest which warrants the restriction of First Amendment rights. In the absence of such a showing, these rights are not subject to impairment or destruction. *Thomas v. Collins,* 323 *U.S.* 516, 65 *S.Ct.* 315 80 *L. Ed.* 430 (1945); *Bates v. City of Little Rock,* 361 *U.S.* 516 (1960); *NAACP v. Button*, 371 *U.S.* 415 83 *S.Ct.* 328, 9 *L. Ed.* 2d 405 (1963); *Gibson v. Florida Legislative Investigation Committee,* 372 *U.S.* 539, 83 *S.Ct.* 880, 9 *L Ed.* 2d 929 (1963); *DeStefano v. Wilson, supra*, at p. 599. ...

In addition to the protection of rights contained in the United States Constitution, the New Jersey Constitution provides the protection of civil and personal rights.

Article I, paragraph 18, of the New Jersey Constitution provides:

> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives to petition for redress of grievances.

The plaintiff's employment positions were a protectable property right under the New Jersey Constitution. Article 1, paragraph 5, of the New Jersey Constitution provides:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right...

Article 1, paragraph 6, of the New Jersey Constitution provides in part:

> Every person may freely speak, write and publish its sentiments on all subject, being responsible for the abuse of that right.

In *Slohoda v. United Parcel*, 193 *N.J. Super.* 586 (App. Div. 1985), the Court held that if the employee's discharge is based in significant part from discriminatory reasons, the discharge must be invalidated. See also, *Arverd v. Bushburg Brothers*, 137 *N.J. Super.* 537 (App. Div.

1975). In the second *Slohoda* case, 207 *N.J. Super.* 145 (App. Div. 1986), the Appellate Division said:

> It is sufficient, if taken with other possible meritorious reasons, the discriminatory purpose was a determinative factor.

The petitioner's employment status as a non-tenure employee does not defeat her claim of a constitutional violation. *Mt. Healthy City Board of Ed. v. Doyle,* 429 *U.S.* 274 (1977). As previously stated, the petitioner was targeted on a "hit list." There is a strong causal connection between the suspension of Superintendent Williams, June 3rd, and the petitioner's removal on June 23rd, or less than 21 days apart. There is no issue about the need for the petitioner's position. She performed her job well and was exceptionally qualified.

In addition, the petitioner claims she was the victim of gender discrimination by Steele in violation of New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq*. Paragraph 22 of the Petition states:

> [Steele] engaged in a pattern of gender discrimination against petitioner...Respondent Steele harassed petitioner and threatened to her (sic) removed.

The petitioner asserts that the evidence supports a finding of sex discrimination in this case. Green is a female and Steele is a male. Ms. Green testified extensively about a strained working relationship with Steele. The harassment began when the Board voted to reorganize the security operations and place Green in charge of security and security officers district-wide. Mr. Steele became angry and resented her (P-16). Mr. Steele was uncooperative and an obstacle to Ms. Green's attempts to her job. In a May 28, 1998 memo, Mr. Steele berated Ms. Green for assigning a security officer, Mr. Reginald Jackson, the job to set up a workshop (P-13). Mr. Steele also spoke publicly that Ms. Green's position should be eliminated. Mr. Steele refused to allow Mr. Jackson to perform assigned job duties. Ms. Steele stated emphatically, that Elwood Roberts was lead security in charge at the high school, not Mr. Jackson (P-13).

On June 12, 1998, Mr. Steele called Ms. Green and made threatening and derogatory statements. Ms. Green alleges that Mr. Steele made statements such as:

1. "He advised me I was not responsible for security at his school and I had better act like a visitor when I enter his building if I entered. He alleged I had gone around him to get what I needed with security but "it will never happen again", he said in a very rude, angry and confident manner."

2. "Finally he informed me that he had to go because Bert Lopez was in his office and they were having a meeting." (P-12)

Mr. Steele, with full bravado, disrespected Ms. Green and the authority vest in her as Chief of Security. The respondent Board did not present Mr. Steele to refute the petitioner's allegations. The Board's failure to call Mr. Steele, and respondent Mr. Steele's failure to testify to refute petitioner's allegations regarding his conduct, should support negative inferences that his testimony would be unfavorable to the Board. *Millison v. E.I. duPont de Nemours,* 226 *N.J. Super.* 5721 (App. Div. 1998) aff'd 115 *N.J.* 252 (1989).

Ms. Green believes that the respondent Steele resented her because of her sex. Steele resented the fact that a female supervised security officers in his "building." Steele began a public campaign to remove the petitioner.

For the foregoing reasons, the petitioner Hiwatha Green asks that this tribunal find that the termination action of the respondent Board was precipitous, arbitrary and in bad faith. Also, they ask that the court find the actions of respondent a violation of her constitutional rights and discriminatory. We request the aware of back pay and benefit.

The Board's Position:

POINT I

THE BOARD DID NOT ACT ARBITRARILY WHEN IT MOVED TO ELIMINATE THE PETITIONER'S POSITION BY WAY OF A REDUCTION IN FORCE

It is well established that in certain situations a board of education has broad authority to effectuate a reduction in force. *N.J.S.A.* 18A;28-9 provides:

> Nothing in this title or any other law relating to tenure of services shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

In the instant action, the petitioner's position was abolished by the Board for reasons of economy given the financial crisis of the district. The foregoing status gives the Board broad latitude because it does not require that the Board's action come at the recommendation of the Superintendent of Schools. Therefore, the statements of the Acting Superintendent Campbell are not relevant in this matter because the Board's action did not require the recommendation of the Superintendent. Reduction in force decisions made pursuant to *N.J.S.A.* 18A:28-9 are entirely within the authority of the local Board. *In re Maywood Bd. of Ed.*, 168 *N.J. Super.* 45, 55 (App. Div.), *cert. denied* 81 *N.J.* 292 91979). Moreover, where the RIF is done for reasons of economy, such a determination is entirely within the authority of the Board. *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982); *cert.. den.* 93 *N.J.* 277 (1983).

The majority of the Board deemed it necessary to abolish certain positions in order to restore the budget to a secure level given the events of the preceding school year and the fact that although the budget had been restored, there were several line items which were inadequately funded. These line items included the Buildings and Grounds Account. This account funds repairs of buildings. It is well known that the Atlantic City School District has some of the oldest facilities in the State.

The petitioner argues that the action of the Board was improper because her supervisor, Dr. H. Benjamin Williams, had given her a satisfactory evaluation. It is conceded that the petitioner's evaluations were satisfactory, however, it has been established through testimony in this matter that the action by the Board has no basis in job performance. The actions taken by the Board were solely for reasons of economy.

In addition, *N.J.S.A.* 18A:27-10 does not factor into this matter either. Although the petitioner was not "non-renewed" before May 15th of the relevant year, the Board was not precluded from taking action to eliminate her position for reasons of economy at a later date.

The petitioner also argues that the creation of an academic academy contradicts the Board's position that there was an uncertain budget situation. However, there was testimony from several witnesses that the concerns of the Board were in the classroom. Mr. Hill, who testified on the petitioner's behalf, indicated that the academic academy was ultimately referred to the Curriculum and Instruction Committee, which he chaired and was recommended to the full Board for approval. Other Board members testified that it was their belief that the academic academy could be implemented without hiring new teachers and incurring significant costs.

The weight of the credible evidence reveals that there was a financial crisis in the Atlantic City School District at the end of the 1997-98 school year. There remained uncertainty with respect to the budget, even after the budget was approved by City Council. Several board members, some of whom testified on behalf of the petitioner testified that there was several uncertaint with respect to the budget going into the 1998-99 school year. It is clear that the action taken against the petitioner was based on reasons of economy and not based on performance or any other undue motive.

POINT II

THE PETITIONER WAS PROPERLY COMPENSATED

The Board took an action to abolish the petitioner's position on June 23, 1998. On June 24, 1998, correspondence was addressed to the petitioner notifying her of the Board's action and giving her notice that her termination would take effect on July 22, 1999. The petitioner presents no basis for the position that the date of termination is to be determined from the date of receipt of the notice of termination. The respondent asserts that the employee is informed of the Board's action and the notice gives the employee 30 days from the date of the Board action.

The petitioner was paid her full compensation for the term of her employment. The petitioner was paid $2,423.07, gross pay, on July 1, 1998, check no. 3723, this represents her bi-weekly pay. She was paid $1,776.92 on July 15, 1998, check no. 4030, which carried her through to her termination date.

POINT III

THE DISTRICT'S ACTION AGAINST THE PETITIONER WAS NOT DISCRIMINATORY

The action against the petitioner was done solely for reasons of economy. The record is replete with testimony as to the financial difficulty of the district during the 1997-98 school year. It is not disputed that the state of the budget for the 1998-99 school year was uncertain, as several budget line items were under-funded. Moreover, it is clear that the action against the petitioner was not based on her performance. The petitioner was in a newly-created position within the school district. Prior to the 1997-98 school year, supervisors and other district administrators had carried out the function. Given the financial constraints, it was the feeling of a majority of the Board members that the petitioner's position was not essential and that the functions could be performed by other staff.

There is no factual basis in the record for the conclusion that the Board took action to abolish the petitioner because she was associated with the former Superintendent.

In *Slohoda v. United Parcel,* 207 *N.J. Super.* 145 (App. Div. 1986), cited by the petitioner to establish a state claim under the Law Against Discrimination, the Court established that: the prescribed methodology requires that plaintiff first carry the burden of demonstrating a prima facie case. If this is done, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for terminating plaintiff's employment. *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792, 802, 93 *S.Ct.* 1817, 36 *L.Ed.* 2*d.* The petitioner has presented nothing more than conjecture and rumor that she was the target of an alleged "hit list." The court took specific notice of the fact that the petitioner never presented the alleged "hit list" in court. This is pure speculation and rumor. Some witnesses even testified that the only information they have regarding the "hit list" was rumor.

The weight of the credible evidence and testimony reveals that the action taken against the petitioner was based solely upon reasons of economy. Moreover, the petitioner's position was not the only position affected. Several personnel actions were taken in anticipation of a questionable budget year.

The petitioner's problems with Mr. Steele are irrelevant for two reasons, the first being that Mr. Steele had no impact on the decision of the Board. Mr. Steele is not a member of the Board and does not vote. The second is that the action taken against the petitioner has nothing to do with any statements she made concerning her employment, her decisions made in her position or any statements she made concerning her job functions or decisions.

For the foregoing reasons, the respondent Atlantic City Board of Education, et als. respectfully requests that the court find that the Board action abolishing the petitioner's position was a reduction in force for reasons of economy and was not arbitrary or in bad faith. Moreover, the respondents ask that the court dismiss all counts of the petitioner's appeal.

CONCLUSIONS

The herein record clearly demonstrates that the Board was faced with a variety of difficulties during the 1997-98 school year. It was under close scrutiny by the DOE as a consequence of its having been classified for Level II monitoring. The Board experienced deficit spending, contrary to law. It also, contrary to prior approval of the Commissioner, expended funds to open and operate the former high school, known as the Albany Avenue School, as a middle school. Both parties concede that the Albany Avenue School was an educational failure and a financial disaster. It was under such circumstances that petitioner was employed as the school district's Chief of Security by the then Superintendent of Schools, H. Benjamin Williams.

Petitioner alleges that the Board's action to abolish her position, thus terminating her employment, was arbitrary and capricious. The Board denies the allegation.

The definition of "arbitrary and capricious," as found in Black's Law Dictionary, Fifth Edition, is as follows:

> Arbitrary and capricious. Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle (citation omitted). *Id.* at 96.

The facts in this matter demonstrates that the Board was in a financial crisis and deliberated with options to resolve the matter. One avenue for the Board to pursue was the option of a reduction in force. Petitioner was one of other employees considered for a RIF under *N.J.S.A.* 18A:28-9. The Board exercised its option pursuant to the statute, and caused petitioner's position to be abolished and petitioner to be reduced in force.

Petitioner has failed to show, by a preponderance of the credible evidence, that the Board's action was arbitrary or capricious. Its action to abolish petitioner's position was not unreasonable nor without consideration of its obligation to maintain its schools within the

constraint of its budget. The Atlantic County Superintendent of Schools was satisfied that the Board's action wre appropriate. Petitioner cannot show that the Board's action on June 23, 1998, to abolish her employment position were for reasons other than for economy. I **CONCLUDE**, therefore, that petitioner has failed to demonstrate that the Board's action to abolish her position was arbitrary and/or capricious. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (App. Div. 1965) aff'd 46 *N.J.* (1966).

With respect to petitioner's compensation claim, she asserts that basic contract law applies to this matter. A review of the contracts which petitioner entered into with the Board for the 1997-98 and 1998-99 school years sets forth petitioner's annual salary of $63,000, effective September 2, 1997 to June 30, 1998, with an adjustment for the 1998-99 school year pending the results of collective negotiations. The contract also provides that either party may, at any time, terminate the contract upon 30 days notice, in writing. The Board exercised its rights, under the contract, and gave petitioner 30 days notice of termination of her employment through the abolition of her position and the termination of her employment.

I **FIND** and **CONCLUDE** that the Board properly terminated petitioner's employment by the terms and conditions of the contract entered into by the parties. Petitioner's argument that she did not receive the Board's notice of termination until July 29, 1998 and, therefore, she is entitled to compensation to that date is without merit. The herein record clearly demonstrates that petitioner was given notice of the Board's proposed action on or about June 19, 1998, with the opportunity for petitioner to participate in the public discussion. Thus, petitioner was put on notice that the Board intended to ". . . discuss personnel/staffing matters which may adversely affect your terms, conditions and termination of employment" (P-6).

Petitioner had ample time to exhaust her vacation days between the time the Board took its action to abolish her position on June 23, 1998, and the effective date of her termination on July 24, 1998.

Unless specified by the collective agreement between the Board and its negotiating units, which may or may not have an effect on petitioner's employment, this tribunal is not aware of

any requirement for the Board to compensate petitioner for unused sick day and/or personal days. In the event such provisions are incorporated in a collective agreement, the Board would then be obligated to adhere to the terms and conditions of such an agreement. Petitioner produced no such document.

I **FIND** and **CONCLUDE** that petitioner's claim of a violation of the New Jersey LAD by the Board is without merit. There is absolutely no evidence that the Board engaged in any discriminatory activity when it voted to abolish petitioner's employment position of Chief of Security. To the contrary, this tribunal, having evaluated the evidence, found and concluded that the Board's action was due to economic factors and the record supports such a conclusion. Petitioner has failed to establish a *prima facie* case to support her claim. I **CONCLUDE**, therefore, that this claim should be dismissed.

ORDER

Accordingly, it is **ORDERED** that the herein petition of appeal be and is hereby **DISMISSED** for the reason expressed above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 October 2000
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12-27-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

WITNESSES

For petitioner:

Hiawatha Greene-Janvier
Melvin Clarke
Herbert Benjamin Williams
Martin Ney
Elisha Thompkins
Marvin Hill
Jeffree Fauntleroy
Alma Dobson

For respondent:

Theresa Kelly
Daniel Gallagher

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Petitioner's Resume
P-2 Contract for 1997-98
P-3 Contract for 1998-99, Stipulation
P-4 Memo to Dr. Williams, dated May 20, 1997
P-5 Evaluation, dated May 11, 1998
P-6 Rice letter, dated June 19, 1998
P-7 Termination letter, dated June 24, 1998
P-8 Summary Security Report
P-9 Letter to Dr. Williams, dated February 6, 1998
P-10 Memo from Clarke, dated March 12, 1998

P-11 Memo by Steele, dated March 16, 1998

P-12 Summary of telephone conference, dated June 12, 1998

P-13 Memo to petitioner, dated May 28, 1998

P-14 Memo to Clarke, dated December 18, 1997

P-15 Memo to Dr. Williams, dated December 22, 1997

P-16 Memo to Dr. Williams, dated December 22, 1997

P-17 Memo to Dr. Williams, dated December 23, 1997

P-18 Memo to security managers, dated January 30, 1997

P-19 Memo to Dr. Williams, dated March 20, 1997

P-20 Memo to security staff, dated November 21, 1997

P-21 Memo to Atlantic City Public Schools, dated January 30, 1997

P-22 Memo to Dr. Williams, dated February 11, 1997

P-23 Memo to security managers, dated February 25, 1997

P-24 Memo to security managers, dated March 10, 1997

P-25 Memo to security managers, dated May 18, 1997

P-26 Memo to principals, dated January 6, 1997

P-27 Memo to security managers, dated January 6, 1998

P-28 Memo to security managers, dated December 12, 1997

P-29 Memo to district staff, dated January 10, 1998

P-30 Statement of Grievance, dated January 12, 1998

P-31 Memo by Clarke to D'Ambola, dated March 23, 1998

P-32 Security Aides (ACEA), dated January 21, 1998

P-33 Atlantic City Board of Education minutes, June 23, 1998

P-34 Atlantic City Board of Education minutes, May 13, 1998

P-35 Interim Balance Sheet, June 30, 1998

P-36 School District of City of Atlantic City

For respondent:

None

OAL DKT. NO. EDU 8904-98
AGENCY DKT NO. 430-9/98

HIWATHA GREEN-JANVIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, JAMES HERZOG, DANIEL GALLAGHER AND WILLIAM STEELE, PRINCIPAL, individually and jointly,	:	DECISION
RESPONDENTS.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.[1]

In her exceptions, petitioner essentially restates her position that respondent's action to terminate her employment for reasons of economy was unreasonable and in bad faith because the District's budget crisis ended with the closing of the Albany Avenue School. Pointing out that the District completed the year with a surplus, that the acting superintendent recommended against abolishment of petitioner's position and that petitioner's position remained in respondent's budget following cuts made by the City Council after the budget defeat, petitioner urges reversal of the Administrative Law Judge's (ALJ) finding that respondent's action was not arbitrary or capricious. (Petitioner's Exceptions at 1-3) Petitioner also objects to

[1] Respondent did not file exceptions to the Initial Decision, nor a reply to petitioner's exceptions.

the ALJ's determination that she was not entitled to compensation for unused vacation, sick and compensatory days, stating that "[t]he ALJ's decision that petitioner should have taken the vacation days before her last day of work is just wrong." (*Id.* at 3)

Upon a thorough review, the Commissioner determines to affirm the decision of the ALJ with modification, as noted below. Initially, the Commissioner concurs that the record supports respondent's contention that the District was in a financial crisis and that its action to pursue a reduction in force was for reasons of economy. The Commissioner, therefore, determines, for the reasons expressed by the ALJ, that petitioner has failed to show by a preponderance of credible evidence that respondent's action to abolish her position was arbitrary or capricious. The Commissioner also agrees that there is absolutely no evidence that respondent engaged in discriminatory activity when it voted to abolish petitioner's position, and that petitioner has failed to establish a *prima facie* case to support her claim of a violation of the New Jersey Law Against Discrimination. Finally, the Commissioner finds that respondent properly exercised its rights, under the terms of the contract, in providing petitioner 30 days notice that her position had been abolished and her employment terminated.

With respect to petitioner's compensation claim, however, the Commissioner modifies the determination of the ALJ. The Commissioner notes that petitioner's contracts are silent as to any employment benefits she is to receive in addition to her annual salary. The supplemental stipulation entered into by the parties, however, states that:

> 1. Petitioner started work for the District in October 1997. *As a twelve month employee*, the petitioner was entitled to the accrual of vacation time at 1.6 per month (from November 1997 to June 1998) or 13.33 vacation days for the 1997-98 school year.
> 2. The respondent did not pay petitioner for her accumulated vacation days. (emphasis added) (Supplemental Stipulation)

By acknowledging that it awarded vacation days to petitioner *as a twelve-month employee,* respondent has conceded that it provided benefits to petitioner which were not specified in her contractual agreement, as both petitioner and the head of personnel testified at hearing. Although the record does not contain a copy of the policy or collective agreement which respondent applied in awarding petitioner 13.33 vacation days per year, respondent is obligated to adhere to the terms and conditions of the same policy or collective agreement it applied in awarding the vacation days with respect to compensation, if any, to petitioner for any unused vacation days. In the event that petitioner was also awarded sick or personal days under the twelve-month employee provision, petitioner is also entitled to compensation for any unused sick or personal days, if so provided for in the policy or agreement applied to her.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein, as modified above.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: DEC 11 2000

Date of Mailing: DEC 11 2000

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

405-00

IN THE MATTER OF THE TENURE :
HEARING OF GREGORY J. BREWER, :
SCHOOL DISTRICT OF THE :
BOROUGH OF ROSELLE, UNION :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent science teacher for allegedly engaging in a continuing pattern of sexual harassment directed at A.F., a 19-year-old female special education student.

Having found respondent not credible, the ALJ concluded that respondent's conduct, which included asking A.F. for her phone and beeper number, asking A.F. out on dates to the movies, and looking at her in a sexual manner, was unacceptable and that the only appropriate penalty was removal from position. The ALJ ordered respondent dismissed from his teaching position. Since the time period of suspension without pay is limited to a total of 120 calendar days, the ALJ ordered that respondent be given back pay for the period of October 16 through December 15, 1998. Subsequent to the issuance of the Initial Decision, respondent filed a Motion to Re-Open the Hearing with the Commissioner, alleging that the ALJ's findings and conclusions with respect to his credibility were erroneous and supported by no competent proof in the record. He requested that the hearing be reopened to allow the introduction of additional evidence in this regard.

After conducting an independent review of the record, including a thorough scrutiny of the transcripts of the hearing at OAL, the Commissioner determined that, since the resolution of this matter depends on the credibility of the witnesses, and having found that the ALJ's stated determinations with regard to respondent's credibility were based in large part on facts not supported by evidence in the record, interests of fairness dictate that respondent be provided with an opportunity for entry into the record of further testimony and evidence as will permit the critical determinations relating to credibility to be based on a full and fair record. Thus, the Commissioner granted respondent's Motion to Re-Open and remanded the matter to the OAL for further proceedings. The Commissioner adopted that portion of the Initial Decision which found the Board owed respondent salary payment for the period between October 16 and December 15, 1998.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7083-98

AGENCY DKT. NO. 205-6/98

I/M/O THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY

Neil M. Cohen, Esq., for petitioner
(Gill & Cohen, attorneys)

Harold N. Springstead, Esq., for respondent
(Springstead and Maurice, attorneys)

Record Closed: May 1, 2000 Decided: September 13, 2000

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

On May 1, 1998, the petitioner, School District of the Borough of Roselle, (Board or District) suspended the respondent, Gregory J. Brewer, a Science teacher from his teaching duties. On May 22, 1998, tenure charges were certified by the Board and thereafter filed with the Commissioner of Education on June 18, 1998. The tenure charges allege that the respondent engaged in unbecoming conduct in that he sexually

harassed a 19-year-old female student during class. The respondent filed an answer to the charges on June 29, 1998.

On July 23, 1998, the Commissioner transmitted the matter to the Office of Administrative Law for a hearing as a contested case. See *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

After a prehearing conference, the matter was scheduled for hearing. Hearing dates were adjourned several times at the request of the Board. On July 28 and October 12, 1999, plenary hearings were conducted. On October 20, 1999, the respondent moved for summary judgment on Board's failure to return him to the payroll on the 121st day of his suspension. A decision on the motion was held in abeyance until the issuance of the instant decision.

The Board requested an additional date to present rebuttal testimony. Thus, the record remained open. Subsequently, that request was withdrawn. Written submissions were filed on March 27, and April 4, 2000. Transcripts were received on May 1, 2000, at which time the record was closed.

The time for the issuance of the Initial Decision was twice extended by Order of the Commissioner until September 13, 2000.

STIPULATED FACTS

The parties have stipulated to the following **FACTS** and thus they are adopted as the **FACTS** herein:

1. Respondent has been in the employ of the Board since September 1986 when he was employed on a part-time basis and full-time as a Science teacher since September 1987.

2. Respondent was suspended from his teaching duties by Superintendent of Schools, Darlene M. Roberto, on May 1, 1998.

3. Tenure charges were served on respondent on or about May 22, 1998.

4. The Board voted to forward the tenure charges to the Commissioner of Education on June 16, 1998 and suspended respondent's pay at that time.

5. One hundred twenty calendar days from June 16, 1998 is October 14, 1998.

6. The Board reinstated respondent to the payroll as of December 15, 1998. (J-1)

TESTIMONY

Joseph Pisauro, was the Vice Principal at Abraham Clark High School in 1998,. He was required to assist the Principal of the High School. On the morning of April 30, a 19 year old female student, A.F., came to his office and told him that she was having problems with the respondent. She related that the respondent was asking for her phone and beeper numbers. Further, that he was asking her to go out with him. She reported feeling pressured because the respondent told her "you're a senior . . . you need me." Pisauro immediately left his office to speak with the principal.

Pisauro admitted that student phone numbers are logged on a computer that is accessible to the teachers. He further admitted that in the initial interview with him, A.F. did not talk about the teacher touching her blouse. However, the conversation was abrupted terminated when he realized that the matter was beyond the scope of his responsibilities.

Kenneth L. Holmes, Principal of Abraham Clark High School, confirmed that on the morning of April 30, 1998, Pisauro came to him and related that A.F. had complained about a teacher. He investigated the matter by interviewing A.F. A.F. essentially related that the respondent had asked for her phone numbers; had pulled a

string on her blouse; and had said "senior, senior you need me." A.F. further related that although she did the same work as her friends, her grades were lower. She believed that she was failing the respondent's class because she would not date him.

After his interview with A.F., Holmes interviewed two other students, C.R. and K.Fr. (hereinafter K.) The students were interviewed individually and they did not know of his interview of A.F. Holmes was familiar with the three students as he was previously their teacher.

P-1 is a memoralization of his interviews with the students. R-1 is an affidavit submitted by Holmes in support of the Board's tenure charges. Holmes called A.F.'s mother about the situation. The mother replied that she had been advised of same by her daughter on April 29th.

Under cross-examination, Holmes admitted that he was present when the police questioned three other students about this incident. These students were not the same students that he interviewed. He did not take notes during the police interviews.

On May 1, 1998, he interviewed the respondent. His notes were given to the Superintendent of schools who suspended the respondent that same day. He did not make a recommendation in his report.

Holmes admits that he believed that the string on A.F.'s dress, if pulled, would expose her. He did not know that the string was merely decorative.

After the respondent was suspended, he found a stack of test papers "a foot high" in the respondent's locker, which essentially verified his students complaints that he failed to give them their test papers back. Moreover, the respondent's filing cabinet was filled with papers from "months ago" that were not graded. He did not look at the respondent's grade book, believing that any grade could have been recently recorded. Conversely, he opined that the test papers would prove whether the respondent was

marking A.F.'s test scores differently from the other student. However, the respondent was unable produce A.F.'s test papers. Subsequently, un-graded test papers and homework assignments were found in a garbage bag. The records were in such disarray that some students had to be retested.

A.F. testified that from 1993 to 1998 she was a special education student in Abraham Clark High School. The respondent was her biology teacher. She had biology everyday. On April 30, 1998, she reported to the school administrators that she was having a problem with the respondent. The problem was that her two study mates (K. and C.) were passing and she was failing, notwithstanding that she did the same amount of work as they did. She related that the respondent had asked to take her to the movies and asked for her phone number.

The biology class was for 10th graders and she was a senior (12th grade). However, she needed the extra credit to graduate. A fact that the respondent knew. During the last week in September, (the first marking period), the respondent asked her for her phone and beeper numbers. He also asked her to go to the movies with him. She rejected him both times. On October 20, 1997, the respondent asked her what she "was going to be for Halloween." It was customary for seniors to dress up for Halloween. She told him that she was going to be a doctor. The respondent responded that, "ooh, could you be my doctor." During the first half of the school year, the respondent would repeatedly tell her that she had a nice body. During the second marking period, the respondent asked her out to the movies on two occasions. He continued to ask her for her telephone number.

A.F. admitted wearing both tight clothes and very loose clothes. The respondent would compliment her on her attire. On April 29, 1998, she was wearing a pair of tight blue plaid bell-bottom pants and a long white tank shirt underneath a sheer blouse. While in the classroom, the respondent "grabbed her thigh, trying to pull on her pants". Subsequently, A.F. explained that the respondent attempted to pull her pants, however her pants were so tight that he made contact with her thigh. Thereafter, he pulled the

string on the back of her shirt. The string loosened and when she attempted to retie it, the respondent told her "that's okay, I'll tie it up for you." She proceeded to retie the strings and walked away from him. This incident, as well as the request for her phone number, took place during class time in the presence of others. She noted that her class seat was located "all the way in the back of the classroom." She sat next to C. and K. The class has twelve tables and three rows.

K. saw the respondent touch her thigh and told him "you better stop." A.F. also told him to stop, which he did. The respondent proceeded to his desk. Subsequently, he returned to her desk and loosened the string on her blouse. The strings were attached to each side of the blouse at the waistline and tied at the back. The strings hung down outside a hole in the chair.

On another occasion, respondent placed his knee in the opening and touched her back. A.F. further testified that the respondent would wink and stare at her during the 97-98 school year. He would look at her from head to toe in a sexual way. The respondent also asked her if she liked to walk on the beach. On several occasions, the respondent would sit at his desk and say, "senior, senior, you need me." She understood this to mean that if she didn't do her work she would not graduate. She was also fearful because she had refused to date him. She noted that her study partners K and C. would get a 75 and 70, respectively on their test, however she would receive a grade of 65.

A.F. was aware that was another senior in the classroom. However, the respondent's comments, senior, senior were in the singular sense.

She reported the respondent's conduct because she was afraid of failing. Further, she was concerned about her reputation, as she feared that the respondent would discuss her with other teachers.

Under cross-examination, A.F. conceded that her home number is on file with the school. She was aware that beepers were not allowed in school, however she denied ever having one confiscated from her.

A.F. acknowledged that in order to graduate, she had to pass the respondent's class. In the first marking period, she received a grade of 70; a 65 for the second and third marking periods. Thus, in April 1998 she was failing. Grades for the class consisted of test, dittos, notebooks, homework and lab reports. She admits not turning in one of the lab reports during the first marking period and that she received a 79 on a test during the first marking period. During the second marking period she recalls receiving test grades of 75 and 74. She completed all homework assignments but admits that she did not turn her lab notebook in as required. She admits that this omission would cause her grade to be lower. However, she opined that it shouldn't have caused her grade to fall to 65.

A.F. further admitted "cutting" biology class on two or three occasions. She further admits that she had excused absences from school. She acknowledged that the written statement of her interview with Holmes does not refer to the respondent's alleged touching of her thigh; his looking at her in a sexual manner; his putting his knee to her back; or reference any talk about the beach. She further admitted that she did not tell her parents about the incidents until April 30th.

She was not aware of any warning notices being sent to her home. She was also unaware of the number of missed assignments. However, she denied failing to turn in 13 of 28 homework assignments. She denied getting two zeros and a 10 for three of the five grades given during the third marking period.

She admits telling the police that she did not know her test grades because she had not received them from the respondent. She denied that this was an inconsistency, because she believed that these grades were for tests taken in the first marking period. It was after the first marking period that the respondent failed to return test papers.

A.F. acknowledged that her statement to the police reflects that she denied that the respondent touched her body or treated her any different from the other students. (P-2).

Under redirect, A.F. clarified that she told the police that the respondent had grabbed her thigh. (P-2) Any denial that the respondent had touched her body was directed at an intimate touching, such as, touching her breasts. In that same interview, she related that she had told the principal about "what was going on" in an effort to get her grade changed because she didn't deserve those grades since she had done the same work as C. and K. Yet, she was failing and they were passing.

A.F. admits that while she told K. and C. that the respondent had asked her for a date, their individual statements given to the police do not confirm that they heard him do so. Further, their statements do not support her police statement that they had witnessed him touching her thigh.

K., a student in the respondent's biology class testified that A.F. called her at home and told her that the respondent had asked her out on a date to the movies. A.F. was "scared" because she needed to graduate and feared failing the class but felt she had to do something about it.

She saw the respondent winking at A.F. She also saw the respondent "press" his knee in A.F.'s back. A.F. told him to stop. On this occasion, she also observed the respondent pull strings on A.F.'s blouse and offered to retie them. Further, it was obvious from the way that the respondent looked at A.F. that he wanted to be with her.

On another occasion, she and A.F. were having a discussion about birthdays when the respondent interjected and asked A.F. when she was going to be an adult. A.F. responded that she would be 19 in February. The respondent then said, "you're an adult". During a conversation with A.F., the respondent approached them and said

"maybe me and you should be on the phone." K. also overheard the respondent tell A.F. that she had gained weight and wanted to know what she was eating.

Under cross-examination, K. admitted that A.F. told her that she was going to report the respondent. However, A.F. never told her that she would give her name to Holmes. Nor did A.F. request that she "back her up." K. acknowledged that she did not hear the respondent ask A.F. for her phone number. However, she was there when he pressed his knee into A.F.'s back and heard her ask him "what are you doing."

K. acknowledged telling Holmes that she got better grades than A.F. even though she believed that the two of them do the same work. K. admitted that the three of them were "talkative" in the classroom. Thus, the respondent had on one occasion removed her from her regularly assigned seat.

K. said she was generally a good student. During the first marking period, she completed all of her homework assignments whereas A.F. did not. She recalled that A.F. did complete her homework by the "late date". She believed that A.F. did her lab work but could not recall if she turned in a lab notebook. She recalled that A.F. did not have many absences from school.

Gregory John Brewer, respondent herein, testified that A.F. was a student in his general biology class. The class consisted of seventeen students, nine were ESL students, and one was a senior, (A.F.); the remainder were 9th and 10th graders. Grades were given on a numerical basis from 0 to 100. He kept grade and attendance books.

Two days prior to his May 1st suspension, he met with Principal Holmes who related A.F.'s complaint. After the meeting, he made a copy of his grade book for the biology class. He also copied the attendance records of A.F., C. and K. (R-4). As of that date, A.F. was absent some thirty-two (32) days; K was absent for nineteen (19) days; and C for twenty days (20).

In the first marking period, he assigned twenty-four homework assignments and A.F. completed four. K completed all assignments and C failed to turn in fourteen assignments, five of which were excused. There were four tests given in the first marketing period and A.F. received grades of 78, 77, 80 and 75. She received a 70 on her lab notebook. He noted that 60 is the lowest score that the school district allows.

During the second marking period, there were twenty-two homework assignments. A.F. completed nineteen assignments, thus three were missing. She completed all labs. There were also six tests during that marking period. She received a 75 on her class notebook. During the second marking period, there were two examinations, a mid term and a final. A.F. received a 39. on the final which constituted one fifth of her overall grade. A minimum grade of 50 is allowed on mid terms and finals. A.F. received an overall grade of 75 on her report card.

During the third marking period, A.F. completed fifteen of twenty homework assignments. There were five "labs" for which she received two zeros; a 10; and two 70's. There were six tests and she was given a 68, 74, 70, 60, 48 and a 52. She did not turn in her notebook and thus she received a zero. Her overall grade was a 65. Lab was usually twice a week and the students worked in groups of two and three. Students were required to turn in lab reports.

A.F. was talkative in class. She would play around, sleep and wouldn't follow directions. C. and K. also talked but would do their work. Therefore, they passed. He constantly warned her that she needed the class to graduate and explained to her why she was failing. She had no response.

The respondent denied asking A.F. for dates and for her telephone number. He denied commenting or touching A.F.'s body. He denied looking at her in a sexually suggestive manner. Nor did he pull the strings on her shirt. He did admit that he would give A.F. compliments on her clothing. He admits that A.F. jokingly asked him to take

her to the movies or to the mall. He further emphasized that a student's home telephone number is a part of a teacher's records.

The respondent admitted telling Holmes that A.F.'s brother had given him her beeper number. (R-5). A.F.'s brother was a former student. Although, he had graduated, the respondent saw the brother in the school. The brother related that his parent's were concerned about A.F.'s grades. The brother gave him "his" beeper number to call if he had problems with A.F.

With respect to his past disciplinary record, the respondent admitted that on May 8, 1996 he cursed at a student. (P-3). He was under a great deal of personal stress because his wife had miscarried that same morning. He denied calling a student a "fag". (P-11). He admitted however that he accidentally hit a student. (P-5, P-6, P-7). He does not recall P-8. Respondent assert that he was never denied a salary increment.

Under cross examination, the respondent conceded that A.F.'s report card shows her attendance records during the 1997-98 school year. (P-9). It reveals that she was absent two (2) times during the first marking period; five (5) times during the second marking period, two (2) times during the third marking period; and eleven (11) times during the fourth marking period. Thus, A.F. had a total of 20 absences for four marking periods. However, respondent emphasized that P-9 does not show any "cuts" or school suspensions. He did not maintain any records on how many times A.F. "cut" his class. He does not recalls the weighing system he used to calculate class grades. He did recall however that tests, notebooks, homework and lab work were accorded different weights.

Respondent confirmed that K. was an above average student in his class. She did her work promptly and was generally well behaved. Further, she was respectful and truthful to her teachers.

C. was an average – to below average student. She had problems with talking and paying attention. Generally, she was truthful and respectful. He did not refer any requests for discipline to the principal's office for K. or C. He could not recall if he did so for A.F.

With respect to his statement, his answers reflect what he remembered at the time. (R-5) He did not have his grade book with him when he gave the statement. He had given the grade book to Holmes.

He concludes that K. lied in her testimony herein. He did not touch A.F. or look at her in any sexually suggestive manner.

D. W., a junior at High School, testified in support of the respondent. She was in the respondent's biology class and was acquainted with A.F. A.F. was talkative and did not do much work. She did not participate in class and was often late and or absent. A.F., K. and C., were often reprimanded by the respondent.

She never saw the respondent flirting or touching A.F. Indeed, he treated A.F. the same as all other students. While D.W. believed that A.F. did not do well in class, she did not actually see her test papers.

F.O.A.W., brother of D.W., testified that he observed A.F. "talking, eating, playing around and not working." A.F. would bring her lunch to class or would leave and go to the lunchroom and return with her lunch. The respondent told her not to bring food to class. However, A.F. ignored him.

A.F. would wait until the last minute to do her class work. Further, she did not take notes in class and would wait until the last moment.

The respondent treated everyone the same. He did not observe any flirting or touching between A.F. and the respondent. He recalled hearing A.F. ask the

respondent if he would take her to the beach. The respondent told her no. He doesn't know whether the conversation was serious or in jest.

Under cross-examination, the witness admitted that he did not take any notes in class. He concludes that A.F. did not do her work because he did see her hand in any assignments.

M.S., also a student in the respondent's biology class testified that A.F. came to class late, talked in class and did not do her class work. A.F. did not participate in class. The respondent would tell A.F., C. and K. to do their work but they would not listen. The respondent treated A.F. as he did all students. He did not observe him flirting with A.F. M. S. admitted that he sat in front of A.F., K. and C. Thus, he could not see them unless he turned his chair around. However, he was able to hear them.

ARGUMENT

The Board maintains that respondent engaged in a continuing pattern of sexual harassment directed at a special education student. The testimony of A.F. was credible and was substantially corroborated by the testimony of K. Thus, terminating respondent is more than justifiable and proven by a preponderance of the evidence, whether one looks at each instance individually, or collectively. The unrelenting advances made by respondent directed at a female special education student are of such a nature that the only appropriate penalty is removal from his position under *N.J.A.C.* 6:11-3.4.

The respondent contends that he did not engage in any inappropriate conduct with respect to A.F. Respondent argues that A.F. was not a credible witness because there were many inconsistencies between her testimony at the hearing, the statement she gave to Holmes and the statement she gave to the police. Likewise, respondent asserts that K. was not a credible witness.

Further, the respondent maintains that Holmes interviewed students besides the three girls that gave statements, and although he took notes of those interviews they were destroyed or well not in his possession. There were approximately 15 students in the class aside from the three who gave statements, however, Holmes never spoke to any of the other students. Thus, the respondent contends that an unfavorable inference should be drawn against the Board.

Finally, the respondent argues that the Board failed to prove by a preponderance of the evidence that he engaged in unbecoming conduct based on the lack of credible testimony from A.F. and K. A.F.'s poor performance in the class and her fear that she would not pass, and the inadequate investigation conducted by Holmes. Therefore, respondent maintains that the charges should be dismissed.

FINDINGS AND CONCLUSIONS

The New Jersey Supreme Court illustrated the importance of the tenure statutes stating, "tenure is an item that intimately and directly affects the work and welfare of public employees." *Wright v. Bd. of Educ. of the City of East Orange*, 99 *N.J.* 112, 118 (1985). "In the context of the public school teacher tenure statute, tenure 'prevents school boards from abusing their superior bargaining power . . . in contract negotiations.' It protects employees from dismissal for unfounded, flimsy or political reasons." *Wright, supra*, 99 *N.J.* at 118 (citing *Spiewack v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982)). The Court further acknowledged: "once the status of tenure is earned, it provides a measure of job security to those who continue to perform their jobs properly." *Wright, supra*, 99 *N.J.* at 118.

A tenured teacher may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause," only after a hearing in compliance with the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 to –30.1. The burden is on the board that

certified the charges to prove them by a preponderance of the credible evidence. *In Re Polk License Revocation*, 90 *N.J.* 550, 560 (1982).

In the instant matter, the Board seeks to dismiss the respondent, thereby revoking his tenure on charges of conduct unbecoming. Although unbecoming conduct is not specifically defined in the statute or regulations, in *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), it was established that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of one's office or position. See also, *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 28-29 (App. Div. 1974), *certif. denied*, 65 *N.J.* 292 (1974). Beyond the field of education, conduct unbecoming a public employee has been defined as an "elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the bureau ... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960). When such conduct creates a hostile and potentially dangerous environment, it also constitutes just cause for major discipline under the civil service laws. *Perry v. Mercer County Department of Public Safety*, 96 *N.J.A.R.*2d (CSV) 834, 837. A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based primarily on a violation of an implicit standard of good behavior. *Emmons*, *supra*, 63 *N.J. Super.* at 140; *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

Conduct unbecoming is a type of disciplinary charge that is determined on a case-by-case basis and can embrace a wide range of conduct. The use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 741 (App. Div. 1988). Ultimately, consideration must be given to "the gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation, or aggravation," and "any harm or injurious effect which the teacher's conduct may have

had on the maintenance of discipline and the proper administration of the school system." *Fulcomer*, *supra*, 93 *N.J. Super.* at 422. It is, however, important to recognize that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *Id.* at 421 (citations omitted).

Teachers are held to a high standard of conduct because of the influence they exercise over the students of the State. In *In re Tenure Hearing of Bradley*, 92 *N.J.A.R.*2d. (EDE) 13, it was held that "[a] teacher should possess personal qualities valued by our society because a teacher helps to shape the attitudes of young minds toward that society." *Id.* at 15. It necessarily follows that their duties require "a degree of self-restraint and controlled behavior rarely requisite to other types of employment" because teachers have been entrusted with the care and custody of children. *In re Tenure Hearing of Lucarelli*, 97 *N.J.A.R.*2d (EDU) 537, 541 (citations omitted).

Thus, in *In re Tenure Hearing of Hovington*, EDU 4318-95S & 225-96S (consolidated), Final Decision, (August 5, 1997), *adopted*, State Board, (January 21, 1999) http://lawlibrary.rutgers.edu/oal/, a physical education teacher and coach of the women's track team was dismissed from his tenured position for engaging in an inappropriate relationship with a student and for inappropriately touching another student. The Commissioner found that the teacher's behavior constituted unbecoming conduct based on the finding that he had sexual contact with a student on a repetitive basis. *Ibid.* The sexual contact therein involved kissing a student on the lips. *Ibid.* *In re Tenure Hearing of McClelland*, No. A-152-83T2 (App. Div. Jul. 20, 1984), a tenured teacher was charged with conduct unbecoming based upon, "his habitual flagrant conduct in touching, caressing and hugging minor female students in his charge." *Id.* at 2. The teacher argued that dismissal was too severe a penalty considering his outstanding reputation. In reversing the penalty imposed by the ALJ, the Commissioner found that dismissal was warranted because his "proclivities ... far exceed the bounds of good judgment and restraint." *Id.* at 3. The Appellate Division described the Commissioner's penalty as harsh but nevertheless

affirmed the decision on the grounds that it cannot be said "that it lacks substantial support by credible evidence in the record." *Id.* at 6.

The disposition of sexual misconduct allegations often depend on an assessment of credibility. In *In re Tenure Hearing of Ciufi*, 96 *N.J.A.R.*2d. (EDU) 980, a student alleged that a tenured assistant principal had kissed her and placed her hand on his penis while she was in his office. Based on the circumstances of the case, the ALJ was forced to put great weight on the credibility of the witnesses because the assistant principal and the student were alone in the office. The student was found to be credible while the assistant principal was deemed an incredulous witness in that he was "fidgeting, perspiring and being evasive in his answers." *Ibid. Id.* at 898. *In re Tenure Hearing of Mantone*, 93 *N.J.A.R.*2d. (EDU) 322, 323 a teacher was dismissed for writing love letters to two female students. The letters stated, that the student had "a beautiful body", that he found her to be "very attractive" and he "wondered what it would be like to be with her". *Id.* at 323-24. The Commissioner sustained the tenure charges found that dismissal was appropriate. *Id.* at 326. There, it was held that:

> Conduct condemned as sexual harassment in the workplace will not be tolerated in a school setting, where adolescents are entitled to greater protection. Although many of the reported tenure cases involve fondling or other examples of actual physical contact, that aspect is not an indispensable element of an "unbecoming conduct" charge. It is enough that ... [the teacher] misused his authority and destroyed the mutual respect necessary for a successful teacher-pupil relationship.... [The teacher's] behavior will not be excused merely because his two intended victims had the good sense to reject his improper advances.
>
> [*Mantone, supra*, 93 *N.J.A.R.*2d (EDU) at 324(citations omitted).]

I **FIND** credible the testimony of A.F. that the respondent asked her for her phone and beeper number; asked on her dates to the movies; looked at her in a sexual

manner; compliments her on her appearance; and untied her blouse. These actions and the respondent's superior position constitute sexual harassment.

I **FIND** the testimony of K to be credible. I am persuaded that A.F. told her two friends that the respondent was attempting to date her. Contrary to the respondent's assertion, I **FIND** the minor discrepancies in the testimonies of K and A.F. support that their actions were not contrived.

I do not **FIND** credible the testimony of the respondent that A.F.'s brother came to school and gave him his beeper number. It is noted here that the respondent told Holmes that A.F.'s brother gave him her beeper number.

Further, I **FIND** incredulous the respondent's testimony that he copied the three students grades from his grade book. The grades submitted into evidence in this proceeding is not a copy taken from a grade book. Rather, it is a document construed by the respondent. Further, his grade book cannot be found. I reject the respondent's testimony that the grade book was given to Holmes. Moreover, as Holmes testified test papers would have proved one way or the other whether the respondent was grading A.F. differently from the other students. However, this could not have been done since the respondent had not properly maintained the class records. Indeed, many test papers were found ungraded in a garbage bag and in a file cabinet. Respondent did not file any disciplinary complaints or cut slips with the principle on the three students. Thus, his testimony cannot be corrobated. Such conduct by itself is a manifestation of incompentency and inefficiency.

The precedents controlling this matter are clear. Conduct, as exhibited by the respondent is unacceptable and will not be tolerated. I **CONCLUDE** that the respondent's removal from his position is the only appropriate remedy.

The next issue for resolution is whether the respondent was entitled to be returned to the payroll on the 121st day of suspension notwithstanding that he is compensated on a 10-month pay schedule.

Pursuant to *N.J.S.A.* 18A:6-8.3 an employee of a board of education who is suspended from his employment may be suspended with or without pay at the discretion of the board. However, *N.J.S.A.* 18A:6-14 sets forth specific procedures for suspending tenure employees after the certification of tenure charges. *N.J.S.A.* 18A:6-14 provides, in full:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal there from, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal there from, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.
>
> [*N.J.S.A.* 18A:6-14.]

Thus, the Legislature has mandated the full payment of salary to a charged tenured employee on the 121st day subsequent to the certification of charges where there has been no determination by the Commissioner. The court in *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), *cert. denied* 65 *N.J.* 292 (1974), articulated the purpose of the statute:

> It seems clear that in enacting it the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.
>
> [*Grossman, supra*, 127 *N.J. Super.* at 35-36]

The determination that must be made, in order to toll the payment of salary during a suspension, is the Commissioner's decision on the merits of the case and not the initial decision. *Caporaso v. Bd. of Educ. of Belleville*, 1987 *S.L.D.* 1005, 1020, 1021. The case law also indicates that the Commissioner's decision need not be the absolute final decision but must be a decision on the merits. *In the Matter of the Tenure Hearing of Anthony Grandrino*, No. A-3190-81 (App. Div. Mar. 18, 1983).

There are no exceptions to the statute's requirement that payment to the suspended person of his or her full salary resumes on the 121st day following certification of charges and until the Commissioner renders a decision. *See, Bd. of Educ. of Asbury Park v. Martin,* 1985 *S.L.D.* 1958 (unreported App. Div. Decision). Nor does a provision exist for repayment to the school district upon a determination adverse to the affected person. *Barshatky v.*

Freehold Reg. High Schl. Dist. Bd. of Educ., 95 *N.J.A.R.*2d (EDU) 71, 73. However, "the provision for reinstatement of salary after 120 days excludes in the time computation all delays" caused by the charged employee. *Ott v. Bd. of Ed. of Hamilton Twp.*, 160 *N.J. Super.* 333, 342 (App. Div. 1978), *certif. denied* 78 *N.J.* 336 (1978); *Priceton Reg. Schl. Dist. Bd. of Educ. v. Campbell*, 93 *N.J.A.R.*2d (EDU) 196, 224. Additionally, the salary owed by a board of education will be set off by pay or salary earned by the suspended person from substitute employment assumed during suspension. *School Dist. of Willingboro et al. v. Gilbert*, 3 *N.J.A.R.* 206, 208, 209 (1982).

In the instant case, it is not disputed that the mandate concerning the payment of salary on the 121st day applies to respondent. There is, however, a dispute pertaining to whether the summer months count toward the calculation of 120 days in circumstances where the tenured employee is compensated on a 10-month pay schedule.

The Commissioner has held that the time period of suspension without pay is limited to a total of 120 calendar days, including weekends, vacations, holidays, summer vacations, and any other day falling within a period of 120 days from the commencement of the suspension. *In re Tenure Hearing of Walter Kizer,* 1974 *S.L.D.* 501; *In re Tenure Hearing of Anthony Polito,* 1974 *S.L.D.* 662; *In re Tenure Hearing of Matilda Grabert,* 1977 *S.L.D.* 163. In support of the assertion that the summer months are included within the 120 days, in *Kizer, supra*, the Commissioner pointed out that, "the Legislature did not say 'school calendar days' as it certainly could have done." *Kizer, supra*, 1974 *S.L.D.* at 504. The tenured employee in *Kizer, supra* was under a 10-month teaching contract. *Ibid.* Therefore, the summer months were incorrectly excluded from the computation of the 120 days, thus respondent should have been restored to his salary on October 16, 1998, rather than December 15, 1998. Thus, I **FIND** that the respondent is entitled to back pay for the period between October 16 and December 15, 1998.

Based on the whole of the record, I **CONCLUDE** that the mitigating factors do not support the respondent's continued employment with the Roselle public schools. Consequently, I **CONCLUDE** that the appropriate penalty is removal from his tenured teaching position.

ORDER

It is **ORDERED** that Gregory J. Brewer be removed from his teaching position with the School District of the Borough of Roselle, Union County and that all of his tenure rights be extinguished.

It is further **ORDERED** that the respondent be given back pay for a period of October 16 through December 15, 1998.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/13/00
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

9-15-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses

For Petitioner:

Kenneth Holmes
Joseph Pisauro
A.F.
K.F.

For Respondent:

Gregory J. Brewer
D.W.
F.A.W.
M.S.

Exhibits in Evidence

J-1 Joint Stipulation of Facts
P-1 Report 4/30/98
P-2 Police Statement
P-3 Memorandum 5/8/96
P-4 Memorandum 3/10/97
P-5 Confidential Memorandum
P-6 Report 4/18/97
P-7 Letter 9/10/97
P-8 Memorandum 2/12/98
P-9 Report Card

R-1 Affidavit of Kenneth Holmes
R-2 Memo with Letter Attached

R-3 Seating Chart

R-4 Attendance & Grade Chart

R-5 Report Card

OAL DKT. NO. EDU 7083-98
AGENCY DKT. NO. 205-6/98

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

On October 3, 2000, one day after filing his exceptions, respondent filed a Motion to Re-Open the Hearing After the Initial Decision, pursuant to *N.J.A.C.* 1:1-18.5, wherein he maintains that the Administrative Law Judge's (ALJ) Initial Decision findings and conclusions with respect to his credibility were clearly erroneous and were supported by no competent proof, so that he seeks to have the hearing in this tenure matter reopened to allow additional evidence to be introduced. The Board submitted reply exceptions and a response to the motion on a timely basis. In that resolution of respondent's motion could impact upon the Commissioner's assessment of the Initial Decision, the within decision will commence with such determination.

In his exceptions and his motion[1] respondent argues that this entire tenure case

[1] It is noted that the parties' motion papers only briefly highlight arguments advanced in detail in their exception submissions. To allow a full understanding of their respective positions on this one particular issue, the documents have been synthesized to present the full argumentation advanced with regard to this issue.

turns on the credibility of the Board's witnesses as opposed to that of respondent and his witnesses. He vehemently challenges certain of the ALJ's findings and conclusions which he contends were based on nonexistent or incompetent evidence, or on misstatements of testimony, and which entailed a shifting of the burden of proof to respondent, leading the ALJ to make erroneous determinations with respect to respondent's credibility. Respondent urges that in light of the ALJ's clear and prejudicial error, failure to reopen the proceedings would result in a miscarriage of justice.

Specifically, the ALJ's Initial Decision made the following limited findings with regard to respondent's credibility:

> I do not FIND credible the testimony of the respondent that A.F.'s brother came to school and gave him his beeper number. It is noted here that the respondent told Holmes that A.F.'s brother gave him her beeper number.
>
> Further, I FIND incredulous the respondent's testimony that he copied the three students grades from his grade book. The grades submitted into evidence in this proceeding is not a copy taken from a grade book. Rather, it is a document construed by the respondent. Further, his grade book cannot be found. I reject the respondent's testimony that the grade book was given to Holmes. Moreover, as Holmes testified test papers would have proved one way or the other whether the respondent was grading A.F. differently from the other students. However, this could not have been done since the respondent had not properly maintained the class records. Indeed, many test papers were found ungraded in a garbage bag and in a file cabinet. Respondent did not file any disciplinary complaints or cut slips with the principle [sic] on the three students. Thus, his testimony cannot be corrobated [sic]. Such conduct by itself is a manifestation of incompetency and inefficiency. (Initial Decision at 18)

Respondent contends that, for the following reasons, each of these findings upon which the ALJ relied to find his testimony incredible is incorrect:

1. Respondent states that he testified that A.F.'s brother, Ge.F., concerned that his sister was not in class, asked him where she was, stating that his parents were worried about her grades. Respondent cites specific hearing testimony to establish that he asked Ge.F. for *his* beeper number, not A.F.'s beeper number. He opines that the Board could have challenged this sworn testimony by calling A.F.'s brother as a witness, which it chose not to do. Consequently, respondent's testimony with regard to his conversation with Ge.F. is unrebutted and, therefore, the credibility findings of the ALJ in this instance "were based on incompetent hearsay evidence." (Respondent's Exceptions at 20-21)
2. In determining that respondent's testimony that he hand copied information regarding absences, homework assignments, laboratory assignments, test results and grades for A.F. and her two friends (Exhibit R-4) from his grade book was incredulous, the ALJ ignored A.F.'s report card which was introduced into evidence by the Board as Exhibit P-9. This Board exhibit, respondent contends, is essentially a "mirror image" of respondent's Exhibit R-4. Therefore, he queries, if he didn't copy this information from his grade book, what could he possibly have used to formulate Exhibit R-4. Consequently, he advances, "the grades which were contained in R-4 were precisely what respondent testified under oath they were and not a document 'construed by the respondent' as found by the ALJ." (Respondent's Exceptions at 2-4)

Additionally, with regard to this ALJ finding, Certification of respondent's counsel in support of his Motion to Re-Open the Hearing states that at one of their conferences respondent had showed him photostatic copies of certain pages of his grade book, which he said

he had utilized to compile Exhibit R-4. Counsel claims that because the exhibit adequately represented the grades, test scores, homework, lab grades and notebook, he did not retain the photostatic copies. Inasmuch as Board counsel had sent a letter to the ALJ on October 22, 1999 wherein he was seeking an additional hearing date to present certain additional witnesses to refute certain portions of respondent's testimony in an attempt to impugn his credibility, counsel here avers that he planned to introduce the photostatic grade sheets at that time, as well as examine Mr. Holmes and call the President of the Roselle Education Association as a witness in rebuttal to anticipated testimony of the Board's additional witnesses. He further states that rather than proceed in accordance with his letter, Board counsel chose to rest without calling any rebuttal witnesses. (Motion to Re-Open the Hearing, Certification of Harold N. Springstead, dated September 29, 2000)

3. The ALJ's statement rejecting what she asserts was respondent's testimony that his grade book was given to Holmes is baseless as is her intimation that it is somehow repondent's fault that his grade book cannot be found. He again cites hearing transcripts for the proposition that he testified that the day he left he turned in the attendance and grade book, pointing out that such testimony never asserted that these records were turned over to Holmes. (Respondent's Exceptions at 4) Moreover, respondent asserts, the Board advanced no testimony or evidence that the grade book could not be found; that anyone in the District looked for his grade book or attendance records; or that anyone sent respondent a letter seeking them. Respondent advances that instead of placing the onus on the him for his nonproduction of records that his uncontroverted testimony stated he did not possess, the ALJ should have

drawn an adverse inference against the Board for its failure to produce these records. (*Id.* at 5)

4. Respondent charges that the ALJ placed the burden of proof on him to come up with test papers, which testimony indicates were customarily graded and returned to students, to prove that he wasn't grading A.F. differently from other students, undoubtedly an impossible burden. (*Id.* at 5-6)

5. Contrary to the ALJ's finding, the record of this matter contains no proof that respondent did not properly maintain class records. Once again, he avers, the ALJ "shifted the burden of proof to the respondent to show that the papers which the Board never produced were somehow not related to the grades." (*Id.* at 9) Here, respondent avers, the Board failed to introduce any testimony as to the nature of the stacks of papers found, never produced any of these documents, nor did it present any foundation to support its assertion that many tests were left ungraded. It stands to reason, he argues, that if A.F.'s name appeared on any test or homework assignment, the Board could have introduced it as proof that respondent was treating this student differently. It is evident, respondent charges, the ALJ shifted the burden to him to produce records which he did not have and used his failure to do so to discredit his credibility.

6. Contrary to the ALJ's finding, Exhibit R-4 (respondent's summary from his grade book) indicates that he filed cut slips for A.F.'s nonattendance in his class. He cites to hearing testimony to explain that, notwithstanding that A.F.'s report card only showed 20 absences from school for the year, this number "doesn't include in-school suspension, ISS; out of school suspension; or cuts." (citations omitted)

(Respondent's Exceptions at 9) As such, it was the Board's burden, as the keeper of these records, to discredit respondent's Exhibit R-4, which they failed to do.

7. For some unknown reason, respondent charges, the ALJ found that because he had a one-foot-thick pile of papers, which allegedly were student papers or records, his conduct evidenced incompetency and inefficiency. Respondent avers that "[t]his gratuitous afterthought was neither alleged or proven and is not substantiated by the record presented." (Respondent's Exceptions at 10) Here, he asserts, the Board found papers which they never claimed supported their allegation that he gave A.F. undeserved grades because she refused to date him. Although these supposedly "important" papers were in the Board's possession, they never found it necessary to analyze, copy or produce them. Consequently, respondent posits, it would appear that the Board, rather than respondent, was inefficient and incompetent. More importantly, respondent submits, it is obvious that in this instance "[t]he ALJ relied upon the *non* production of evidence to discredit respondent's testimony. The pile of unidentified and undisclosed papers was transformed into ungraded tests which, in turn, [were] transformed into tests that A.F. never got back, which then became evidence supporting A.F., and Holmes' testimony and findings of respondent's manifestation of incompetency and inefficiency (Dec. pg. 18)." (emphasis in text) (Respondent's Exceptions at 11) This line of reasoning in the ALJ's findings of fact, respondent contends, is totally based on incompetent evidence. (*Ibid.*)

In conclusion, respondent avows that all of the erroneous and unsupported findings made by the ALJ which led her to disparage respondent's credibility require the reopening of the record of this matter for further testimony and evidence. Respondent urges that,

inasmuch as the entire case here turns on the issue of credibility, the Commissioner exercise his discretion to reopen the hearing, pursuant to *N.J.A.C.* 1:1-18.5(b), in the interest of justice.

In reply, the Board argues that respondent's arguments here "are an attempt at misdirection from the real and critical issues of Respondent's inappropriate behavior with a student." (Board's Reply Exceptions at 7) Whether respondent copied student grades from his grade book; whether his grade book was turned in to the District; whether the District produces student records in its possession; whether or not respondent maintained proper class records; whether respondent filed "cut slips"; or whether or not respondent was incompetent or inefficient are tangential in this matter, dealing only with the "maintaining of records." It asserts that the Board's tenure charges and heart of the case here is inappropriate sexual misconduct directed at a special education student. (*Id.* at 6) The Board charges that "respondent attempts to use peripheral record keeping issues which have nothing to do with the allegations of sexual misconduct by the Respondent to somehow attack the credibility of the student who[m] the sexual misconduct was directed at, and the student witnesses who supported many of the allegations made against the Respondent." (Board's Opposition to Respondent's Motion to Re-open at 3) Specifically, it posits:

> Whether or not the Respondent had the grade book, or copied information from the grade book,***[w]hether the Principal did see or did not see the grade book is of no moment. This does not change the credible facts placed before Judge Irene Jones that Respondent asked A.F. to go on dates to the movies and it does not change the testimony that he commented to the student that she had a beautiful body, and it does not change the testimony concerning the way this teacher looked at the student. Whether or not the grade book was turned in by the Respondent to the school district has no impact on testimony that this teacher made very personal and inappropriate overtures to a special education student who was under his control. Whether or not turning a grade book into[sic] a school district is unrelated to the credibility of witnesses who stated that this teacher touched or grabbed the thigh of A.F.

> and pulled on her blouse and removing a string which was part of the garment causing it to open. This conduct is unrelated to any inappropriate actions by the Respondent. We would point out that whether A.F. was a good or bad student and whether or not A.F. had good or bad grades or even whether or not A.F. was a major disciplinary problem, the conduct of this teacher concerning the allegations of sexual misconduct are the controlling issues. No student, whether or not exceptional in school or an educational disappointment, should ***be subject to the behavior of this teacher as testified in detail below. (Board's Reply Exceptions at 7-8)

Finally, the Board urges that respondent's motion be denied as an application to reopen is extraordinary relief and should not be granted except, possibly, in cases "where new witnesses came forward, which would strike at the heart of the sexual misconduct allegations ***." Such is not the case here. Rather, it proffers, "the information which Respondent seeks to have introduced was available to him at the time he testified." (Board's Opposition to Respondent's Motion to Re-open at 3-4) He did not have to wait for the Board to call rebuttal witnesses to himself offer additional testimony or witnesses on these record-keeping issues which, it maintains, whether accurate or inaccurate, have no bearing on whether he committed acts of sexual misconduct against a special education student. (*Id.*) Furthermore, it argues, in making her credibility determinations the ALJ "had the ability to listen to the testimony and observe the method and manner of Mr. Brewer's appearance and testimony before her. She simply did not believe that Mr. Brewer was a credible witness. This determination should be given weight since court was present throughout the proceedings." (Board's Reply Exceptions at 9)

Upon careful and independent review of the record in this matter, which includes transcripts of the hearing conducted at the OAL,[2] along with the parties' Initial Decision

[2] Hearing dates were July 28, 1999 and October 12, 1999.

exception arguments and motion submissions, the Commissioner determines that interests of fairness dictate that respondent's Motion to Re-open the Hearing be granted and this matter be remanded to the OAL for further proceedings. In so concluding, the Commissioner finds that it is beyond dispute that paramount to the ultimate resolution of this case is the credibility of the witnesses. Although cognizant of the principles of law dealing with reviewing credibility determinations and duly recognizing the due weight which must be accorded the ALJ in this regard since, in addition to receiving testimony and evidence, she also had the opportunity to observe the witnesses and their demeanor, (*See Parker v. Dornbierer*, 140 *N.J. Super.* 185 (App. Div. 1976); *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14.) the Commissioner's independent review of the record, including a thorough scrutiny of the transcripts, compels him to agree with respondent that the within ALJ's stated determinations with regard to respondent's credibility were based, in large part, on facts not supported by evidence in the record.

The Commissioner is also obliged to remain mindful that in this, as in all tenure matters, his ultimate decision could have a profound effect on respondent and his family, his professional career, and his reputation in the community. Given the gravity of the allegations, *i.e.*, sexual misconduct directed at a special education student, and the significance of the stakes at issue here, the Commissioner concludes that it is essential that respondent be provided with an opportunity for entry into the record of such further testimony and evidence as will permit the critical determinations relating to credibility to be based on a full and fair record.

The Commissioner does, however, adopt that portion of the ALJ's recommended decision which concludes that respondent is entitled to back pay for the period October 16, 1998 to December 15, 1998 for the reasons aptly stated on pages 19-21 of her decision.

Accordingly, respondent's Motion to Re-Open the Hearing After the Initial Decision is hereby granted. The Initial Decision of the ALJ with respect to the tenure charges is set aside and this matter shall be remanded to the OAL for further proceedings in conformance with the instant decision. The Board is hereby directed to pay respondent salary for the period between October 16, 1998 and December 15, 1998.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: DEC 11 2000

Date of Mailing: DEC 11 2000

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

406-00

M.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, sister of M.S., challenged the Board's residency determination that M.S. was not eligible for a free public education in West Orange. The Board sought tuition reimbursement for the period of ineligible attendance.

The ALJ concluded that petitioner failed to prove by a preponderance of credible evidence that M.S. was eligible for a free public education in the District. Petitioner did not prove that M.S.'s parents in Haiti were not capable of supporting or providing care for her due to a family or economic hardship. (*N.J.S.A.* 18A:38-1(b)1) Petition was dismissed. The ALJ concluded that petitioner should be assessed the tuition due the Board.

The Commissioner adopted the findings and determination in the Initial Decision as his own and ordered petitioner assessed tuition in the amount of $5,473.20.

December 15, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11823-99
AGENCY DKT. NO. 279-9/99

M.S. ON BEHALF OF MINOR CHILD, M.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

M.S., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: September 12, 2000 Decided: October 26, 2000

BEFORE **RICHARD McGILL**, ALJ:

M.S. (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of West Orange (hereinafter "respondent") in regard to her sister, M.S. Respondent seeks tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition on September 15, 1999, invoking the authority of the Commissioner of Education to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. Respondent filed an answer on October 7, 1999, and the matter was transmitted to the Office of Administrative Law on November 18, 1999, for determination as a contested case. The hearing was conducted on September 11, 2000, at the Office of Administrative Law in Newark, New Jersey.

ISSUES

The issue in this proceeding in whether M.S. meets the requirements in *N.J.S.A.* 18A:38-1(b)(1) to attend respondent's public schools free of charge during the period from September 22, 1999, to March 24, 2000. Respondent denied eligibility during this period of time based upon the view that petitioner did not establish through an affidavit from M.S.'s parents that they were not capable of supporting or providing care for M.S. due to a family or economic hardship. Thus, the specific issue in this case in whether M.S.'s parents were not capable of supporting or providing care for M.S. due to a family or economic hardship.

FACTS

There is no real dispute as to the underlying facts in this matter, and I **FIND** as follows. M.S. was born in Brooklyn, New York, on November 23, 1987, and she is a U.S. citizen. Shortly thereafter, M.S. was taken to Haiti, where she lived with her parents. Her father is E.S., and her mother is M.M.J.S. E.S. is also the father of petitioner in this matter, and M.S. is the younger half sister of petitioner.

E.S. was a captain in the army in Haiti. E.S., M.M.J.S. and their three daughters, including M.S., lived in a three-bedroom house in Port-au-Prince, Haiti. M.S. was sent to an international school, where the students were taught in both English and French. E.S. paid tuition to send M.S. to this private school. The other two daughters, who are now eight and eighteen years of age, attended public school in Haiti. M.M.J.S. is a homemaker and is not

employed. In the home, the family has a telephone, a television, a small stove and indoor plumbing. E.S. has a car, but it is not running. E.S. is in his sixties and is in good health. M.M.J.S. is considerably younger and is also in good health.

After E.S. retired from the military, he was supposed to receive a pension. However, he does not always receive the payment promptly. Petitioner has sent E.S. money from time to time.

In 1995, petitioner went to Haiti for a vacation. During that visit, E.S. asked petitioner for help with M.S. After petitioner returned from the visit, E.S. telephoned petitioner and asked her to take M.S. Petitioner agreed to take M.S., who arrived in June 1996 by plane from Haiti.

At the time, petitioner was living in Irvington, New Jersey, with her three children. M.S. was accepted into the Irvington public schools as an affidavit student.

In 1999, petitioner moved to West Orange and enrolled her three children in the public schools there. The registrar asked petitioner to complete an affidavit with respect to M.S. and to provide an affidavit from her parents. At the time, M.S. was eleven years old, and petitioner was seeking to enroll her in the sixth grade.

Petitioner provided her affidavit which is dated September 1, 1999. As set forth in the affidavit, M.S. lives at 10 N.K. Place in West Orange, petitioner is supporting M.S. gratis, petitioner will assume all personal obligations for M.S., and petitioner intends to keep and support M.S. indefinitely.

Petitioner also presented an affidavit from E.S. Petitioner completed the affidavit because E.S. speaks French, and E.S. signed it. The affidavit states that E.S. is not capable of supporting or providing care for M.S. Specifically, the economy in Haiti is very bad, and E.S. is unemployed. Life in the United States would be better for M.S. Further, the American schools in Haiti are costly with the result that E.S. cannot pay for M.S.'s education. M.S. will remain with petitioner for a longer period of time than the school term.

Respondent denied petitioner's application to enroll M.S. in its public schools because the affidavit did not establish that there was a family or economic hardship. After petitioner filed her petition with the Commissioner of Education, M.S. was admitted to respondent's public schools. On March 24, 2000, the Superior Court of New Jersey entered an order granting custody of M.S. to petitioner. Respondent is not contesting M.S.'s eligibility from that date forward. M.S. entered the seventh grade in respondent's public schools in September 2000.

The period from September 22, 1999, to March 24, 2000 includes 120 school days. At a per diem rate of $45.61, the total tuition for the disputed period is $5,473.20.

LAW AND ANALYSIS

Attendance at public schools shall be free to any person who meets age requirements, is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, and satisfies other specific requirements. *N.J.S.A.* 18A:38-1(b)(1). One of the other specific requirements is that the child's parent or guardian is not capable of supporting or providing care for the child due to a family or economic hardship. *Ibid.*

Here, both of M.S.'s parents are in good health. While E.S. has reduced income as a result of his retirement, the family continues to live in a three-bedroom home. One specific concern mentioned by E.S. in his affidavit is that he can no longer afford to send N.S. to a private school where she would be educated in French and English. While it is understandable that E.S. would want M.S. educated in English considering all of the circumstances, an inability to afford a private school does not constitute the type of a hardship contemplated by *N.J.S.A.* 18A:38-1(b)(1). Therefore, I **CONCLUDE** that petitioner has failed to prove by a preponderance of the believable evidence that M.S. met the requirements to be eligible for a free education in respondent's public schools during the period from September 22, 1999, to March 24, 2000.

In regard to respondent's request for tuition reimbursement, the applicable statute is *N.J.S.A.* 18A:38-1(b)(1), which provides in pertinent part as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.

Here, the tuition for the period of ineligible attendance is $5,473.20. Therefore, I **CONCLUDE** that petitioner should be assessed tuition in the amount of $5,473.20.

Accordingly, it is **ORDERED** that:

1. The petition in this matter be dismissed.

2. Respondent's request for assessment of tuition in the amount of $5,473.20 for the period of ineligible attendance is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 26, 2000
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

10-31-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 0 2 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

M.S.

For respondent:

Josefa Lopez

EXHIBIT LIST

P-1	Affidavit of M.S.	Evidence
P-2	Affidavit of E.S.	Evidence
P-3	Order of Superior Court of New Jersey dated March 24, 2000	Evidence
R-1	Tuition calculation	Evidence

OAL DKT. NO. EDU 11823-99
AGENCY DKT. NO. 279-9/99

M.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.[1]

In her exceptions, petitioner disputes the finding by the Administrative Law Judge (ALJ) that M.S.'s parents are capable of supporting and providing care for her. Petitioner asserts that it was unfair of the ALJ to base his decision regarding economic hardship on what M.S.'s father owns, because the fact that M.S.'s father owns a house does not mean that he does not have an economic problem. (Petitioner's Exceptions at 2-3) Petitioner avers that the three-bedroom house her parents own is about 14-15 years old, and although it does have indoor plumbing, there is no water coming through the pipes. Petitioner also states that her father's car has been parked for years due to engine failure and that his television set is a 13" black and white one. (*Id.* at 2) Further, petitioner contends that if she had known that she would be responsible for tuition while awaiting the court's decision, she would not have sent M.S. to school because "I knew I would not be able to pay this kind of money." (*Id.* at 3)

[1] Respondent did not file exceptions to the Initial Decision nor reply to petitioner's exceptions.

Upon review, the Commissioner determines to affirm the decision of the ALJ. Notwithstanding petitioner's assertions that M.S.'s parents have economic problems, as noted by the ALJ, M.S.'s parents are both in good health, are living on a retirement income and own their own home. Additionally, the father of M.S. states in his affidavit that his reason for sending his daughter to be educated in the United States is because he can no longer afford to send his daughter to a private school in Haiti. The Commissioner agrees that, while it is understandable that a private school education where M.S. would receive instruction in both French and English might be preferable to M.S.'s parents, an inability to afford a private school does not constitute the type of hardship contemplated by *N.J.S.A.* 18A:38-1(b)1.

With respect to petitioner's contention that she was not aware that she could be assessed tuition, the Commissioner notes that the affidavit for nonresident pupils she signed, and the acknowledgement letters that were sent to her from the Bureau of Controversies and Disputes refer her to the applicable statute, *N.J.S.A.* 18A:38-1. The Commissioner also observes that respondent's Answer, which was served on petitioner on October 5, 1999, requests that the Commissioner assess petitioner and/or M.S.'s parents a *tuition charge* for each day of M.S.'s ineligible attendance. While it is unfortunate that petitioner apparently did not fully realize her potential financial obligation under the statute, petitioner's submission of the required parental affidavit for nonresident students and her own account of conversations with District staff demonstrate that she understood that M.S.'s parents in Haiti must show that they were unable to support or provide for M.S.'s care if she were to attend school *free of charge* as an affidavit student in respondent's District.[2] The Commissioner, therefore, is compelled to accept the ALJ's recommendation assessing tuition for the period of M.S.'s ineligible attendance.

[2]Petitioner obtained an Order granting custody of her sister to her on March 24, 2000.

Accordingly, the Commissioner adopts the Initial Decision in this matter concluding that petitioner has failed to prove by a preponderence of credible evidence that M.S. met the requirements for a free education in respondent's schools from September 22, 1999 to March 24, 2000 for the reasons expressed therein. Petitioner is, therefore, assessed tuition in the amount of $5,473.20.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: DEC 15 2000

Date of Mailing: DEC 15 2000

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

407-00

407-00

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT DUFFIELD,	:	COMMISSIONER OF EDUCATION
STOW CREEK TOWNSHIP SCHOOL	:	DECISION
DISTRICT, CUMBERLAND COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and insubordinate conduct against respondent teacher for allegedly engaging in sexual relations with an 8th grade student. Respondent pled guilty to the charge of aggravated sexual assault, which resulted in a sentence of six years in New Jersey State Prison.

In view of respondent's conviction for the extremely serious charge of aggravated sexual assault involving a minor student, the ALJ found that respondent engaged in conduct unbecoming a teacher and that misconduct required that he be stripped of his tenure and removed from his teaching position. Summary decision was granted to the Board.

The Commissioner concurred with the ALJ. Respondent was dismissed from his teaching position and the matter was referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

DEC 18 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00894-99S
AGENCY DKT. 33-3/99

BOARD OF EDUCATION
OF THE SCHOOL DISTRICT OF
STOW CREEK TOWNSHIP,
CUMBERLAND COUNTY,
Petitioner,
v.
ROBERT DUFFIELD,
Respondent.

Gerald J. Neski, Esq., for petitioner
Steven R. Cohen, Esq., for respondent (Selikoff & Cohen attorneys)

Record Closed: September 26, 2000 Decided: November 3, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The Board of Education of Stow Creek Township ("Board") filed a petition with the Commissioner of Education ("Commissioner") seeking to remove the tenure of Robert Duffield, a teacher employed by the Board, The petition was filed on February 26, 1999. It alleged that Mr. Duffield had engaged in conduct unbecoming a teacher and insubordinate conduct. More specifically, the Statement of Evidence alleged that he had sexual relations with an 8th grade student who was a student in his class, K.N. In addition to the tenure charges, criminal charges were filed against Mr. Duffield, who was indicted by the Salem County Grand Jury for a violations of *N.J.S.A.* 2C:14-2A, aggravated sexual assault, and *N.J.S.A.* 2C:24-4a, endangering the welfare of a child to whom he had a legal duty. After the tenure charges were transferred to the Office of Administrative Law ("OAL") by the Commissioner pursuant to *N.J.S.A.* 52:14B-1 to –21 and *N.J.S.A.* 52:14F-1 to –13, the case was held in abeyance pending the resolution of the criminal charges. These were resolved by a guilty plea to the charge of

aggravated sexual assault on January 28, 2000, which resulted in a sentence imposed on August 25, 2000 of six years in New Jersey State Prison.[i] Following the sentencing, petitioner has filed a motion for summary decision seeking removal of Duffield's tenure. Counsel for Mr. Duffield has advised that he will not be filing any opposition to the motion.

It is beyond question that in view of Mr. Duffield's conviction of the extremely serious charge of aggravated sexual assault involving a minor student, his tenure must be removed. The conviction removes any question as to the validity of the charge that he engaged in conduct unbecoming a teacher. Summary decision is fully warranted at this time, as counsel for the respondent has, in essence, conceded.

FINDING AND ORDER

I **FIND** that Mr. Duffield engaged in conduct unbecoming a school teacher and that the nature and quality of such misconduct inexorably requires that he be stripped of tenure protection and removed from his position. It is **HEREBY ORDERED** that the motion for summary decision is **GRANTED** and Mr. Duffield's tenure protection is revoked. In addition, the Commissioner no doubt will require that the matter be reviewed by the State Board of Examiners.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[i] Other terms and conditions of the sentence are not relevant here.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 3, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

11-5-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 9 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

gjy

OAL DKT. NO. EDU 00894-99
AGENCY DKT. 33-3/99

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT DUFFIELD,	:	COMMISSIONER OF EDUCATION
STOW CREEK TOWNSHIP SCHOOL	:	DECISION
DISTRICT, CUMBERLAND COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge. Accordingly, respondent is dismissed from his tenured position as a teacher with the Stow Creek Township School District as of the date of this decision. In view of the nature of the charges, this matter is hereby referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: [illegible]

Date of Mailing: [illegible]

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

408-00

408-00

ROY J. CORSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOGATA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

DEC 18 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3385-00
Agency Dkt. No. 86-3/00

ROY J. CORSO,

Petitioner,

v.

BOGOTA BOARD OF EDUCATION

OF EDUCATION

Respondent.

Steven P. Goodell, Esq., for petitioner
(Herbert, Van Ness, Cayci & Goodell, attorneys)

Richard A. Brovarone, Esq., for respondent

Record Closed: November 15, 2000 Decided: November 15, 2000

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law (OAL) on March 31, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into a settlement on the record on October 4, 2000 and agreed that the Board would pay Roy J. Corso, petitioner, the sum of $6,667.00 as a travel allowance for the 1998-99 and 1999-2000 school years. An agreement has been prepared which is attached and fully incorporated herein.

I have reviewed the settlement and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

11-17-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 22 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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NOV 6 1 51 PM '00

HERBERT, VAN NESS, CAYCI & GOODELL
A Professional Corporation
22 Chambers Street
Princeton, New Jersey 08542
(609) 924-2495
Attorneys for Petitioner Roy J. Corso

ROY J. CORSO Petitioner, v. BOGOTA BOARD OF EDUCATION Respondent.	:	OFFICE OF ADMINISTRATIVE LAW THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 3385-00 AGENCY DOCKET NO. 86-3/00 ORDER

THIS MATTER having been opened to the Court upon Verified Petition of Roy J. Corso; Steven P. Goodell, of Herbert, Van Ness, Cayci & Goodell, appearing on behalf of Mr. Corso, and Richard Brovarone appearing on behalf of the Bogota Board of Education; and the Administrative Law Judge having signed an Order dated April 14, 2000, granting emergent relief and ordering the Bogota Board of Education to reinstate Petitioner's salary and benefits as Superintendent; and the Administrative Law Judge having further ordered that a hearing be set for Petitioner to prove any additional out-of-pocket damages resulting from the Board's termination of his Superintendent's contract; and the Office of Administrative Law having scheduled said hearing for October 4, 2000; and the parties having settled their outstanding issues on that date by agreeing that the Board would pay Roy J. Corso the sum of $6,667 as a travel allowance for the 1998-99 and 1999-2000 school years; and the parties having set forth that agreement on the record October 4, 2000; and there being no request for further restraints due to the fact that Mr.

Corso's contract to serve as Superintendent expired on June 30, 2000;

IT IS on this 15 day of November, 2000,

ORDERED that the contested case is hereby resolved, and that an initial decision shall be prepared and forwarded to the Commissioner of Education for his review.

Edith Klinger, ALJ

Dated: November 15, 2000

43:CORSO-ORDER.wpd

3b

OAL DKT. NO. EDU 3385-00
AGENCY DKT. NO. 86-3/00

ROY J. CORSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOGATA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Order of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.*

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: DEC 18 2000

* It is noted for the record that the April 14, 2000 Order for Emergent Relief issued by the Administrative Law Judge in this matter, granting petitioner reinstatement of his salary, back pay, benefits and pension credit was not submitted to the Commissioner for his review pursuant to *N.J.A.C.* 1:1-12.6(i) -(j) but was, instead, treated as an Order subject to interlocutory review pursuant to *N.J.A.C.* 1:1-14.10.

410-00

410-00

CAROLYN TALIAFERRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 3807-99
AGENCY DKT. NO. 399-9/98

CAROLYN TALIAFERRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: DEC 27 2000

411-00

411-00

ROGELIO HERNANDEZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, DECISION

RESPONDENT. :

_____:

SEP 28 2000

OAL DKT. NO. EDU 11673-98
AGENCY DKT. NO. 506-11/98

ROGELIO HERNANDEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,		DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: DEC 28 2000

412 – 00

412-00

ROBERT COMEAU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OAL DKT. NO. EDU 11346-99
AGENCY DKT. NO. 204-7/99

ROBERT COMEAU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: DEC 28 2000

413-00

413-00

ANN M. SNEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 7466-98
AGENCY DKT. NO.212-6/98

ANN M. SNEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: DEC 29 2000

414-00

414-00

K.P., on behalf of minor child, J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONROE TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 00825-00
AGENCY DKT. NO. 61-2/00

K.P., on behalf of minor child, J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONROE TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

John M. Sherry
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: DEC 29 2000

415-00

415-00

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA HORNER,	:	COMMISSIONER OF EDUCATION
ATLANTIC CITY SPECIAL SERVICES	:	DECISION
SCHOOL DISTRICT, ATLANTIC COUNTY.	:	

DEC 21 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION,

SETTLEMENT

OAL DKT. NO. EDU 115-00

AGENCY DKT. NO. 383-12/99

IN THE MATTER OF THE TENURE HEARING OF BARBARA HORNER, ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

---

John R. Armstrong, Esq., for petitioner (Cooper, Perskie, April, Niedleman, Waggenheim & Levinson, attorneys)

Michael C. Damm, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: November 1, 2000 Decided: November 8, 2000

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Atlantic County Special Services School District (BOE) brought charges against respondent Barbara Horner, a tenured teacher in the BOE's school system. See N.J.S.A. 18A:6-10. As shown by the attached Joint Request for Approval of Settlement and Settlement Agreement, the parties have settled the case.

PROCEDURAL HISTORY

On December 20, 1999, the BOE's statement of charges, statement of evidence, etc., were filed with the Department of Education. N.J.S.A. 18A:6-9. On January 3, 2000, the respondent's answer to the tenure charges and separate defenses, etc., were filed with the Department. The Department determined that the matter was a contested case and transmitted it to the Office of Administrative Law (OAL) where, on January 11, 2000, it was filed. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). On January 18, 2000, the case was assigned to me and I forwarded a scheduling letter to the attorneys. In view of criminal charges filed against respondent, she moved for a stay and, on February 1, 2000, I forwarded a letter order, granting the stay with conditions, including respondent's waiver of her claim for salary, etc., during the period of the stay. On March 22, 2000, I received from the BOE statements of evidence that had not been transmitted by the Department of Education. The charges were remanded to the Absecon City Municipal Court and they were downgraded to charges of violation of Absecon municipal ordinance §230, Loitering, to which in municipal court respondent pleaded guilty. The parties' attorneys then settled the case as shown by the attached, executed Joint Request for Approval of Settlement, Including Withdrawal of Tenure Charges and Settlement Agreement Regarding Actions Pending before the Commissioner of Education, which were received on November 1, 2000.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This case involves substantial questions of fact and complete litigation would require substantial expenditure of time and effort by all involved and would require testimony by children.

I have reviewed the settlement papers and I **FIND** and **CONCLUDE** that the parties have voluntarily entered into the settlement agreement, the settlement disposes of all issues in controversy and is consistent with the law and the settlement meets the requirements of N.J.A.C. 1:1-19.1 and that it should be approved as a reasonable and expeditious resolution of this case.

ORDER

I approve of the settlement, I **ORDER** the parties to comply with it and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 8, 2000
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

11-14-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
Attorneys for Respondent Barbara Horner

IN THE MATTER OF THE TENURE HEARING OF BARBARA HORNER,

ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
OAL DOCKET NO. EDUTH CC115-CCS
AGENCY REF. NO. 383-12/99

JOINT REQUEST FOR APPROVAL OF SETTLEMENT INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Atlantic County Special Services School District Board of Education ("Board") and counsel for its tenured employee Respondent Barbara Horner ("Horner") join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6(a) recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the Board be withdrawn and this matter be dismissed with prejudice.

3a

PROCEDURAL STATEMENT

This matter arises out of tenure charges certified by the Board to the Commissioner of Education on December 20, 1999, against Respondent Horner, a tenured special education teacher for the multiply-handicapped, alleging that she engaged in certain acts of misconduct in the course of her employment as alleged therein. Ms. Horner filed an Answer to those charges on January 3, 2000, denying those allegations. Accompanying the filing of her Answer, by way of correspondence dated December 30, 1999, Respondent's counsel advised the Department of Education that there were two citizen criminal complaints relating to the tenure charges which had been filed against Respondent, and which were pending.

The tenure charges were transmitted to the Office of Administrative Law (OAL) as a contested case on January 7, 2000. or about January 18, 2000, the tenure matter was assigned to the Honorable John R. Tassini, A.L.J. who on February 1, 2000, after being apprized of the pendency of certain citizen criminal complaints related to such tenure charges, entered an order staying the tenure case pending the outcome of those complaints against Ms. Horner pursuant to U.S.C.A. Const. Amend 5, Ott v. Bd. of Ed. Hamilton Tp., 160 N.J. Super. 333, 342 (App. Div. 1978).

Those criminal complaints were considered by the Atlantic County prosecutor's office which after review, by correspondence dated June 28, 2000, reduced and downgraded the allegations to disorderly persons charges under N.J.S.A. 2C:12-1A(1) and referred the matters to the Absecon City Municipal Court for disposition. Those disorderly person complaints were then further downgraded a

then resolved through Respondent Horner's entry of a plea of guilty to violation of Absecon Municipal Ordinance, Section 230, entitled Loitering.

The parties have now reached a settlement expressly conditioned upon the approval of the Commissioner of Education, for the tenure charges to be withdrawn.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that Ms. Horner, who has advised that she has no further interest in remaining employed with the Board will resign from her position effective on the approval of this agreement by the Commissioner of Education, but no earlier than December 1, 2000.

The parties have further agreed under the terms of the Settlement Agreement (Exhibit A), that Ms. Horner will not be entitled to any further wage, salary, or any other form of remuneration and benefits in connection with her employment other than what has already been paid or provided to her by the Board, (with the exception of those benefits available to any separated employee including pension and COBRA entitlements). This waiver includes reimbursement of legal fees and costs in connection with the tenure matter as well as with respect to the citizen complaints brought in the Absecon City Municipal Court.

The parties have further agreed under the terms of the Settlement Agreement (Exhibit A) that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Ms. Horner shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement (Exhibit A)

without modification, the parties have agreed to make eve reasonable effort to reform their Settlement Agreement to meet any objections thereto.

Unless mandated by law or otherwise requested by Respondent Horner or any one acting on her behalf, the Board shall take no further adverse action in connection with Respondent Horner's prior employment by the Board.

JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board originally instituted tenure charges against Ms. Horner based upon initial information received from others concerning her actions. The Board through counsel having now had an opportunity to further investigate and assess the allegations, confer with witnesses and obtain input from the parents who filed the citizen complaints which have now been resolved as set forth ante at pg 2, ¶3, and in consideration for the mutual promis contained in Exhibit A, it is in the interest of the parties that the Settlement Agreement be approved by the Commissioner. In this regard, Respondent Horner has indicated that she no longer desires to continue her employment with the Board, while also continuing to assert that her conduct, as referenced in the tenure charges, was in accordance with school law and that her conduct, within the context of what she believes to be a good employment history with the Board, does not substantiate such charges. The Board, while continuing to maintain that its tenure charges are meritorious, also recognizes that Respondent Horner's resignation and dismissal of its tenure charges, serves the interests of the Board through Respondent Horner's voluntary separation from the Board, and further avoids the commitment of Board resources otherwi

necessary to accomplish that separation through a contested tenure proceeding.

CONCLUSION

The parties have been fully informed of their respective rights in connection with these proceedings, including those standards for approval of the Settlement Agreement by the Commissioner. The parties are satisfied with the Settlement Agreement (Exhibit A) and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6(a), recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and thereafter upon such approval dismiss with prejudice the tenure charges.

Respectfully submitted,

COOPER, PERSKIE, APRIL, NIEDELMAN, WAGENHEIM & LEVENSON
Attorneys for Atlantic County Special Services School District Board of Education

BY: _____
JOHN R. ARMSTRONG

SELIKOFF & COHEN, P.A.
Attorneys for Barbara Horner

BY: _____
MICHAEL C. DAMM

Barbara Horner
BARBARA HORNER

EXHIBIT A

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Atlantic County Special Services School District Board of Education ("Board") and its tenured employee Barbara Horner ("Horner").

WHEREAS, Ms. Horner has been continuously employed by the Board as a teacher of the multiply-handicapped since in or about September 1993; and,

WHEREAS, on December 20, 1999 the Board certified tenure charges against Ms. Horner to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE
HEARING OF BARBARA HORNER,
ATLANTIC COUNTY SPECIAL
SERVICES SCHOOL DISTRICT.
OAL DOCKET NO. EDUTH CC115-CCS
AGENCY REF. NO. 383-12/99

WHEREAS Ms. Horner filed an Answer contesting the tenure charges, and,

WHEREAS, the aforesaid tenure charges were assigned for hearing before the Honorable John R. Tassini, A.L.J.; and,

WHEREAS, the tenure charges were stayed by directive of A.L.J. Tassini on February 1, 2000, pending the resolution of two citizen criminal complaints; and,

WHEREAS, in consideration for the mutual promises contained herein, the parties intend to resolve all matters in dispute, or which otherwise may be raised by them, both in the context of this tenure proceeding or otherwise, in connection with Ms. Horner's employment by the Board upon approval of this Settlement Agreement by the Commission of Education.

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, it is hereby stipulated and agreed as follows:

1. The Parties will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Ms. Horner to be withdrawn and dismissed with prejudice. The terms of a Joint Request for Approval of Settlement Including Withdrawal of Tenure Charges submitted to the Commissioner are incorporated herein by reference.

2. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

3. It is agreed that in consideration of this Settlement Agreement, that if it is approved by the Commissioner of Education, Ms. Horner in view of her expressed desire to voluntarily cease her employment with the Board, shall resign from her employment effective on approval of this agreement by the Commissioner of Education but no earlier than December 1, 2000. The Board agrees to release her from any contract responsibilities in this regard without penalty.

4. Ms. Horner shall seek nothing further from the Board in terms of employment benefits, including any other form of remuneration other than what she has already received, with the exception of those benefits which are available to any separated employee such as pension or COBRA entitlements. This waiver includes reimbursement of legal fees and costs in connection with the tenure matter as well as with respect to the citizen complaints brought in the Absecon City Municipal Court.

5. Unless mandated by law or otherwise requested by Ms. Horner or anyone acting on her behalf, the Board shall take no further adverse action in connection with Ms. Horner's employment by the Board. With respect to any prospective employer of Ms. Horner, it will provide the following only: positions held, salary history and dates of employment.

6. Ms. Horner and the Board further agree that they will not assert in any judicial or administrative proceeding that any statements by their attorneys concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

7. Ms. Horner and the Board understand and agree that as a contested case which has been brought to the Office of Administrative Law, all settlement documents shall become part of the public record in this matter and as such shall be appended to the initial decision of the Administrative Law Judge and the decision of the Commissioner of Education.

8. Ms. Horner agrees that she has been fairly and adequately represented and advised at all stages of these proceedings, that she is fully satisfied with the services of

counsel and that she is voluntarily and without coercion with full understanding of her rights and the ramifications of this settlement agreement entering into it on her own accord. Ms. Horner has been specifically advised that the Commissioner may refer tenure determinations resulting in loss of position by a teaching staff member to the State Board of Examiners for possible suspension or revocation of certificate.

DATED:

COOPER, PERSKIE, APRIL, NIEDELMAN, WAGENHEIM & LEVENSON
Attorneys for Atlantic County Special Services School District Board of Education

BY: _____
JOHN R. ARMSTRONG

SELIKOFF & COHEN, P.A.
Attorneys for Barbara Horner

BY: _____
MICHAEL C. DAMM

_____
BARBARA HORNER

OAL DKT. NO. EDU 115-00
AGENCY DKT. NO. 383-12/99

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA HORNER,	:	COMMISSIONER OF EDUCATION
ATLANTIC CITY SPECIAL SERVICES	:	DECISION
SCHOOL DISTRICT, ATLANTIC COUNTY.	:	

The record, Joint Request for Approval of Settlement Including Withdrawal of Tenure Charges, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

In so approving, however, the Commissioner notes that Executive Order No. 11 (1974) states, in pertinent part, that the following information be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service and the reason therefor;* and the amount and type of pension he is receiving ***. (emphasis added)

Term number five of the within agreement, therefore, shall not in any way be read to contradict Executive Order No. 11 or to preclude the Board from providing the reasons for separation from service.

The matter is hereby dismissed, with prejudice, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

416-00

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board contested the Department's determination that student S.R., who was living in a Correction Center, was a resident of the District and that the Board was responsible for the costs of her education. The Department contended that the Board was properly assigned responsibility for S.R. because S.R.'s parent or guardian resided in the District on January 15, 1997, the date of S.R.'s placement in the Center. The Board sought restoration of $12, 281 in State aid. The 1998-99 school year was the period in question.

The ALJ ordered the amount of $12, 281 be restored to the State aid received by the Board, concluding that without more evidence, the Department could not show that S.R.'s parent or guardian was a resident in the District on January 15, 1997.

The Commissioner set aside the Initial Decision. Noting that the Board carried the burden in this matter, the Commissioner found that he was unable to rule in the absence of an analysis conducted under the proper burden of proof. Matter was remanded for further proceedings.

DEC 18 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10117-98

AGENCY DKT. NO. 417-9/98

BOARD OF EDUCATION OF BOROUGH OF SOUTH RIVER,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Robert A. Blanda, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: September 18, 2000 Decided: November 1, 2000

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The petitioner Board of Education disputes the Department's determination that S.R. is or was resident in the district and that the Board is responsible for the costs of her education. The Board seeks restoration of $12,281 in State aid.

The Department of Education argues that the Board properly was assigned responsibility for the pupil because the pupil's parent resided in South River on January 15, 1997, the date of the pupil's placement.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case. *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. Following a limited hearing, the matter was extensively briefed. This judge took the matter under advisement and closed the record on September 18, 2000.

BACKGROUND OF THE CASE

The parties stipulate that M.R. is the natural mother of S.R. S.R. was placed on or about January 15, 1997 at the Edna Mahon Correction Center. The 1998-1999 school year is the only period in question in this case.

Testimony

Judith A. Marino, Director of Student Personnel Services for the South River Board of Education testified. She has been in position for more than 11 years. When this matter arose, the superintendent gave it to her to investigate. She reviewed the facility's report dated November 19, 1997. It noted a discrepancy in the Board's State aid application. There was a statement that S.R.'s parent or parents lived in South River on October 15, 1997. S.R. was unknown to the district.

The witness did a records check. No person with S.R.'s name was ever enrolled in the South River public schools. The witness went to the listed address. It was a two-family home. She received no response. She had sent a letter previously and received no response and could not make a telephone call because no telephone was listed at that address. Neighbors had never heard of M.R. A next-door neighbor said he had "been here a while" and that no person with the last name R. ever lived next door.

The witness then tried to get information from the Mahon Center. She called the Division of Youth and Family Services to see if a Division worker could recall anything about S.R. The Division was unable to provide information because of confidentiality rules.

Marino then checked with the Monroe School District Director of Pupil Personnel. The director advised Marino that S.R. had been placed with a family in Monroe, that M.R. kept in touch and that M.R. lived at a certain address in New Brunswick. The Mahon Center also told Marino that M.R. lived in New Brunswick.

On February 3, 1999, Marino spoke with M.R. M.R. said her daughter was still at the Mahon facility. M.R. said that she had moved to her present quarters in New Brunswick in or about August 1997.

One month later, the superintendent of the building in New Brunswick advised Marino that M.R. had moved out and he had no idea where M.R. had gone. Marino called the Mahon facility again. She received no help; staff explained that the material was confidential.

In June, Marino again contacted the superintendent of the building in New Brunswick and again contacted the Edna Mahon Correction Facility. She tried to reconstruct what had occurred. She placed a telephone call to the tax office in South River. From that office she learned that the property where M.R. allegedly resided was owned by a Mr. and Mrs. C. They had taken possession on January 8, 1996.

Marino sent several letters to Mr. and Mrs. C. She asked them to certify that M.R. had lived at the South River address. Exhibit P-1 is a letter from Marino to C. dated June 24, 1999. At the bottom of the page Marino provided a space that said, "This is to certify that [M.R.] resided at [ ] Street, South River, NJ, between the following dates." C. signed the letter, but crossed out the word resided and gave no beginning date or ending date.

Marino tried unsuccessfully to press C. for further information. The superintendent and the Board attorney wanted to know if M.R. had ever lived there. Marino again wrote to inquire and received no response although she tried still another time to make contact.

Marino was able to contact the New Brunswick Director of Pupil Personnel, Craig Yetman. She spoke to Yetman on March 3, 2000. Other [R.] children resided at the New Brunswick address. However, Yetman could not give dates. Marino believed she could not establish M.R. ever resided in South River.

The Department called Anthony J. Sarlo. He is director of education at New Jersey State Prison and has held that position since January 2000. Previously, he was Coordinator of Child Study Curriculum in the Office of Educational Services, Department of Correction. He has dealt with several district of residence cases.

It was his function to coordinate the October 15 count, referred to as the facilities report, in 1997. He collected all data and submitted it to the Department of Education. If a question or challenge arose, he would act as liaison between the facility and the Department of Education and try to work out any problem.

Each October 15, all inmates under the age of 21 years who do not have high school diplomas are counted and the data sent to the Department of Education. The Department assigns responsibility for these children's tuition to local districts of residence.

In the second phase, Sarlo receives a list of objections. Typically, the Division of Finance in the Department of Education would ask for more data. He would send to a particular institution for a response or clarification. In some cases, the student/inmate would be interviewed. Sarlo would also refer to intake records and court records. When he had the necessary information from the various institutions, he would forward it to the Department of Education. He has made changes to the October 15 count in the past.

Sarlo knows this case and was involved in it following a request for information from the Department of Education. He identified Exhibit R-1, a New Admissions Interview form concerning S.R. completed on January 13, 1997. This form showed S.R.'s address before incarceration as a post office box in Jamesburg. Jamesburg rejected any attempts to place S.R.'s domicile in Jamesburg.

Sarlo then sent an inquiry to the Mahon facility. He received a memorandum (R-2) from the Mahon facility Supervisor of Education dated February 17, 1998. The subject is address verification. The memorandum reads:

> [R., S.]: [R.M.] was [S.'s] foster parent. The incident that has [S.] at EMCFW occurred at the [M.] residence. It is unknown to us whether this incident affected the guardianship of [S.]. [S.R.'s] biological mother's name is [M.R.], ___, South River, N.J.
>
> Information provided by: inmate interview, P.S.I. and the Monroe Twp. IEP.

IEP refers to Individualized Education Program. This is a program required under federal law. The Individuals with Disabilities Education Act, 20 *U.S.C.A.* §§ 1401 through 1484a and *N.J.S.A.* 18A:46-1 through -46, for every child identified as qualified for special education services.

The witness identified Exhibit R-3, a 17-page IEP for S.R. developed by the Monroe Township public schools. It reflects testing done in April and May 1990. It gives S.R.'s home address as being in Jamesburg. On page 7, under the heading Family Composition, is the following paragraph:

> [S.] was placed with the [Ms.] (by DYFS) for several months last year. She returned home to live with her mother in South River last year. As [S.] disliked her new school, her mother made a "personal arrangement" with Mrs. [M.] to have [S.] stay with her to finish her schooling. She returns home for holidays, some weekends and summer vacations.

Sarlo stated that, in response to the request for more information, he reviewed the presentencing report and reinterviewed S.R. in February 1998. The witness did not know if the Mahon facility had tried to contact S.R.'s mother while doing its investigation, but he believes it would be the normal practice to do so.

Sarlo relied on what S.R. told him. In addition to what S.R. said, Sarlo has the IEP, the memorandum of February 17, 1998 and the intake form.

DETERMINATION AND ORDER

The Board argues that the controlling statute is *N.J.S.A.* 18A:7B-12(b) which provides:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> * * *
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

In this matter, the parties stipulated the operable date is October 15, 1997 with regard to the first criterion under the statute. If the address of the parent is not known at that time, then the second criterion is used which is the address of the parent as of the placement on January 15, 1997.

When the South River Board of Education was notified by the Division of Finance that there would be a reduction in aid, the Board did make an investigation and filed an action concerning the aid reduction.

Dr. Marino did make inquiries to determine the residence of the parent. She spoke by telephone twice with M.R. in February and March 1998. M.R. indicated she had been a resident of the City of New Brunswick since August 1997. When Dr. Marino made further inquiry, she sent both P-1 and P-2 to the owner/landlord, C., who indicated that M.R. did not reside at that address. C. had owned the property since at least 1996 and stated that M.R. had never resided there. Consistent with this, the manager of the New Brunswick property said that M.R. was a resident at that location.

Finally, Dr. Marino asked both school districts about records of the children of M.R. P-3 was introduced into evidence regarding the information received about S.R.'s IEP.

The Division of Finance witness testified as to the documents placed in evidence. The Pre-Sentence Interview (PSI) is dated January 13, 1997.

The Board further argues that the Division is relying completely on interviews made with the incarcerated child and nothing more. Ultimately, this tribunal must determine whether that reliance is reasonable.

The Board states it has done all that could be reasonably expected of it by making a serious inquiry at the time notified of its liability. The Board also argues that the State's reliance on *State-Operated School District of the City of Newark v. New Jersey Department of Education, Division of Finance*, EDU 1370-98, Final Decision (Mar. 22, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>, is misplaced. The facts in that decision are distinguishable from today's case. In *Newark*, a social worker reviewed the entire DYFS file concerning the residence of a student in question and did submit that information on the form that is required by *N.J.A.C.* 6:20-5.3. The administrative law judge determined that the social worker provided credible testimony based upon the detailed review of the matter. The Commissioner, in his decision, concluded as did the administrative law judge. He found it noteworthy that the school district produced no documentary or testimonial evidence in support of its claim that the child's parents were not resident in Newark.

The Board asserts that the criteria used in the *Newark* decision dealt with whether or not the district could prove that the Division of Finance action was arbitrary, capricious or unreasonable. The respondent did not provide any evidence to disprove Dr. Marino's testimony. Dr. Marino's inquiry was more than sufficient. It was complete and done in detail.

The Division of Finance objects to the receipt into evidence of Exhibits P-1 and P-3 because they were not provided in discovery. Because the Division lacked the information

provided in the documents, it did not conduct an investigation of the facts contained. Nor was it able to cross-examine the Board's witness in regard to the information.

In *Newark*, above, the Commissioner agreed with the administrative law judge that the issue in a district of residency case is whether the district can show that the Department's determination regarding the district of residence is arbitrary, capricious or unreasonable. In this matter, the judge must determine whether the Board proved that it was unreasonable for the Division to make its determination based on the information provided by the Office of Education in the Department of Correction. A presumption of reasonableness attaches to an agency decision. The burden of proof lies with the Board.

N.J.S.A. 18A:17-12 and the companion regulation, *N.J.A.C.* 6:20-5.3, assign the financial responsibility for a child who has been placed in a residential state facility by state agencies. The district of residence of the parent as of the last school day prior to October 16 is responsible for the child for that school year. If, however, that cannot be determined, the district in which the parent is residing at the time of the initial placement is the district responsible for the cost of the pupil's education.

In this case, the Division was unable to determine the residency of the parent on October 15, 1997. Therefore, it made its determination in accord with the second criterion of the test: where the parent resided at the time of the pupil's initial placement at the Edna Mahon Correction facility. The pupil was placed on January 15, 1997. Therefore, the critical date is January 15, 1997 and the critical question is where the parent lived on that day.

The information provided by the correction facility shows that the mother resided in South River as of the time of the initial placement. The Board tried to show where the mother resided on October 15, 1997. However, the Division's decision was based on the second criterion. As Mr. Sarlo testified, the information assigning responsibility to South River as of January 15, the date of the pupil's placement was based on a previous IEP that identified the name of the parent and her residency. The determination was also based on the prison interview and information from the sentencing investigation. The Board did not provide evidence to show the mother did not reside in South River on January 15, 1997. Further, the Board has not proved

it was improper for the Division to rely on the information provided by the Department of Correction.

Finally, it was not improper for the Division to rely on the information provided to it in regard to the parent's residency from the Department Correction. The Board's case, however, is based entirely on hearsay, which may not be used to overturn an agency or department decision. Testimony regarding conversations with neighbors or with the mother is hearsay. The Division had no opportunity to cross-examine, to test probative value or otherwise impeach the testimony. Without a residuum of credible evidence, the Board's case must fail. The information provided by the district alleging that the mother resided in New Brunswick in October 1997 cannot be used to make a determination that New Brunswick is responsible for the pupil's education. There is only hearsay evidence regarding the parent's residency in New Brunswick. The Division cannot assign responsibility for the pupil on that basis. If, as the Board argues, the parent resided in New Brunswick, more is required to hold New Brunswick financially responsible for the pupil's education than the uncorroborated hearsay attempts to ascribe the mother's residency to New Brunswick.

As the Division of Finance correctly observes, the critical date for the purposes of this case is not October 15, 1997, but January 15, 1997. I **FIND** the testimony of Dr. Marino to be credible and consistent with experience in matters of this type. However, the fact that South River was unable to produce any records of this pupil when it examined 1997 does not prove that the pupil was never resident in the district, or at least not resident on the critical date. I **FIND** that the presence of an IEP is inconclusive. It does show S.R.'s school history to include brief attendance in South River. Assuming, *arguendo*, that S.R. was attending South River schools from sometime in the first quarter until sometime in the second quarter of her seventh grade year, it is possible that her parent or guardian was resident for some time in 1997. The problem lies in the fact that there is no independent corroboration of this. Thus, it is an unsupported bit of hearsay. The efforts of Dr. Marino seem to cut against a finding that M.R. was a South River resident at any pertinent time.

I **CONCLUDE** that, without more, the Division of Finance cannot show that S.R.'s parent or guardian was resident in South River on January 15, 1997. The Division did the best it

could with what it had. What it had was insufficient to withstand this challenge. The burden of proof for establishing claims before the Office of Administrative Law is a fair preponderance of the evidence. *In re Polk*, 90 *N.J.* 550 (1982); *N.J.S.A.* 52:14B-10(c). The South River Board of Education has carried that burden. It cannot be said that it is more likely than not that S.R. or the parent or guardian of S.R. was domiciled in South River in 1997.

I further **CONCLUDE** that this matter is not apposite to *State-Operated School District of the City of Newark v. New Jersey Department of Education, Division of Finance*, EDU 1370-98, Final Decision (Mar. 22, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. The judge in that matter concluded the petitioning board had not proved that the Division had been unreasonable, arbitrary or capricious in its reliance on DYFS records. The records in that case were significantly more complete than the sketchy documents here. Because it has not been shown by competent evidence that S.R. or the parent or guardian of S.R. was resident in South River at the appropriate times in 1997, it is **ORDERED** that the amount of $12,281 be and is hereby restored to the State aid received by the South River Board of Education from the State of New Jersey.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

NOV 0 1 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11-3-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 6 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner

Judith A. Marino, Ed.D.

For respondent

Anthony J. Sarlo

EXHIBITS

Petitioner's

P-1 Letter, Marino to Cagno, June 24, 1999

P-2 Letter, Marino to Cagno, July 13, 1999, 2 pp.

P-3 Memorandum, Yetman to Marino, March 3, 2000, 2 pp., and letter, Marino to Yetman, January 18, 2000

Respondent's

R-1 New Admissions Interview form re: S.R., January 13, 1997

R-2 Memorandum to Sarlo from Chukumba re: S.R., February 17, 1998

R-3 Individualized Education Program for S.R. prepared by Monroe Township Public Schools, April 1990, 17 pp.

OAL DKT. NO. EDU 10117-98
AGENCY DKT. NO. 417-9/98

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on November 6, 2000 and the exceptions were filed on November 21, 2000, outside the 13-day period prescribed by regulation.[1] Accordingly, the exceptions were not considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner is compelled to set aside the Initial Decision. Although the Administrative Law Judge (ALJ) acknowledges that the petitioning Board carries the burden of proving that respondent's determination that S.R. was a resident of South River on January 15, 1997 was improper, he nevertheless states, "without more, *the Division of Finance cannot show that S.R.'s parent or guardian was resident in South River on January 15, 1997*" (emphasis added) (Initial

[1] In that the thirteenth day from the date the ALJ's initial decision was mailed to the parties fell on Sunday, November 19, 2000, exceptions were due on or before the next day.

Decision at 9, 10), thereby indicating that he looked to respondent to demonstrate that its determination was correct. However, as the Commissioner recently underscored:

> [I]t is well-established that when a board is contesting a district of residence determination made by Finance based upon the information provided it by the Department of Human Services, the board bears the burden of proving that such determination was in error. *See Board of Education of the City of Atlantic City v. New Jersey Department of Education*, 92 *N.J.A.R.* 2d (EDU) 545; *Board of Education of the City of Wildwood v. New Jersey State Department of Education*, 97 *N.J.A.R.* 2d (EDU) 273, *Reversed on other grounds* State Board of Education June 7, 2000; *State-operated School District of the City of Newark v. New Jersey State Department of Education, Division of Finance*, decided by the Commissioner March 22, 1999. (*Board of Education of the Borough of Bradley Beach v. New Jersey State Department of Education, Division of Finance*, Commissioner Decision, July 3, 2000, Slip Opinion at 8-9)

In the absence of analysis under the proper burden of proof, the Commissioner is reluctant to make a final ruling in this matter. Accordingly, the Initial Decision is set aside and the matter is remanded to the Office of Administrative Law for analysis and such further proceedings as may be necessary to decide this matter under the proper burden of proof.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: [illegible]

Date of Mailing: [illegible]

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

417-00

417-00

IN THE MATTER OF THE TENURE :

HEARING OF CECELIA JAMES, :

STATE-OPERATED SCHOOL DISTRICT :

OF THE CITY OF NEWARK, ESSEX :

COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The District certified tenure charges of unbecoming conduct against respondent teacher for her alleged participation in a scheme to defraud the State Health Benefits Program.

The ALJ concluded that the District proved by a preponderance of competent evidence that respondent engaged in conduct unbecoming a public school teacher. The District found that respondent's testimony was not credible concerning her knowledge and understanding of the insurance scheme and that participation in the scheme resulted in the theft of and improper payment of public monies. The ALJ noted that the issue of termination was moot because respondent forfeited her position. Citing *In re Tordo*, *In re Sammons* and *In re Henderek*, the ALJ concluded that due to the seriousness of the charges and the breach of public trust, respondent was unfit to remain a teacher and that the determination to suspend respondent was appropriate. The ALJ ordered no reimbursement of pay for the period of suspension.

Having reviewed the record and the transcript of the hearing conducted at OAL, the Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner transmitted the matter to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

DEC 22 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7958-97

AGENCY DKT. NO. 223-6/97

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

CECILIA JAMES,

Respondent.

Philip E. Stern, Esq., appearing for Petitioner
(Sills, Cummis, Zuckerman, Tischman, Epstein & Gross, attorneys)

Hardge Davis, Jr., Esq., appearing for Respondent

Record Closed: October 2, 2000 Decided: November 8, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, the State Operated School District of the City of Newark, (the District) filed charges alleging conduct unbecoming a public school teacher, against Respondent, Cecelia James, on November 18, 1996; the Certificate of Determination,

the Statement of Charges, Statement of Evidence and Appendix of Exhibits and supporting documentation were filed with the Department of Education, Bureau of Controversies and Disputes and served on Respondent on or about June 24, 1997.

An answer to the charges was filed with the Department of Education on August 8, 1997. Thereafter, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) on September 21, 1997, as a contested case.

This case was assigned to Administrative Law Judge MaryLouise Lucchi-McCloud for hearing. The hearing took place on March 24, 25, and 26, 1998. The parties sought leave to submit written closing statements and briefs. A briefing schedule was set and the record closed on thereafter on November 28, 1998. Judge Lucchi- McCloud requested and received a number of extensions of the deadline for issuing her initial decision; on September 15, 1999, the parties were notified that Judge Lucchi-McCloud had retired on disability and the Chief Judge reassigned the matter to the undersigned.

The District charges that Ms. James, an elementary teacher at Morton Street Elementary School, is guilty of conduct unbecoming a teacher to require that her employment be terminated. According to the District, Ms. James knowingly and intentionally participated in conduct intended to defraud State Health Benefits Program (SHBP) when she provided personal information to Carl Lichtman, a psychologist, which enabled him to submit false claims for treatment on her behalf. In exchange for the information, Ms. James accepted a portion of the payment received by Lichtman as payment on the false claims.

Ms. James pled guilty to criminal charges associated with this matter in January 2000; as part of her plea agreement, Ms. James agreed to forfeit her position with the Newark Public Schools. The District requested that I take notice of the forfeiture, which would render the charges moot, insofar as the termination of Petitioner's employment was concerned. Respondent asserted that she was entitled to a decision in this matter,

since four months pay was at issue.[1] Respondent asserted that she was appealing the judgment of conviction; moreover, the matter had been heard two years previously and, pursuant to the rules of this forum, the decision should have been issued prior to the entry of the guilty plea.

The parties were asked to submit briefs on the question of whether this Court should place this matter on the inactive list pending the disposition of Respondent's appeal.[2] Petitioner's brief was received on October 2, 2000; Respondent failed to submit a brief.

I have reviewed Petitioner's submission on the issue and I have considered the assertion that Respondent's plea precludes her from re-litigating the issue of her participation in a scheme to defraud the SHBP as well as the assertion that, because forfeiture is automatic, the charges have been rendered moot. I note for the record that the matter has not been re-litigated; this administrative record had been created well before Respondent was indicted. The record was available for use in the criminal action. The fact that Ms. James entered a plea does not change the record in this forum.

Because the hearing in this matter occurred before there was an indictment, but through no fault of Respondent a decision has not yet been issued, and because Respondent has requested that the matter be resolved, I am issuing an initial decision based on my review of the transcript and evidence presented at the hearing. I do take official notice of Petitioner's guilty plea, her agreement to forfeit her position as a teacher in the Newark Public Schools, her appeal and her application for disability retirement. I also note that Petitioner has not requested a stay of the penalty pending the outcome of the appeal.

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[1] The four months of pay at issue are those during which Respondent was suspended as a result of issuing these charges.

[2] The parties were asked to brief the question of whether the time for issuing an initial decision should be extended pending the outcome of the appeal. In view of the length of time it takes to process an appeal, this is tantamount to placing the matter on the inactive list. (See letter from the Public Defender, submitted by Respondent, dated April 11, 2000.

Accordingly, although I must determine whether Petitioner did engage in conduct unbecoming a teacher so as to require that her employment be terminated, the sole reason for the resolution, in light of the forfeiture, is to determine whether she is entitled to back pay for the period of her suspension.

FINDINGS OF FACT

Based my review of the transcript and documentary evidence submitted at the time of hearing, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Respondent was a teacher certified to teach in the public schools of New Jersey; she was employed by the State Operated School District of the City of Newark in October 1996, when the District filed tenure charges against her.

2. Respondent was suspended in October 1996 pending the determination of the charges which are the subject of this action.

3. Another disciplinary action, based on charges of excessive absenteeism, inefficiency and insubordination was the subject of a settlement agreement which was rejected by the Commissioner, was remanded for hearing, and was assigned to another judge. (T-3)[3]

4. Respondent provided her name, address and her social security number to Lichtman, who was a psychologist licensed to practice in the State of New Jersey.

[3] Throughout, T-1 refers to transcript of March 24, 1998; T-2 refers to transcript of March 25, 1998; T-3 refers to transcript of March 27, 1998.

5. Lichtman admitted to involvement in a scheme to defraud insurance carriers, including SHBP by submitting false claims for psychological services purportedly rendered to insured and/or their dependents.

6. Respondent was one of the insureds for whom Lichtman submitted false claims for services rendered.

7. No psychological services were ever rendered to Respondent by Lichtman.

8. Respondent spoke to Lichtman, or someone purporting to be Lichtman on only one occasion at which time she gave him her personal information.

9. Lichtman received checks directly from the insurance carrier for the claims he submitted; upon receipt, he deposited the carrier's checks and issued his own personal checks to the insured.

10. Respondent received two checks totaling $2350 from Lichtman. The moneys received represented 25 percent of $13,400, the total amount collected by Lichtman from SHBP for services he represented he performed for Respondent.

11. The checks issued by Lichtman to Respondent was negotiated.

12. Upon receipt of the checks from Lichtman, Respondent tried unsuccessfully to communicate with him.

DISCUSSION AND CONCLUSION

The issues to be determined in this matter are whether Respondent engaged in conduct unbecoming a teacher and, if so, whether such conduct warrants termination.

Petitioner bears the burden of proving by a preponderance of competent, credible evidence that Respondent should no longer be allowed to teach.

At the outset, it is necessary to note that there are several serious weaknesses in the testimony of Respondent's witness, Lichtman. He was testifying as a result of a provision in his plea agreement; he could only testify as to the general procedures he followed in gathering information, filing claims, and issuing finders' fees and kickbacks. He had no specific recollection of conversations of dealings with Respondent. Consequently, his testimony, standing alone, cannot be dispositive of the ultimate issue in this matter.

From the factual findings set forth above, it is clear that Respondent contacted Lichtman, spoke with him or someone purporting to be him; she never met him in person, presumably until after the scheme was uncovered. It is equally clear that she provided personal information to the person to whom she spoke, despite never having met him or having had services performed for her; in addition, she admitted receiving two checks from him for substantial amounts of money, despite neither receiving services or performing services for him;[4] moreover, she admitted that she received checks from him, deposited them and spend the money.

Respondent testified that she believed that she was participating in some sort of "insurance procedure;" however, she was unable to explain what she meant by that term. She also testified that she believed that she was participating in some sort of group study; then, she testified that she did not know whether she was participating or not. In addition, although she admitted receiving, depositing and spending checks sent to her by Lichtman, she was never successful in contacting him for further information about just what her involvement in the study was to be.

[4] Respondent testified that she could not recognize the endorsements on the back of the checks which had been drawn by Lichtman to her because they were copies; she did, however, admit that she received checks from him and that she deposited them in her account and spent them.

The record clearly reflects that Ms. James did provide certain personal information to someone purporting to be Lichtman over the telephone, even though she had never met him. She also acknowledged receiving, depositing and spending money sent to her by Lichtman even though she was not sure whether she was participating in a group study or an "insurance procedure." Finally, she acknowledged that she never received any service from Lichtman nor did she provided any service, such as participation in a study, in return for the money she received.

There is no indication in the record that Ms. James did anything more than call Lichtman, albeit unsuccessfully, to find out why she had been sent the checks. The amount of money involved is substantial; the effort Petitioner made to determine why she was receiving it was minimal; moreover, she took the substantial amount of money sent to her, deposited it and spent it, although she was not sure why she was receiving it. I **FIND** that Respondent's testimony as to her understanding of the "study" she assumed she was participating in lacks plausibility.

Based on Respondent's conflicting testimony that at one point that she believed she was participating in a study and at another that she believed she provided information for an insurance procedure," I **FIND** that Respondent's testimony lacks credibility. Because of the lack of credibility and plausibility of Respondent's testimony as a whole, her failure to make a meaningful effort to determine why she was receiving substantial amounts of money from Lichtman, as well as the fact that she provided personal information over the telephone to a person who she had not met and, thereafter, deposited checks and spent money she received from someone from whom she did not receive services, I **CONCLUDE** that Petitioner has sustained the burden of proving that it is more likely than not that Respondent had knowledged and understanding of Lichtman's scheme. I also **CONCLUDE** that the participation in such a scheme and the payment of money under the circumstances described herein resulted in the theft of and improper payment of public moneys. Accordingly, I **CONCLUDE** that Petitioner has proven by a preponderance of competent evidence, that Respondent engaged in conduct unbecoming a public school teacher.

Although I am aware that the issue of termination is, at this time,[5] moot because Respondent has forfeited her position, I do note that Petitioner did seek termination. In cases where termination is the penalty, the seriousness of the charges which have been sustained is the ultimate factor to be weighed. The Commissioner of Education has commented on the seriousness of charges which arise from a teacher's breach of public trust:

> Teachers are public employees who hold positions demanding public trust, and in such position, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher. When a teacher deliberately and willfully violates the . . . public trust placed in him, he must expect dismissal . . . .

I/M/O Tenure Hearing of Ernest Tordo, School District of Jackson, Ocean County, 1974 *S.L.D.* 97, 98-99. See, also, I/M/O *Tenure Hearing of Jacques, L. Sammons, School District of Black Horse Pike Regional, Camden County*, 1972 *S.L.D.* 302, 321; and *I/M/O Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick, Middlesex County*, 94 *N.J.A.R.* (EDU) 268 at 275.

A single incident may be sufficiently egregious in nature to warrant termination. In this case, the breach of trust is such an incident; the fact that the breach of trust is predicated on the theft of public money further enhances the egregious nature of the incident. I **CONCLUDE**, therefore, that the Respondent was unfit to remain a teacher. I further **CONCLUDE** that the determination to suspend Respondent was appropriate and should be affirmed.

[5] "[A]t this time" refers to the time at which this decision is issued.

ORDER

I hereby **ORDER** the determination to suspend Respondent be and hereby is **AFFIRMED**. I further **ORDER** that there be no reimbursement of pay for the period of suspension.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 8, 2000
DATE

Maria M-La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

11-14-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 16 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Cecelia James

Dr. Carl Lichtman

Natalie Ruiz

Philip B. Larkin

Rita Binn

Exhibits:

P-1 Affidavit of Dr. Lichtman, October 29, 1996

P-2 Explanation of Benefits (9 pages)

P-3 Verified Complaint, August 8, 1997

P-4 Memorandum of Interview, September 7, 1995

R-1 Statement of Ms. James, September 6, 1995

R-2 Medical Reports, Dr. Jaszczult to Mr. Liss, April 22, 1997

R-3 Five-page document

R-4 Transcript of tape of Acquilla Jones, March 3, 1997

R-5 Statement from Ms. Jones, December 5, 1994

J-1 Certificate of Determination, June 20, 1997

J-2 Statement of Charges, November 18, 1996

J-3 Response by Cecelia James, July 15, 1997

C-1 Letter, Ms. Collins to Mr. Cox, April 11, 2000

C-2 Notice of Appeal

C-3 Letter, Ms. Collins to Ms. James, April 11, 2000

OAL DKT. NO. EDU 7958-97
AGENCY DKT. NO. 223-6/97

IN THE MATTER OF THE TENURE	:	
HEARING OF CECELIA JAMES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on March 24, 25 and 27, 1998, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge. Accordingly, for the reasons expressed in the Initial Decision, the District's charge is sustained and respondent, therefore, is not entitled to reimbursement of pay. *N.J.S.A.* 18A:6-14. This matter shall be transmitted to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: [illegible]

Date of Mailing: [illegible]

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

418-00

MARTIN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES R. DURR, MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Martin Cohen, alleged that respondent, a Chesterfield Board member, was not a resident of the District. Petitioner, who was divorcing his spouse, while acknowledging that he sometimes was away from the home, provided documentation listing the Chesterfield property as his residence.

N.J.S.A. 18A:12-3 states that membership in a local board of education terminates immediately when a board of education member ceases to be a bona fide resident of the district. The ALJ found no proof that respondent was no longer residing in Chesterfield. The ALJ found that respondent testified credibly and presented documentation such as bills, tax records, *etc.*, that listed Chesterfield as his address. The ALJ denied petitioner's request for a declaration that respondent was not a bona fide resident of Chesterfield Township.

The Commissioner reversed the determination of the ALJ and remanded the matter to the OAL for further findings of fact and credibility determinations. The Commissioner noted that the ALJ incorrectly listed two witnesses for petitioner as respondent's witnesses and, because the ALJ made no credibility determinations or factual findings with regard to the testimony of these witnesses, the matter must be remanded for further proceedings.

December 28, 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4104-00

AGENCY DKT. NO. N/A

MARTIN COHEN,

Petitioner,

v.

JAMES R. DURR, MEMBER
BOARD OF EDUCATION
OF THE TOWNSHIP OF
CHESTERFIELD, BURLINGTON COUNTY

Respondent.

Peter Emmons, Esq., for petitioner (Gibbs & Gregory, attorneys)

James R. Durr, petitioner, *pro se*

Record closed: September 22, 2000 Decided: November 6, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

The petitioner, Martin Cohen, asserts that James R. Durr, a member of the Board of Education of the Township of Chesterfield, Burlington County, is not a resident of the District.

PROCEDURAL HISTORY

The petitioner appealed to the State Department of Education and on May 18, 2000, the Department of Education transmitted this matter to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was heard on September 22, 2000, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

James Durr is a member of the Chesterfield Township Board of Education. He and his wife are in the process of obtaining a divorce. The family home is at 279 Sykesville Road, Chesterfield.

The basis of Cohen's petition is a statement in documents from the divorce action in which Durr's residence is given as 66 Bunting Bridge Road, New Hanover Township. However, Durr said that his previous attorney for the divorce action listed the Bunting Road address in error, because Durr did not want correspondence relating to the divorce to be delivered to his home.

Durr's present attorney for the divorce action, Henry Tutek, filed an amendment to the documents correcting Durr's address to 279 Sykesville Road, Chesterfield, claiming that the other address (Bunting Bridge Road) was stated in error.

Durr presented at the hearing copies of bills for 1999 property taxes for James Durr Wholesale Florist, Inc. at 279 Sykesville Road, Chesterfield. Durr's Driver's License, utility bills and tax forms list 279 Sykesville Road, Chesterfield as his address. His magazines come to this address.

Durr, his wife and daughter testified credibly that going through a divorce is sometimes difficult, and it is better for Durr sometimes to be out of the home, but that the divorce is not yet final and no distribution of assets have yet been made.

DISCUSSION

The statute, at *N.J.S.A.* 18:12-3, states that membership in a local board of education terminates immediately whenever that member ceases to be a bona fide resident of the district.

> ***N.J.S.A.* 18A:12-3 Cessation of membership**
> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it. Whenever a member of a county special service school district or a member of a county vocational school district shall cease to be a bona fide resident of the district, or shall hold office as a member of the governing body of a county, his membership on the board shall immediately cease.

The question then becomes, did Durr cease being a bona fide resident of Chesterfield Township? To answer this, one must look to the concept of residence. There is no precise legal definition of "bona fide resident." It is largely a matter of interpretation from all the circumstances, including the intention of the person involved.

Here, Durr's bills, taxes, magazine subscriptions and driver's license all list 279 Sykesville Road, Chesterfield as his address. Durr testified credibly that sometimes he does not stay at 279 Sykesville Road, Chesterfield overnight. but this is because of the unsettled situation caused by the divorce. No evidence was presented that James Durr has or is about to change his residence to another address.

I **FIND** no proof that James Durr is no longer residing at 279 Sykesville Road, Chesterfield.

Therefore, the petition to declare that James Durr is not a bona fide resident of Chesterfield Township is **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 6, 2000
DATE

Kathryn A. Clark
KATHRYN CLARK, ALJ

Receipt Acknowledged:

11-13-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 14 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lam

DOCUMENTS IN EVIDENCE:

For Petitioner:

P-1 Document, :to the Chesterfield Township Board of Education, 2 pages

P-2 Complaint, 4 pages

P-3 Civil Action Answer, 3 pages

P-4 Minutes, Chesterfield Township Board of Education Regular Meeting, February 14, 2000

P-5 Interrogatories, 9 pages

For Respondent:

None

WITNESSES:

For Petitioner:

Martin Cohen, petitioner

For Respondent:

James Durr

Elizabeth Durr

Casey Durr

OAL DKT. NO. EDU 4104-00
AGENCY DKT. NO. 78-2/00

MARTIN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES R. DURR, MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.[1]

In his exceptions, petitioner argues, *inter alia*, that the Administrative Law Judge (ALJ) incorrectly lists Elizabeth Durr and Casey Durr as witnesses for respondent, and that the ALJ's mistaken belief that these witnesses were testifying on behalf of respondent directly influenced her conclusions. (Petitioner's Exceptions at 1) Petitioner also asserts that these two witnesses never made the statements attributed to them by the ALJ, and that, given the witnesses' actual testimony, it is virtually impossible to believe that the ALJ understood their testimony to be in support of respondent. (*Id.* at 2)

Initially, the Commissioner notes that Elizabeth Durr and Casey Durr *are listed* in the Initial Decision as witnesses for respondent as asserted by petitioner. In the absence of credibility determinations by the ALJ, however, the Commissioner is unable to determine what

[1] Respondent did not submit exceptions nor reply to petitioner's exceptions.

effect, if any, the ALJ's mistaken belief that these witnesses were testifying on behalf of respondent had on her conclusions, and what reasoning she utilized in assigning weight to that testimony. [2]

Moreover, the Commissioner notes that, according to the Initial Decision, the sole basis of petitioner's claim that respondent is not a resident of the school district on which he serves as a board member is that respondent listed an out-of-district address in his divorce papers. In the event that petitioner presented other evidence in support of his claim, including testimony offered at hearing, it is imperative for purposes of the Commissioner's review that the ALJ acknowledge any relevant evidence with an explication as to why such evidence was accepted or rejected.

In that the ALJ rendered neither sufficient factual findings nor credibility assessments to permit the Commissioner to fairly resolve whether petitioner has met his burden, the Commissioner is compelled to remand this matter to the OAL for a complete recitation of testimony and findings of fact.

Accordingly, this matter is remanded to the OAL for further findings and credibility determinations to address the concerns expressed herein.

IT IS SO ORDERED.[3]

Gloria Harrell

ACTING COMMISSIONER OF EDUCATION

Date of Decision: DEC 28 2000

Date of Mailing: DEC 29 2000

[2] Petitioner did not provide transcripts of the hearing for the Commissioner's review.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.